The Rights of Indigenous Populations: The Emerging International Norm

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I. INTRODUCTION

The United Nations Working Group on Indigenous Populations wants to declare 1993 the year of indigenous peoples. By then, the United Nations is

† J.D., Yale Law School, 1991. I am grateful to W. Michael Reisman, Wesley Newcomb Hohfeld Professor of Jurisprudence, Yale Law School, and to my editors at the Yale Journal of International Law: Jonathan J. Ross, Student Writing Editor; Matthew M. Ricciardi, Managing Editor; Steven R. Schultz, Senior Editor; and Carl L. Liederman, Co-Editor-in-Chief. I would also like to thank Jeff Rosen for his helpful editorial comments.

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likely to issue a declaration and a convention on indigenous rights. Given the current interest in indigenous affairs and the rapidly developing international recognition of indigenous concerns, it seems worthwhile to examine the problems faced by indigenous peoples, the emerging indigenous norm for the redress of those problems, and the mechanisms that are currently used to implement that norm.

Section I of this article defines some essential terms and briefly introduces four representative indigenous populations. Section II then uses these four examples to argue that indigenous groups throughout the world face similar problems, despite the often unique historical context surrounding different populations in various states. The article will show that these problems have contributed to the formation of an emerging international norm on indigenous rights that is implemented through a variety of nonbinding mechanisms. Section III argues that the existing indigenous norm adequately responds to the issues confronting indigenous populations because it directly corresponds to the common problems they face. This Section also argues that the norm currently affects states' treatment of indigenous populations. Section IV argues that nonbinding implementation mechanisms, while unable to enforce full compliance with the norm, encourage states to adopt it voluntarily by enhancing cooperation between states and indigenous groups. In contrast, compulsory mechanisms may make states less receptive to indigenous claims, since formally acknowledging such claims would render them vulnerable to international intervention in what are usually considered domestic concerns. Consequently, the current noncompulsory implementation mechanisms are the best suited to encourage states to adopt the norm in the long run.

This article adopts the definition of indigenous populations presented in the Study of the Problem of Discrimination Against Indigenous Populations submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities ("Cobo Report"). The Cobo Report defines indigenous groups as:

[T]hose 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 existences as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

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2. An international norm is defined here as a pattern of authorized communications and acts on the part of international organizations and states. See infra notes 103-07 and accompanying text.


While this is not the only available definition of indigenous populations,\textsuperscript{5} it is the most comprehensive one. Broad enough to encompass aboriginal populations not only in the Americas but throughout the world, it takes into account the common traits found in most indigenous populations instead of focusing on the peculiarities of each indigenous group. By stressing indigenous populations’ need for cultural protections and their ties to their territory as original occupiers of the land, the Cobo Report’s definition succeeds in distinguishing them from other ethnic and religious minorities.\textsuperscript{6}

Applied to various groups throughout the world, this definition indicates the existence of a substantial number of indigenous populations in both the eastern and western hemispheres. In Scandinavia, the Sami\textsuperscript{7} have a common history predating the Indo-European invasion of their territory and currently form a nondominant sector of Scandinavia’s population.\textsuperscript{8} Similarly, the Mapuches in Chile have common precolonial roots and are now a nondominant group striving to preserve its culture and gain some measure of autonomy.\textsuperscript{9} These and other indigenous populations in the western hemisphere have been described as a Fourth World which extends from the state of Alaska to Tierra del Fuego.\textsuperscript{10} This article, however, focuses largely on indigenous populations in Canada, Guatemala, Nicaragua and Scandinavia.\textsuperscript{11} While many other states


\textsuperscript{6} The main shortcoming of the report’s definition is that it focuses on nondominant indigenous populations. This limitation does not mean that an indigenous population that constitutes a majority of its state’s population is not included in the definition. The term nondominant does not refer to numerical dominance. Thus, an indigenous group like the Guatemalan Indians, which is numerically superior to non-Indians, would fall under the Cobo Report’s definition. However, indigenous groups that dominate a state and its government would not fall under the Cobo definition.

\textsuperscript{7} The Sami are also known as the Lapps. They are a native group belonging to the Finno-Ugric ethnic group, which at one time occupied large expanses of Norway, Sweden and Finland.

\textsuperscript{8} For a brief history of the Sami, see M. Jones, THE SAMI OF LAPLAND (1982).

\textsuperscript{9} Currently, the Mapuches make up between two and three percent of the Chilean population. H. Gutiérrez Roldán, LA POBLACIÓN DE CHILE 45 (1975).

\textsuperscript{10} See Berger, The Fourth World: The Worldwide Movement for Native Rights, in THE RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW: WORKSHOP REPORT 7 (R. Thompson ed. 1986). One should not infer from Berger’s discussion, however, that the experiences of indigenous populations are confined to the western hemisphere.

\textsuperscript{11} Other regions and countries with substantial nondominant native populations include the Soviet Union, Australia, New Zealand, India, Japan, the United States, and Mexico. An historical discussion of all these indigenous populations is beyond the scope of this paper. While this article’s main focus is on New World indigenous populations, the arguments presented herein are also applicable to indigenous populations in other parts of the world, as the discussion of the Sami populations in Scandinavia illustrates. There are some obvious historical differences among different countries, especially in terms of the varying chronologies of conquest and independence. For example, although native Africans, like their American counterparts, were dominated by European powers before, during and after the European conquest of the New World, most African states (since having obtained independence in the twentieth century) are now
have significant indigenous populations, the historical development of the respective indigenous populations in these four areas demonstrates the emergence of common problems despite diverse historical and political contexts.

Prior to the settlement of Europeans in America, Canada was inhabited by a wide variety of Indian nations, including the Cree, the Haidi, the Micmacs and the Inuits.\(^2\) The arrival of European settlers, however, resulted in the decimation of indigenous groups by a combination of war, disease and dependency on a fur trade that undermined self-sufficient indigenous subsistence patterns. Although Canada has recognized a number of indigenous rights in the last century, it has often followed a policy of assimilation that has further decreased the number of Canadian Indians.\(^3\)

In contrast, the Indians in Guatemala currently form a majority\(^4\) of that state’s population.\(^5\) This status is largely due to their different treatment by the colonial power. Spain’s early colonial policy treated the Indians as a source of forced labor through the \textit{encomienda} system,\(^6\) but it also sought to protect them through a series of laws enacted by the Crown.\(^7\) In addition, Spain dominated by native leaders and not by whites, South Africa being an exception. \textit{See} J. CARTWRIGHT, \textit{POLITICAL LEADERSHIP IN AFRICA} 49-51 (1983). Amerindians, on the other hand, have not been a dominant force in their respective societies, because even after independence in the nineteenth century, the whites retained control. European indigenous groups usually constitute a minority, especially since the process of their assimilation has lasted for many centuries. \textit{See}, \textit{e.g.}, Baer, \textit{The Sami: An Indigenous People in Their Own Land}, in \textit{THE SAMI NATIONAL MINORITY IN SWEDEN} 11, 13 (B. Jahreskog ed. 1982) ("Colonization of Lapland and exploitation of its resources began at the dawn of the Middle Ages and grew during the thirteenth and fourteenth centuries").


13. \textit{See infra} text accompanying notes 37-39. Today, Canadian Indians are a minority group, making up only two to three percent of the population. Still, it is difficult to find reliable figures in relation to Canada’s indigenous population, especially given the government’s awkward and artificial classification of Status and Non-Status Indians. The 1981 census estimates that Canada has a total of 491,460 native people, which includes 25,390 Inuits, 292,700 Status native Indians, 75,110 Non-Status native Indians, and 98,260 Môtis (mixed native and non-native ancestry). \textit{See} R. GAFFNEY, \textit{BROKEN PROMISES: THE ABORIGINAL CONSTITUTIONAL CONFERENCES} 18 (1984).


16. Under the \textit{encomienda} system, designated Indian groups and families were entrusted to a colonist (the \textit{encomendero}). According to the terms of the grant of \textit{encomienda}, the \textit{encomenderos} could exact labor from the Indians but in the process had to Christianize them. In practice, the \textit{encomenderos} neglected their end of the bargain and simply exploited the Indians. This forced-labor system, however, did ensure the survival of Latin American Indians. \textit{See} W. HAGAN, \textit{AMERICAN INDIANS} 8 (1974).

17. First, the Crown introduced the Laws of Burgos (1512-13), which sanctioned the \textit{encomienda} system while trying to limit the abuses within it. For instance, it forbade Indian mistreatment and the enslavement of Indian labor while stressing the \textit{encomenderos}’ proselytizing role. Second, the Crown promulgated the New Laws of 1542-43 which prohibited the enslavement of Indians and the granting of new \textit{encomiendas}. These laws ordered clergymen to relinquish their \textit{encomiendas} and stipulated that the \textit{encomenderos} could not bequeath their Indians to their heirs. These codes, however, were rarely observed by the colonists. Instead, the \textit{encomienda} system only came to an end when it failed to provide the colonists with substantial profits. As the Indian population decreased, there were fewer natives available to support
Rights of Indigenous Populations

created a *República de los Indios*, a communal village or region where indigenous peoples could live and follow many of their cultural traditions while remaining under the Crown's jurisdiction. As a result of this policy, the Guatemalan Indians were able to preserve their numbers and their cultural heritage, despite discrimination against them and the loss of nearly all of their land since the fall of the Spanish Empire.

The Miskito Indians in Nicaragua, unlike the Guatemalan Indians, were never conquered by the Spanish, and independence did little to change their circumstances. The Miskitos continued living in a state of *de facto* autonomy. The Atlantic Coast did not become an active part of Nicaragua's economic and political life, thus permitting the Miskitos to preserve control over their land, their traditions and their subsistence economy. However, Sandinista

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the *encomienda* system. The colonists could not rely upon the *encomienda* for a steady flow of labor. Consequently, the *encomenderos' income* dropped in the late sixteenth century, as the production rates of their lands decreased while their business expenses remained the same. See C. Gibson, *Spain in America* 53-65 (1966).


20. This is not meant to imply that the Guatemalan Indians are not currently facing the problems of loss of land, lack of cultural protections, and violation of individual and collective rights. In fact, the problems that Guatemalan Indians face are aggravated by their inability to articulate their needs effectively as a group because they are numerous and scattered throughout the country. Because many of these problems — lack of education, unemployment, absence of adequate housing — are shared by all inhabitants of the country, the uniqueness of the Indians' situation is obscured even though their needs have a different context and require different policies.

21. For a history of the Miskitos, see C. Dozier, *Nicaragua's Mosquito Shore: The Years of British and American Presence* (1985). Unlike the Guatemalan Indians, the Miskito Indians do not constitute a majority of the state's population. As an ethnic group, the Miskitos are mostly found in the region of Central America between the Grande de Matagalpa River and the Coco River, going from east to west, and between the Black River and Punta Gorda from north to south (a zone known as the Mosquitia). The Miskito population is estimated at anywhere from 100,00 to 200,000, with 125,000 as the most likely figure. See CICDA, *Demografía Costeña: Notas sobre la Historia Demográfica y Población Actual de los Grupos Étnicos de la Costa Atlántica Nicaragüense* 25-37 (1982).

22. While the Spaniards managed to settle on the Pacific Coast, dominating the Indians found there and establishing cities like Granada and León, the Atlantic Coast seemed indomitable. The Atlantic Coast Indians — which belonged to the Miskito, Sumu and Rama groups — were able to resist Spanish domination. The Miskitos, though, did establish friendly relations first with the British and then with the American traders who, in the absence of a Spanish presence on the Mosquito Coast, established trading posts and various enterprises (e.g., rubber and banana plantations). R. Torres, *Indian Self-Rule: A Historical and Political Perspective of the Interactions between the Nicaraguan State and the Miskito Indians on the Question of Autonomy* 5-7, 23-28 (Mar. 24, 1988) (unpublished thesis on file at the Harvard Archives, Pusey Library).

23. The Treaty of Managua of 1860 between Nicaragua and Great Britain recognized this Miskito autonomy as *de jure*. Under this treaty, the British relinquished their protectorate over the Atlantic Coast. Treaty Relative to the Mosquito Indians and the Rights and Claims of British Subjects, Jan. 28, 1860, Great Britain-Nicaragua, art. 1, 50 Brit. Foreign & St. Papers 96 (1867), 121 Parry's T.S. 317. Article 2 of the treaty established a self-governing Miskito reservation under Nicaraguan sovereignty. *Id.* at art. 2. The treaty also stipulated that the Miskitos would receive an annuity from the Nicaraguan government for ten years or, in the alternative, they could choose to incorporate themselves into the Nicaraguan state. *Id.* at arts. 4-5.
attempts in 1979 to incorporate the Indians into Nicaragua’s social and economic life\textsuperscript{24} threatened Indian self-rule\textsuperscript{25} and was met with strong Miskito opposition.

Similarly, the Sami\textsuperscript{26} have enjoyed a considerable measure of autonomy since they were pushed into the northernmost area of Scandinavia by the Indo-Europeans.\textsuperscript{27} Although they were removed from their ancestral lands, the Sami were not exterminated and enslaved as were most aboriginal populations in the Americas. Due to their limited contact with non-Sami people, the Sami were able to preserve many vital aspects of their culture.\textsuperscript{28}

\textsuperscript{24} The Sandinistas attempted to do in the twentieth century what other countries had already accomplished by the mid-nineteenth century, namely to build a state by extending their power over previously neglected areas of the country.

\textsuperscript{25} In Section VI of their 1969 Historic Plan — a blueprint for the movement’s objectives — the Sandinistas expected to integrate the Mosquitia into Nicaragua’s economic, political and social life. See \textit{CONFLICT IN NICARAGUA: A MULTIDIMENSIONAL PERSPECTIVE} 326 (J. Valenta & E. Durán eds. 1987) [hereinafter \textit{CONFLICT}]. The Sandinistas implemented this plan through a variety of measures. First, the government built east-west roads in an attempt to foster greater communication between the country’s Atlantic and Pacific Coasts. Second, it established many non-Indian agencies in the Mosquitia to manage the area’s resources and to monitor opposition in the area (e.g., the \textit{Asociación de Trabajadores Campesinos} (a farmers’ group), the \textit{Confederación Sandinista de Trabajadores} (a workers’ group), and the \textit{Comités de Defensa Sandinista} (a neighborhood group monitoring political activities)). R. Torres, \textit{supra} note 22, at 41. Third, the government conducted campaigns designed to end the isolation of the Miskitos (e.g., the literacy campaign). \textit{See id.} at 42. Fourth, the Sandinistas established programs to foster the area’s economic development by creating state agencies — such as the \textit{Corporación Forestal del Pueblo} (forestry resources) and the \textit{Instituto Nicaragüense de Pesca} (fishing resources) — and by establishing local cooperatives for the collectivization of production patterns. \textit{Id.} at 45-49. In addition, the Sandinistas relocated entire Indian communities, thus depriving them of their land, of their subsistence activities, and of the opportunity to rule themselves. \textit{See id.} at 56-57. These policies contributed to the Miskitos’ armed struggle against the Sandinistas.

It was not until 1983 that the Sandinistas, realizing that the violent confrontation with the Indians was hurting more than it was helping the regime, explored peaceful solutions to the Miskito question, such as granting amnesty to Miskitos who had fought against the government. \textit{See Ortega Saavedra, Nicaragua’s Proposals for Peace in Central America, reprinted in NICARAGUA: THE SANDINISTA PEOPLE’S REVOLUTION} 239, 243-45 (B. Marcus ed. 1985). In October 1984, talks concerning a peace plan and autonomy for the Miskitos began between the Sandinistas and Brooklyn Rivera, a MISURASATA leader. R. Torres, \textit{supra} note 22, at 68-71. This organization, whose name is derived from Miskito, Sumu and Rama, was founded in 1979 to represent those peoples; it broke with the Sandinista government in 1981. \textit{CONFLICT, supra}, at 426. The talks between the Sandinistas and MISURASATA were interrupted at various times, resulting in renewed hostilities between the Indians and the government. The Chamorro government and the Miskitos have agreed to a cease-fire, but have yet to reach an agreement concerning Miskito autonomy.

\textsuperscript{26} Estimating the Sami population is a difficult task since the Sami move constantly, especially during the reindeer season. According to Jones’ estimates, there are about 25,000 Lapps in Norway, 15,000 in Sweden, and nearly 5,000 in Finland. M. JONES, \textit{supra} note 8, at 5. These numbers are low largely because the process of assimilation in the Nordic countries has reduced the number of Lapps in the area. \textit{Id.}

\textsuperscript{27} \textit{See Baer, supra} note 11, at 13.

\textsuperscript{28} Instead, in the north of Scandinavia, the semi-nomadic Sami continue to practice their traditional activities of hunting, herding reindeer, and otherwise relying on the environment to satisfy their subsistence needs. Occasionally, the Sami complement these activities with short periods of paid employment, and with the manufacture and sale of handicrafts. M. JONES, \textit{supra} note 8, at 7-9.
II. THE PROBLEM: INDIGENOUS POPULATIONS THROUGHOUT THE WORLD

Despite variations in the specific political and historical circumstances surrounding nondominant native populations, nearly all indigenous groups share a common set of problems. These problems largely result from the nature of the relationship between colonizers and conquered indigenous populations. The colonizers, in order to benefit from local resources and to establish effective political power over the territory, often took the land away from the natives.29

Furthermore, as the colonial powers began to consolidate power, they found it expedient to impose their way of life on native groups whose traditions they often considered primitive. In North America, for example, the fur trade, with its accompanying introduction of rum and manufactured goods upon which Native Americans quickly became dependent, brought to them the concept of accumulating more private property than needed for subsistence.30 As an ultimate result of this dynamic between colonizer and colonized, the native populations were stripped of their land, their traditions were besieged, and their political autonomy was dramatically circumscribed.

The dynamics of the colonial relationship have left indigenous populations with four basic needs, namely the need for: (a) cultural protections; (b) recognition of land claims; (c) recognition of individual, economic and social (welfare) rights; and (d) political autonomy. This Section focuses on each of these problems in turn as they relate to indigenous populations in Canada, Nicaragua, Guatemala and Scandinavia.

A. Cultural Protections

Indigenous populations, because they are usually nondominant minority groups, often are unable to live according to their cultural traditions,31 especially when their traditions clash with those of the dominant group in the

29. In the United States, since most settlers were farmers and thus needed land, they viewed the Native Americans as "either a nuisance or a menace." W. HAGAN, supra note 16, at 8. Although the colonists often rationalized their actions by maintaining that their "discovery" of the land entitled them (or the Crown) to ownership of the territory, the result, as Hagan notes, was that "if the whites needed the land, they took it." Id. at 9.


31. Indigenous demands for cultural protections do not require the maintenance of those traditions that existed prior to their conquest. In most cases, indigenous populations have already lost much of their culture, and were they required to live according to all of their ancestors' traditions, they would not be able to survive. Some indigenous groups that were once self-sufficient have become heavily dependent on manufactured goods and can no longer rely on subsistence activities. See W. HAGAN, supra note 16, at 6-7; W. JACOBS, supra note 30, at 32-34. Instead, indigenous groups seek to preserve those cultural traditions they still follow and to rediscover their cultural heritage.
society, which may consider aborigines primitive and inferior. Since indigen-
ous populations rarely have substantial voting power or influence in the state's
government, they lack the support necessary to compel the state to pass laws
protecting indigenous cultures. Moreover, to the extent that the cultural
practices of indigenous populations can adversely affect financial or social
enterprises having state approval, indigenous populations may find strong
government apathy toward laws protecting indigenous cultures.

The indigenous populations' cultural concerns include: religious freedom,
subsistence economic activities, language, homecraft activities, dress, diet,
education, communal "ownership" of goods, and medicine. Not all these
concerns, however, are of equal importance to indigenous groups. Most
indigenous groups place greater emphasis on their ability to practice their
religious beliefs, preserve their subsistence economic activities and control
their children's education so that communal traditions and native languages are
transmitted from generation to generation.

In Canada, during the early stages of Indian-white commercial relations,
the Indians' interaction with the whites through the fur trade contributed to
the erosion of Indian cultural traditions. By turning to the commercial fur
trade, exchanging pelts for manufactured goods, indigenous groups abandoned
their subsistence activities. The Indians' increasing dependence on goods that
only the colonists could offer undermined their self-sufficiency.

The Canadian government's classification of Indians into two groups further
threatens the survival of Indian culture. The Indian Act of 1876, most recently
revised in 1985, originally divided the Indians into Status and Non-Status
Indians. Status Indians, those legally and officially recognized by the state
after registering with the Department of Indian Affairs, are eligible for all

32. See, e.g., GUATEMALA, supra note 19, at 34 ("The Indian, with his adherence to his own customs
and values, is [seen as] an embarassment [sic] to Guatemala's rulers").
33. See, e.g., McCool, Indian Voting, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY
105, 105-16 (V. Deloria, Jr. ed. 1985) [hereinafter AMERICAN INDIAN POLICY] (states, despite constitu-
tional prohibition on voting discrimination, have devised various arguments and impediments to Indian
voting).
34. See, e.g., INDIGENOUS PEOPLES, supra note 14, at 24-29.
35. See W. JACOBS, supra note 30, at 32-40. See generally H. INNIS, THE FUR TRADE IN CANADA
(1962).
36. The white settlers had a commercial interest in furs. Because the Canadian Indians were expert
hunters, they could easily supply the settlers with needed furs. The British offered the Indians manufactured
products in exchange for the furs (products that, prior to the Indians' contact with the settlers, had not been
part of the Indian culture). In so doing, the settlers created artificial needs within the Indian community.
For example, once Indians learned how to use rifles, they became dependent on them for hunting, forsaking
their original hunting traditions. Consequently, as Hagan points out, the Indian society deteriorated:
"unable to revert to their primitive practices, they picked up the white man's vices and diseases." W.
HAGAN, supra note 16, at 15; see also W. JACOBS, supra note 30, at 33.
INDIAN ACT; see generally Wilson, Aboriginal Rights: The Non-Status Perspective, in THE QUEST FOR
Rights of Indigenous Populations

federal Indian programs. Non-Status Indians, on the other hand, who have not registered with the government and have not been officially recognized by the state, do not enjoy the same rights and privileges as Status Indians and are not eligible for many federal Indian programs. This classification undermines the Indians' identity by establishing artificial legal barriers between Status and Non-Status Indians. Because they cannot benefit from Indian welfare protections, Non-Status Indians, like any non-Indian Canadian, must find a job in the marketplace. In order to elude anti-Indian discrimination to find a job, Non-Status Indians may have to abandon the practice of their religious beliefs and economic traditions and adopt the lifestyle of the dominant society. This situation undermines the cohesiveness necessary for the Indians to preserve traditions that are challenged by the dominant society.

Opposition to this assimilation fostered an active pro-Indian movement within Canada, including the formation of various indigenous advocacy groups, many of which are still active in furthering Indian interests. The movement has led to Canada's enactment of measures to protect indigenous cultures. Canada now has a Cultural Development Programme which operates under the Department of Indian Affairs and grants money to Indian groups for cultural activities. It has also created a Cultural/Educational Centres Programme to assist natives in the preservation of their culture. But these and other programs are mostly available to Status Indians and are often deemed insufficient to meet indigenous needs. The programs simply do not resolve all indigenous concerns with respect to de facto assimilation and the undermining of traditional economic activities such as hunting and fishing.

Indians in Guatemala, while not threatened to the same extent as those in Canada, have also faced significant threats to their culture. Although the Spanish conquerors of Latin America sought to convert the Indians to Catholicism (thus undermining their polytheistic religions), and although miscegenation contributed to the assimilation of indigenous populations, the conquest of Latin America did not lead to the extensive wars that occurred in the United States and in Canada. More specifically, Spain's division of its colonial

38. While most Non-Status Indians have chosen not to register with the government, others may have lost their status involuntarily, as used to be the case, for example, when Indian women married non-Indian men.
39. Wilson, supra note 37, at 64.
40. Cf. infra text accompanying notes 91 & 92.
42. Id. at ¶¶ 101-02.
43. See E. BURNS, LATIN AMERICA: A CONCISE INTERPRETIVE HISTORY 55-56 (1982); B. KEEN & M. WASSERMAN, supra note 18, at 95-96.
44. See supra text accompanying notes 12-13.
empire into the República de los Españoles and the República de los Indios contributed to the preservation of Indian towns and cultural traditions, especially at a time when the Indian population had suffered substantial decline as a result of labor abuses, war, disease, and miscegenation. Even though this dual-republic system did not survive the fall of the Spanish Empire, it ensured that the main cultural aspects of Guatemalan indigenous groups would survive into the twentieth century.45

Nevertheless, the Guatemalan Indians face challenges to their cultural way of life. For example, they have, in most cases, lost their religious traditions because of conversion to Catholicism.46 Similarly, the loss of much of their land has rendered them unable to preserve their pre-conquest communal lifestyle.47 A provision purporting to protect Indian culture in the current Guatemalan Constitution48 has not been fully enforced. The Indians are now striving to ensure full compliance with the existing cultural provisions in the Constitution.

The Miskito Indians are also concerned over the loss of their culture, especially since they were able to preserve most of their traditions until 1979. While there was a commercial British and American presence in the Atlantic Coast region, the Miskitos did not abandon their traditional subsistence patterns or relinquish their self-rule.49 Instead, the Miskitos continued their traditional economic activities of hunting and fishing, which they occasionally complemented by participating in the British-American market economy.50 When the Sandinistas came to power in 1979, they enacted laws and instituted programs that threatened to undermine the Miskitos’ ability to support themselves, despite the existing constitutional protections of Miskito culture.51 A law forbidding Miskitos from carrying weapons effectively precluded the Miskitos from hunting. Decrees restricting the Miskitos to a particular area or relocating entire communities further limited their ability to search for food on traditional

45. See B. KEEN & M. WASSERMAN, supra note 18, at 101-03.
46. See supra note 43.
47. See supra note 49.
48. See supra note 22.
50. Usually, the Miskitos worked for American companies for a short period of time, earning extra money for goods they did not produce themselves, such as sugar. After having earned some money, the Miskitos would return to their land and pursue their traditional subsistence economic activities. See R. Torres, supra note 22, at 23-28.
51. The Sandinista Constitution has a provision dealing with Miskito autonomy. In article 89, the Constitution stipulates that “the Communities of the Atlantic Coast have the right to preserve and develop their cultural identities within the framework of national unity.” See also CONSTITUTION OF NICARAGUA, reprinted in CONSTITUTIONS, supra note 48, at arts. 11, 90 & 180.
Rights of Indigenous Populations

hunting grounds.52 The Sandinistas also established a set of organizations in
the Mosquitia that often dictated how the Miskitos were to be educated, thus
limiting the development and preservation of Miskito traditions.53 Finally,
a Spanish literacy campaign threatened the survival of the Miskito language.54

The Sami in Scandinavia are also seeking greater cultural protections.
Sweden and Norway claim that they impose no restrictions on Sami access to
cultural institutions.55 Sweden, however, has not passed special legislation
to ensure the transmission of indigenous traditions to future generations.56
Although Norway has recently adopted policies to protect some aspects of Sami
culture,57 it had previously attempted to assimilate the Sami into the dominant
society. Similarly, although Finland did not pursue a policy of active assimila-
tion,58 incorporation of the Sami into Finnish society resulted from ethnic and
linguistic similarities between the dominant group and the Sami and from a
shared dependence on reindeer-herding.59

Recently, the Sami have expressed great concern over the loss of their
cultural heritage and traditional way of life. They feel that their culture has
been, and in some cases still is, threatened by state development policies. For
example, the destruction of forests and the redirecting of rivers for the con-
struction of hydroelectric dams in northern Scandinavia altered reindeer
herding patterns and threatened the existence of the herds, thus endangering
the Sami's subsistence culture and their ability to preserve a separate way of
life.60 In both Norway and Finland, the Sami are still struggling to obtain
greater environmental protection for their land.

B. Land

Another pressing problem faced by indigenous populations, including those
in Canada, Guatemala, Nicaragua and Scandinavia, is loss of land. In most
cases, indigenous populations have been removed from the land they originally
occupied.61 They were then relocated to reservations situated on small patches

53. See supra note 25.
54. See R. Torres, supra note 22, at 42.
55. Study of the Problem of Discrimination Against Indigenous Populations: Report of the Sub-
56. Id. at ¶ 95.
57. Id. at ¶ 98.
58. Finland has, however, recently enacted some measures to protect Lapp culture. See id. at ¶ 97.
59. See M. Jones, supra note 8, at 7-8.
60. See id. at 9-10; see also Indigenous Peoples, supra note 14, at 56.
61. See W. Jacobs, supra note 30, at 27 ("Of the native peoples who survived the onslaught of the
aliens, few retained their lands or even a portion of them").
of often barren land. Their attempts to recover their lost lands through legislation or legal action have met with little success. Since states are unwilling to limit their exercise of power over any section of the state's territory, especially when these lands may be rich in mineral resources, they are reluctant to grant large areas of land to indigenous groups seeking to establish a limited form of self-government in these areas.

Indigenous populations continue to request that their land rights be recognized, especially since land is of vital importance to the survival of their communities. First, land serves as a base upon which indigenous populations can live according to their own traditions. Second, this land, some of which includes ancestral burial grounds, often has an important religious significance for the aborigines. Third, without a discrete unit of land upon which indigenous populations can establish their community, it is difficult for the natives to press self-determination claims. A state is more likely to grant limited self-determination to a group living in a discrete area because it is easier to restrict self-determination to that particular area. Fourth, because indigenous populations assert claims to a distinct area of land, the state can distinguish them from other nonindigenous ethnic or religious minority groups. Using this distinction, states could grant autonomy to indigenous populations without having to do the same for other minorities.

In Canada, as in the United States, the settlers' growing population and interest in profit and land led to conflicts with the Indians which often culminated in peace treaties. These treaties usually granted compensation, reserves, annuities and/or certain specified rights in exchange for land and peace. By agreeing to these treaties, Canadian Indians lost most of the lands they originally occupied. They argue, however, that their aboriginal land rights have been recognized by the Proclamation of 1763, which acknowledged their

62. See infra text accompanying note 93.
63. See, e.g., cases cited infra note 195.
64. In Australia, aboriginal land containing important mineral resources has been leased to private companies for exploitation. INDIGENOUS PEOPLES, supra note 14, at 25. Similarly, "[i]n the Amazonia, indigenous groups have been pushed aside to make way for mining companies." Id.
65. In particular, because the indigenous populations often depend on the natural resources of the land, they seek to control not only the land, but also important resources such as water. However, they have often failed to exercise full control of the water resources found in indigenous areas. While water rights have been recognized in the United States (see Winters v. United States, 207 U.S. 564 (1908)), Indians complain that off-reservation pumping of water by non-Indians has substantially decreased the available water supply, especially in the American West. See L. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS (1987).
66. W. JACOBS, supra note 30, at 127.
control over the lands they held at the time. While the Canadian government has created a number of reservations where Indians live and establish their own laws subject to the approval of the Minister of Indian Affairs, the Indians remain dissatisfied.

In Guatemala, Indians are seeking to obtain territorial rights through land reform. During the postcolonial period, the dominant non-Indian groups fought for control of Guatemalan land. Whites and *mestizos* often seized lands previously belonging to indigenous communities, establishing large tracts of lands or *haciendas* controlled by one family. The Indians, with neither land nor income, had no choice but to work for the *haciendas* at less than subsistence wages. Past attempts at land reform have left substantial land concentration in the hands of a few (mostly white) landowners controlling large estates, or *latifundios*.

The Miskitos, while largely able to remain on the lands they originally occupied, have since 1979 encountered serious threats to their land tenure. The Sandinistas were particularly interested in exploiting the economic resources of the Atlantic Coast, such as rubber, bananas, and timber. In order to exercise control over the Miskitos’ land, they established a number of economic development organizations in the area, and relocated Miskitos opposing the development programs. Although the Sandinistas eventually allowed most Miskitos to return to their ancestral lands, many of these organizations remain in place. While it is unclear what policy the Chamorro government will follow concerning the Miskitos’ land, the Miskitos are anxious to gain unequivocal recognition of their land tenure rights and to remain in the area in which they lived largely unmolested until 1979.

The Sami are also seeking a fuller recognition of their land rights. Although Scandinavia is known for its progressive land policies concerning the Sami, the Sami have in the past faced public and private encroachment upon
their territory. While presently the Sami are not systematically being removed from their lands, their property rights are not actively protected.

C. Individual and Welfare Rights

Indigenous populations, like other ethnic minority groups, are currently the victims of discrimination and are denied essential goods and rights by their respective states. Moreover, even when indigenous populations gain access to social programs or are able to have their individual legal rights enforced, they often find that these programs and laws do not adequately address their needs. For example, the educational needs of indigenous peoples are seldom met by state systems that do not teach indigenous languages.

In Canada, Indians complain that many of their people are barred from receiving various nonindigenous health and social services, and that Non-Status Indians are ineligible for indigenous welfare programs. Indians are also concerned about high mortality figures and low life expectancy relative to that of whites. As the Canadian government has recognized, "health conditions among Native people are generally poorer than among the white population." In addition, Indians are now trying to improve housing conditions and avert housing shortages on the reservations. Indigenous housing concerns are not adequately addressed by state-wide urban housing projects. While new high-rise buildings may ease housing shortages in urban areas, they cannot be used on an Indian reservation without disrupting and undermining Indian communal traditions and patterns of social interaction.

Similarly, though Indians in Guatemala face serious social and economic problems, they are most concerned with violations of individual human rights. According to Amnesty International, there are reports of "arbitrary arrest, torture, disappearance and extrajudicial execution of Indian peasants

73. See supra notes 57-59 and accompanying text.
77. Id. at ¶ 58.
78. Id. at ¶ 57.
80. For example, the life expectancy of Mayan Indians in Guatemala is 11 years shorter than that of whites. INDIGENOUS PEOPLES, supra note 14, at 17.
Rights of Indigenous Populations

by the Army." 81 In addition, Guatemalan Indians have been forced to resettle in government designated villages and to join "civilian self-defence" patrols, which more often than not are agents of the government. 82 Existing socio-economic ills were aggravated by the constant threat of government sanctioned massacres in the aftermath of the 1982 military coup staged by Rfós Montt. 83

Although the Guatemalan Constitution protects the economic and social rights of citizens, 84 these rights have yet to be fully enforced. In practice, neither the Indians nor the economically disadvantaged mestizos and whites have been able to depend on the state to satisfy their basic economic and social needs, although their socio-economic needs are particularly urgent given the great number of Indians living in poverty and the prevalence of anti-Indian feelings throughout the country. 85

The Miskito Indians and the Sami are also concerned with their individual and collective rights. During the Miskitos' armed struggle against Sandinista attempts to incorporate them into the Nicaraguan state, the Sandinistas abducted, relocated or executed Miskitos in violation of their human rights. 86 While the Sami have not been subject to the same degree of violence, they are unable to procure full enforcement of their individual and collective rights. With regard to housing, the Norwegian government states that "for various reasons . . . the [Sami] may in reality have less opportunity than others to safeguard their rights." 87

D. Self-Determination

Indigenous demands for self-determination are predicated on their claims to land and on their self-definition as separate nations. Because most indigenous groups currently inhabit a discrete unit of land (sometimes referred to as

83. According to Amnesty International, "in 1982 many thousands of noncombatant civilians, most of them Indian peasants, were massacred in the Guatemalan countryside. They were the victims of counter-insurgency strategy of a military government led by General Efraín Rfós Montt ... The exact number of dead is not known, but all estimates put the toll in the tens of thousands." AMNESTY INTERNATIONAL, supra note 81, at 53. The Guatemalan government at first claimed that the guerrillas were responsible for the high death toll, and later justified the killings as necessary to root out subversives. See N.Y. Times, July 20, 1982, at A23, col. 1.
84. See POLITICAL CONSTITUTION OF THE REPUBLIC OF GUATEMALA, reprinted in CONSTITUTIONS, supra note 48, at §§ 1, 4, 7, 8.
85. See supra note 83 (government regards Indians as subversives); see also GUATEMALA, supra note 19, at 33-34 (racial antagonism between ladinos and Indians).
86. See supra note 25 and accompanying text; see also infra note 134 and accompanying text.
a reservation), they can demand the right to exercise self-determination within this specific area. An indigenous population may contend that since it is a "nation" with a land, a shared language and culture, and a common history, it is entitled to self-rule.88

Self-determination can take a variety of forms along a spectrum from autonomy in particular subject matters such as cultural concerns, to full political autonomy, in which indigenous populations establish their own governments, design their own political systems, and enforce their own laws.89 While political autonomy would not necessarily mean that an indigenous population could never be subject to the laws of the majoritarian state (e.g., if an aborigine committed a crime outside the indigenous population's territory), it would mean that the indigenous group would have primary jurisdiction and control over indigenous affairs.

A number of possibilities exist between both extremes of the self-determination spectrum. An indigenous group, for example, may have the power to enact economic programs but not to organize itself politically. Indigenous people may receive the right to manage the mineral and water resources on their land, but not to alienate their land or to organize their local political bodies.

In the extreme case, an indigenous group could attempt to exercise self-determination by seeking full independence from the state through force or political persuasion. However, the risks are high, and indigenous groups seldom follow this course.90 Instead, most indigenous populations seek one or another form of self-determination within the framework of the existing state. Because states feel less threatened by an exercise of self-rule that does not require dissolution of the state, they are more willing to deal with those indigenous groups not seeking independence.

Canadian Indians currently argue that their right to self-determination should be fully recognized because that right had been recognized by the British Crown in the Proclamation of 1763, which states:

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88. See, e.g., Introduction in Pathways, supra note 75, at xiv.
89. This spectrum has been defined by Bartlett in his study of indigenous populations in Canada. Depending upon the extent of state protections and the nature of indigenous land rights, an indigenous group's political conditions may be described in terms of subjugation, self-management or advanced self-determination. Subjugation exists if there is substantial state intervention in indigenous affairs and if few or no aboriginal land rights are recognized. Advanced self-determination exists when there is little or no state intervention, and the state recognizes aboriginal cultural and land rights. Under self-management, while a national state allows natives to administer local programs and recognizes limited aboriginal land rights, the state still exercises national jurisdiction over indigenous groups, thus providing indigenous groups with an internal administration analogous to a municipal government, but not with the option of full autonomy. See R. Bartlett, supra note 12, at 1-4.
90. Indigenous Peoples, supra note 14, at 36.
[W]hereas it is just and reasonable and essential to our interest and the security of our colonies, that the several nations or tribes of Indians with whom we [the British Crown] are connected and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to us, are reserved to them, or any of them as their hunting grounds.  

Canada’s indigenous groups argue that since they have not ceded sovereignty over their lands, these groups should be recognized as separate Indian nations with the power to rule themselves without intervention from Canada’s national and provincial governments.  

Canadian Indians now live on reservations organized by tribes. The Band Council system, introduced in 1871, established a democratically elected local council. However, only after 1950 could the Indian Band Councils adopt local legislation and control the internal administration of the reservation. Under the current version of the Indian Act, the natives enjoy a limited measure of self-administration, especially since existing federal and provincial law may restrict indigenous exercises in self-rule.  

Each tribe has a Council empowered to make bylaws in areas already specified by the Canadian government. These Councils have no broad authority to make law and must forward their bylaws to the Minister of Indian Affairs, who has the power to veto them. In addition, the Minister of Indian Affairs may allocate reserve lands and approve Indian legislation. While the Minister cannot dispose of resources located in Indian territories unless the natives surrender them, provincial governments have sometimes ignored these provisions and have established their own jurisdiction over a particular piece of land or resource. The Canadian Indians continue their struggle to limit the oversight powers of the Minister of the Interior in an effort to exercise greater self-determination.

91. *Quoted in* E. ROBINSON & H. QUINNEY, *supra* note 68, at 5-6 (emphasis in original).  
92. Not all Indians in Canada and Native Americans in the United States agree on the degree of political control that they should have. For example, at the St. Regis Indian Reservation (covering territory in both Canada and the U.S.), a dispute has arisen between those tribe members who do not recognize federal and state authority over their land and who have a leadership based on heredity (the traditionalists), and those who recognize outside governments and have an elected leadership. This disagreement came to the media’s attention recently after a dispute over gambling on the reservation. N.Y. Times, May 3, 1990, at B1, col. 1.  
93. *See supra* note 37.  
97. The Indian Act, R.S.C. 1985, c.I-5 § 18(2); *see also* D. HAWLEY, *supra* note 37, at 53.  
Guatemala’s indigenous populations, on the other hand, have not enjoyed even the limited degree of self-determination that Canadian Indians may now exercise. However, Guatemalan Indians currently do not emphasize the right of self-determination as strongly as indigenous groups in other countries. In part, this is because they face the more immediate challenge of countering widespread murders by the government. In addition, because Indians form the majority of the Guatemalan population and because they are dispersed throughout the country, it is impractical to advance the cause of a separate Indian state within Guatemala. The Guatemalan government is sensitive to any threats to the country’s territorial integrity, especially given its struggle against leftist groups. Indian demands for substantial autonomy are perceived as threats to the state and are likely to result in more repressive policies.

In contrast to Guatemala’s Indians, the Miskito Indians of Nicaragua have enjoyed great political autonomy throughout most of the twentieth century. When the Sandinistas came to power, the Miskitos demanded that the Nicaraguan state legally recognize the _de facto_ autonomy they had previously enjoyed. Their demands were partially fulfilled. The Nicaraguan Constitution has provisions dealing with Miskito cultural _autonomy_, but it does not guarantee the same level of _de facto_ political autonomy the Indians had enjoyed before the Sandinista victory.  

The Sami also seek, and in some cases have already obtained, recognition of their right of self-determination. They have been most successful pursuing this claim in Sweden and Finland. Sweden’s policy toward the Sami attempts to preserve their culture while providing them with the opportunity "to develop their way of life in accordance with" their desires. Sweden has designated a clearly defined Sami area within which a Sami Council has the power to determine the disposition and use of resources. Finland has addressed Sami demands for self-determination by establishing a Sami Parliament. This body

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99. See _supra_ note 51.

100. The Sandinistas presented an autonomy proposal prior to their electoral defeat in 1990. The proposal, however, did not fully meet current Miskito demands. First, it created a series of cumbersome administrative divisions based on foreign Western political models that ignored the Miskitos' traditional decision-making bodies and that would establish a strong bureaucratic non-Indian presence along the Atlantic Coast. Second, it granted few powers to the autonomous indigenous government (the local council is expected to implement national decisions, but not to establish its own local policies). Third, it failed to grant any real economic power or control over local resources to the indigenous communities. Finally, it lacked a neutral monitoring mechanism to ensure Sandinista compliance with the autonomy provisions. R. Torres, _supra_ note 22, at 77-87. The Miskito proposal for autonomy, in contrast, requires greater autonomy for the Indians, recognition of their communal ownership of the Miskito lands, recognition of indigenous rights to self-determination through a grant of greater political and economic powers to the autonomous government, and the establishment of a mechanism for enforcing compliance.

Rights of Indigenous Populations

is elected by the Sami, but it has only consultative status in the Finnish government.102

The Sami continue to seek enhancement of the powers of their representative bodies. The Sami in Finland are not fully satisfied with Finnish policies. They would prefer having a Sami body with actual political power and not merely consultative status. In Norway, the Sami are struggling to establish a political organ with greater control over decisions affecting Lapland.

In sum, although indigenous groups have often developed in unique historical contexts, they all encounter, to a greater or lesser extent, the same set of problems, namely: absence of cultural protections, loss of land, lack of recognition of their individual and collective rights, and denial of self-rule. Indigenous populations must overcome these obstacles if they are to survive as culturally distinct groups. Fortunately, growing awareness of the common nature of these problems has led to the emergence of an international norm for the protection of indigenous rights.

III. THE NORM: CULTURAL PROTECTIONS, ABORIGINAL LAND RIGHTS, INDIVIDUAL AND COLLECTIVE RIGHTS, AND SELF-DETERMINATION

An international norm is a pattern of authorized communications and acts on the part of international organizations and states.103 A norm includes, and is largely determined by, the enunciation and recognition of a given set of standards by authorized international bodies and agencies such as the United Nations. By examining the interactions among nondominant native groups, indigenous advocates,104 domestic governments, and international agencies, it is possible to discern whether the interactions follow a particular pattern. If they do, then a norm is emerging or has been established concerning the problems faced by indigenous populations.

Norms, when developed, help to predict the direction that indigenous concerns will take, even though the details of the norm and its implementation may vary from region to region and from issue to issue.105 The existence of

102. See id. at 21.
104. Although the statements of advocacy groups do not necessarily give birth to an internationally recognized norm, they nevertheless often influence the international community and individual states in deciding whether to follow a particular principle or to engage in certain conduct. In time, as international agencies increasingly accept the principles espoused by advocacy groups, an international norm may emerge as more states begin to modify their behavior largely in accordance with international guidelines and directives.
105. It may be possible to identify a broad international norm calling for the recognition of the principle of indigenous cultural autonomy and for legislation for the protection of indigenous cultures. However, the cultural protections enacted by a particular state need not be identical to those established
a norm does not depend on identical behavior by all actors involved or even universal acceptance of its normative content. A norm does not require absolute compliance with a given rule, and the international system often lacks compulsory mechanisms of implementation. Although a norm may be "soft" (i.e., easily violated), it does not necessarily follow that the norm is a mere formalism with little power to affect state behavior. So long as enough states and international bodies have accepted the norm, a country will most likely incur some costs when it violates that norm. These costs need not take the shape of formal political or economic sanctions (such as the loss of aid from a given country), but could translate into a loss of prestige and credibility that may affect future transactions in a variety of settings. For example, a state may be adversely affected by negative publicity resulting from its denial of cultural protections to an indigenous population.

Although loss of prestige may not have the same immediate impact as economic sanctions, it nevertheless provides states with an incentive to comply with the norm. In an age of interdependence and mass communications in which the acts of one country towards its own people quickly become public knowledge, a state's violation of a particular international norm may lead other nations to denounce that state's behavior and to alter their diplomatic and economic interactions with the state accordingly. This has often been the experience with respect to violations of human rights, as shown by the recent history of South Africa, Chile under the Pinochet regime, and Guatemala

in other countries. As long as a program recognizes and addresses cultural concerns, it may still conform to the prevalent norm, even if it fails to satisfy all of the existing indigenous concerns.

106. For details on the implementation mechanisms used to further the present indigenous norm, see infra Section IV.

107. As Tilman Hasche notes in relation to international human rights, "though not always binding in and of themselves, these manifestiations of international legal consensus are today considered a form of state practice which, to a greater or lesser extent, depending on the degree of unanimity concerning a particular norm, gives rise to generally binding obligations under international law." Hasche, International Law and Human Rights: How Far Have We Come?, 48 OR. ST. BAR BULL., July 1988, at 20. In addition, it cannot be assumed that a norm is irrelevant merely because the policies of all states do not demonstrate an absolute correlation vis-à-vis a particular issue and the existing international standard. As Louis Henkin notes:

[A norm] may keep nations from doing what they may otherwise deem to be in their interests ... Or obligations may impel nations to do what they might otherwise not do ... If an international norm does not completely deter, it may at least delay violative action until the needs are clear, until other alternatives are explored and rejected, or exhausted [and] international norms will also determine choice among alternatives.

L. HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 44-45 (1979). Henkin adds that "it is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." Id. at 47 (emphasis omitted). In fact, Henkin notes that it is the greater attention given to the breach of a norm than to its observance that leads the national and international communities to believe that most international norms are not observed. Id. at 46. Therefore, contrary to popular belief, it is often the case that norms — including human rights norms — are observed most of the time by most countries, and that states' observance of a particular norm in turn contributes to the expansion and strengthening of the norm.

146
Rights of Indigenous Populations

during the military dictatorship. As a result, the state may either adhere more closely to the current international norm, as Nicaragua eventually did in its interactions with the Miskito Indians, or attempt to justify its behavior in terms of international principles, as the Argentine and Chilean governments did during the 1970s, claiming that specific violations of human rights are in essence exercises in self-defense to protect national sovereignty and security.

Before the 1970s, states dealt with indigenous questions on an ad hoc basis. Indigenous policies were almost exclusively shaped by domestic needs, not by an international norm. In the 1970s and 1980s, however, advocacy groups, governments, and international agencies began to identify problems that required examination of the particular needs of indigenous peoples. As various groups came together to formulate and discuss aboriginal issues, an international norm corresponding largely to indigenous concerns emerged.

While the norm does not provide a specific model or prescribe one exclusive way in which indigenous concerns may be met, the norm does encourage states to design progressive indigenous policies adapted to the state’s domestic political and social situation.

A. Before the Norm: Indigenous Affairs Before 1972

Prior to the 1970s, international bodies displayed little interest in the rights of indigenous populations. While some states had clearly defined indigenous policies, and a few indigenous advocacy groups had already been established, policies were shaped largely by the domestic needs and ideological trends of

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108. Even though the existence of a human rights norm depends largely on states’ voluntary acceptance of international principles, and though not all states have voluntarily complied with these precepts, acceptance of human rights continues to grow. In the last four decades, an increasing number of national and international organizations — including United Nations agencies and national universities — have devoted a greater number of resources to the study and monitoring of human rights. These efforts, in turn, have contributed to the increased adoption of human rights principles by states and to the development and spread of a human rights norm.

109. In the area of indigenous rights, even the absence of a norm would not necessarily mean that indigenous claims are simply ignored. The indigenous problems may be addressed indirectly — for example, in the context of overall economic policies or as part of a human rights movement — rather than directly framed in the language of indigenous rights.

110. The existence of the norm, however, does not limit indigenous demands only to those protections covered by the norm. Indigenous populations may seek to control the state in which they live even though control of the state is not part of the indigenous norm. In pursuing these goals, indigenous populations often resort to extralegal activities such as rebellion, both before and after the emergence of a norm. However, the existence of these avenues outside the norm does not minimize the norm’s importance, since these extralegal avenues are rarely successful (especially given the indigenous peoples’ economic and political disadvantages), are costly in terms of lives, and often lead to the violent repression of native demands.
each country, and different states implemented different policies over a period of time. These variations in application precluded the articulation of a widely accepted indigenous norm. The evolution of United States policy toward Native Americans demonstrates the influence domestic factors had on policy formulation.

In the 1930s, prompted by horrendous conditions on reservations and "conditioned by the depression to extreme measures," the United States government adopted a Native American policy based on a reservation system in which Native Americans could -- in theory -- pursue their culture and enjoy some degree of political autonomy. After World War II, disillusionment with the New Deal policies among Native Americans and administrators soon led to a shift in sentiment away from the programs of the 1930s toward a governmental policy of assimilation. This sentiment was encouraged by a new attitude toward Native Americans that favored national unity and which coincided with, and was reinforced by, a desire to integrate minorities into mainstream American society. Not until the 1960s, when the Kennedy and Johnson Administrations emphasized the welfare and economic interests of minorities, did the American government again pay some attention to indigenous concerns. The renewed interest in indigenous affairs later gave way

111. Government attitudes toward an indigenous group take a variety of forms. Canada fostered segregation or assimilation, while Australia favored self-reliance, self-management or limited ethnodevelopment. See generally B. Morse, Aboriginal Self-Government in Australia and Canada (1986). At the time, no general consensus favored one policy over another. Presently, however, few governments will admit outright that they follow policies of segregation or assimilation. Instead, they emphasize their willingness to discuss and provide cultural autonomy and to consider the recognition of land rights and, to some extent, self-determination. This behavior suggests the existence of an indigenous norm precluding deliberate policies of assimilation.


113. The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (1988)) [hereinafter IRA], appropriated two million dollars for the purchase of new tribal lands for native populations. Along with land recovery, the IRA encouraged tribal self-government by allowing Native Americans to hold key positions in the Indian Bureaus and by contributing to the establishment of tribal constitutions, bylaws and charters. At the same time, the IRA aided the establishment of educational centers under federal supervision. The greater autonomy, increased territory, and heightened protection given by the new law to Native American tribes represented an improvement over previous policy, but the IRA nevertheless failed to satisfy indigenous requests for self-determination and greater control over local affairs. All tribal council decisions remained subject to review by superintendents and the Secretary of the Interior, and tribes were not allowed to participate in any New Deal programs unless they first endorsed the IRA and its policies.

114. After 1945, many of the Bureau of Indian Affairs' programs were dismantled. Congress ended its wardship over most of the tribes and lifted restrictions on the sale and use of more than two million acres of tribal allotments. In order to survive, Native Americans had to sell or, in some cases, abandon their land, search for jobs outside the reservations, and integrate into the dominant society. See R. Burnette & J. Koster, supra note 112, at 16-18.

115. This change resulted partly from increased cultural awareness of Native American traditions and partly from President Johnson's Great Society programs, which enabled Native Americans to obtain more federal funds and to use them at their discretion. The Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified with some differences in language at 25 U.S.C. §§ 1301-03, 1311-12, 1321-26, 1331, 1341 (1988)), strengthened guarantees of religious freedom and gave Native American tribes jurisdiction
to a policy of neglect arising from an ideological change that reached its apex
under the administration of President Ronald Reagan.116

The absence of an international norm regarding indigenous populations
placed the discussion of indigenous concerns within the context of other legal
rights under domestic and international law.117 For example, if an indigenous
population's territory was expropriated by a state -- whether by force or by
law -- the aborigines could argue that their aboriginal land rights had been
violated. However, since those land rights were rarely if ever recognized by
the states concerned, the claims would not succeed in court. In contrast, the
aborigines would be more likely to obtain relief if they framed the issue as a
violation of a recognized norm of the dominant society, such as the state's lack
of authority to expropriate land without paying just compensation.118 Similarly,
threats to indigenous religious beliefs could be portrayed as violations of
the accepted norm of religious freedom.119 Denial of the aborigines’ access
to the state's legal system could be framed in terms of a violation of the
accepted principles of nondiscrimination and equal protection, rather than in

(1988)), supplemented the existing Great Society programs by increasing federal money for tribal business
enterprises. However, although the Indian Self-Determination and Education Assistance Act, Pub. L. No.
enacted additional protections, it did not give the tribes total control over internal affairs and use of federal
money, and it did little to offset other policy trends that threatened Native American culture, such as the
43 U.S.C. §§ 1601-29e (1988)). This law forced Alaskan natives to form a corporation — a business
organization foreign to Eskimo traditions — in order to exploit their resources, and thus prevented their
exercise of autonomous communal control over Alaskan land.

116. President Reagan initially made statements recognizing Native American self-determination. See
R. ORTIZ, INDIANS OF THE AMERICAS 176-77 (1984). However, as it turned out, his administration was
not especially sensitive to indigenous concerns. His Secretary of the Interior from 1981 to 1983, James
Watt, described Native American reservations as shameful examples of "the failures of socialism." N.Y.
apologizes for the "hurt" caused by comments but intended them to underscore message that "[t]he Indian
people have been abused by the U.S. government for too many years."). Some indigenous leaders
interpreted Secretary Watt's comments as statements favoring private exploitation of mineral resources on
Native American lands. Id. A number of Native American groups oppose such development, but argue
that they may be necessary to combat unemployment as federal support diminishes. Id. By favoring private
development and discouraging federal expenditures on indigenous affairs, the Reagan Administration
abdicated its responsibilities toward Native Americans.

117. For example, in 1962 the Secretary General of the United Nations prepared a memorandum listing
special international measures for the protection of ethnic, religious and linguistic groups. Aboriginal
populations were included among these groups. The memorandum, however, did not address indigenous
concerns separately, implying instead that such concerns were essentially no different from those faced
by other minorities. See Sub-Commission on Prevention of Discrimination and Protection of Minorities:

118. See, e.g., Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (clan of Alaskan Tlingit
Indians seeks to enforce land rights by bringing suit under Takings Clause of Fifth Amendment).

119. See, e.g., Reuben Quick Bear v. Leupp, 210 U.S. 50 (1908) (Sioux Native Americans, relying
on federal policy against expenditure of public funds for sectarian education for Native Americans, seek
to enjoin Bureau of Indian Affairs from contracting education to Catholic agency).
terms of the affirmative duty of a state to increase indigenous access to the courts.

The necessity of presenting problems in terms of a recognized nonindigenous norm also applied when indigenous peoples pursued their claims through international mechanisms. In particular, aboriginal and human rights advocacy groups would have had to rely on international human rights codified in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights with its Optional Protocol. Advocacy groups have also relied on the International Convention on the Elimination of All Forms of Racial Discrimination and, in the cases of Guatemalan and Brazilian native populations, on the Convention on the Prevention and Punishment of the Crime of Genocide.

Thus, indigenous groups were commonly treated as any other minority group under both domestic and international law prior to the 1970s. At the United Nations, questions concerning indigenous populations were usually assigned to sub-commissions dealing with issues of discrimination against minorities, such as the General Assembly's Third Committee and the Commis-


Although these documents can be used to identify violations, they are not always binding and even when binding are not fully enforceable. For example, because the Universal Declaration of Human Rights is a declaration adopted by the United Nations General Assembly, it does not have the force of law. On the other hand, the Economic, Social and Cultural Covenant and the Civil and Political Covenant are binding on those states that have ratified them. Nevertheless, differences over the interpretation of these documents' loosely drafted provisions preclude effective enforcement. For instance, states could argue that indigenous groups are not "peoples" and thus not guaranteed the right to self-determination recognized in the International Covenant on Civil and Political Rights. Moreover, the Human Rights Committee created by this covenant to receive complaints is incapable of guaranteeing full compliance with its provisions; it can entertain complaints only against parties that have explicitly recognized its authority. The declarations and covenants have been invoked with great frequency and, to this extent, they can be regarded as normative instruments that create minimal legal obligations and that help shape international practices.
Rights of Indigenous Populations

sion on Human Rights' Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Indigenous problems during this period were not generally accepted as distinct and did not receive special attention. Since most domestic and international actors did not acknowledge the existence of an indigenous problem, they neither recognized a need for discussing aboriginal affairs nor established a norm for the treatment of indigenous peoples. Instead, each state dealt with its own indigenous groups as it saw fit, often with little or no supervision from the international community.

B. The Transition: The Use of Accepted Human Rights Principles to Create a Norm After 1972

Although an internationally recognized indigenous norm did not exist prior to 1972, such a norm began to emerge after 1972, largely as a result of increased activity by indigenous advocacy groups and from enhanced media coverage of international human rights and indigenous problems.

1. The Role of Advocacy Groups

Before 1972, pro-indigenous advocacy groups had been organized to oppose specific anti-aboriginal measures. The organizations were often ad hoc in nature, and the scope of their activities was limited. These groups lacked political influence, press coverage, and the resources necessary to make their activities effective. However, increased media attention to indigenous affairs in the 1970s gave indigenous peoples a greater outlet for their activities. In Canada, for example, the Indians' vigorous opposition to assimilationist policies led to the formation of the National Indian Brotherhood (NIB). Other Indian groups were formed in an effort to oppose anti-indigenous legislation and to further the interests of indigenous peoples in Canada. The Canadian Métis Society was organized at the same time as the NIB to give special representation to the interests of the Métis (mixed races) and Non-Status Indians. The Native Council of Canada, the Inuit Committee on National Issues (ICNI), and the Assembly of First Nations (the reorganized NIB) have supported and participated in conferences on constitutional reform and its potential for improving aboriginal self-government in Canada.

127. See infra note 204 and accompanying text. In addition, the fact that the General Index to United Nations Documents did not provide an exclusive heading for indigenous rights or populations, but instead included indigenous groups under the minority rubric, supports the view that before the 1980s an international indigenous norm did not exist.
129. Id. at 233.
130. See id. at 240; see also Hawkes, Preface to R. BARTLETT, supra note 12, at vi-vii.
Similarly, the Miskitos of Nicaragua, when threatened by Sandinista policies, used already existing Indian advocacy organizations to channel indigenous opposition against the government while founding new organizations, such as MISURASATA. These groups were mainly concerned with preserving Miskito culture, obtaining recognition of their aboriginal land rights, and maintaining Miskito self-government. The Sami have also established a number of organizations since the 1950s to represent their interests in obtaining greater individual and economic rights, land ownership, political autonomy, and recognition of Sami cultural problems. For example, the Sami in Sweden organized the National Association of Swedish Sami and, along with the Sami in Finland and Norway, established the Nordic Sami Council.\footnote{See Baer, supra note 11, at 20-21.}

2. The Role of the Media

Advances in communications technology in the 1970s enhanced the media’s power to cover domestic and international incidents. The use of communication satellites, the establishment of overseas news bureaus, and the increased interaction among journalists, advocacy groups and state and international agencies, facilitated the flow of information throughout the world. This exchange of information produced an increase in the number of investigative stories concerning human rights violations, including violations of the rights of indigenous peoples.

The increased media coverage of human rights focused greater attention on indigenous concerns and facilitated the identification of aboriginal issues by international organizations. Greater media coverage of indigenous rights led not only to the identification of indigenous problems, but also to the examination of state policies toward aborigines.\footnote{A state’s relations with nondominant native peoples was considered a domestic issue and, as such, international organizations could not intervene directly in a state’s aboriginal policies. See supra notes 113-14 and accompanying text.} This coverage often resulted in moral or political pressure on states to reassess their indigenous policies, as the U.S. and Nicaraguan examples illustrate. During the 1970s, Native Americans staged a series of demonstrations that pressured the Nixon Administration into acknowledging and confronting, although not resolving satisfactorily, a number of indigenous concerns.\footnote{Native Americans staged mass demonstrations and effectively used the media to pressure the U.S. government into recognizing their grievances and redressing some of them. Although this militancy did not help the tribes gain more land and greater autonomy, it did have a strong impact on American society. Native Americans, long regarded as a passive group with little power, became a force on the political scene. In 1972, President Nixon made a statement in favor of Native American self-determination. See R. Ortiz, supra note 116, at 162. This statement seemed to have been largely designed to neutralize Native American resistance that could have affected the reelection campaign. Nixon, however, failed to undermine their} Similarly, the international media
Rights of Indigenous Populations

coverage of the Miskitos’ demonstrations and armed struggle against Sandinista assimilationist policies encouraged the Sandinistas to seek a peaceful settlement with the Miskitos. Although the Miskito-Sandinista struggle was a domestic conflict, it gained world attention partly because opponents of the Sandinista regime sought to discredit it by showing not only that it lacked the support of Nicaraguan indigenous groups, but also that it was actively arresting and killing Miskito Indians. With its popularity ebbing and its economic problems mounting, and with the eyes of the world focused on Nicaragua, the Sandinista government knew it could ill afford to be branded as a violator of indigenous rights.

Increased attention to indigenous grievances caused states, advocacy groups, and international and domestic agencies to recognize that a solution to these problems required a separate exploration from minority rights in general. These actors realized that many of the alleged indigenous concerns, previously framed in terms of human and individual rights violations, often arose from the aboriginal groups’ shared history of colonial subordination. However, indigenous advocacy groups still had to rely on existing human rights documents, which were not designed for the exclusive protection of indigenous groups, to anchor their demands. These efforts led to the redefinition and expansion of the scope of human rights provisions to include special protections for indigenous populations. Advocacy groups and other nongovern-
ment agencies have relied on the International Bill of Rights\textsuperscript{137} to expand the scope of national and cultural rights through interpretation and, in some instances, through modification of specific articles.

Relying on article 15 of the Universal Declaration of Human Rights, which stipulates that "[e]veryone has the right to a nationality," and that "[n]o one shall be arbitrarily deprived of his nationality,"\textsuperscript{138} some indigenous groups have claimed that they still constitute distinct nations because they have never given up sovereignty over their territory. Indigenous groups in general could invoke the protection of article 15, alleging a state's refusal to recognize aboriginal sovereignty over indigenous territory would deprive the aborigines of their nationality.\textsuperscript{139}

In addition, some indigenous groups have used article 27 of the Universal Declaration to demand specific cultural protections.\textsuperscript{140} Article 27 declares that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancements and its benefits."\textsuperscript{141} Indigenous groups redefined community to mean the aboriginal community, and not the community of the state's dominant group. As a result, some indigenous groups have contended that their ability to participate in the state's cultural activities does not suffice under article 27\textsuperscript{142} and that the state must allow them to cultivate and participate in the cultural life of the indigenous community.

Indigenous groups have also relied on the self-determination provisions of the International Covenant on Economic, Social and Cultural Rights\textsuperscript{143} and the International Covenant on Civil and Political Rights,\textsuperscript{144} which stipulate

\begin{itemize}
\item[137.] See supra notes 121-24. With respect to the enforceability of these instruments, see supra note 126 and accompanying text.
\item[138.] Universal Declaration, supra note 121, at art. 15.
\item[139.] The state’s nationality, in the aborigines' view, was not their own. Thus, the availability and vesting of state nationality in indigenous peoples, often done unilaterally and without consulting the indigenous groups, would not comply with article 15 protections.
\item[140.] See O'Brien, Federal Indian Policies and the International Protection of Human Rights, in AMERICAN INDIAN POLICY, supra note 33, at 53 (discussing article 27 in context of treatment of Native American culture).
\item[141.] Universal Declaration, supra note 121, at art. 27. Indigenous peoples have also relied upon article 15 of the International Covenant on Economic, Social and Cultural Rights, which recognizes every person's right "to take part in cultural life," and declares that "the steps to be taken by the States Parties to the ... Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture." Economic, Social and Cultural Covenant, supra note 122, at art. 15.
\item[142.] Some indigenous groups read article 27 as implicitly recognizing land rights. As Berger observes, "[a]rticle 27 applies to indigenous cultures that are closely linked to their land and its resources. If an indigenous people's loss of their [sic] land inevitably leads to the extinguishment of their [sic] distinct culture, the nation that took their [sic] land has violated article 27 of this Covenant." Berger, supra note 10, at 13.
\item[143.] Economic, Social and Cultural Covenant, supra note 122, at art. 1.
\item[144.] Civil and Political Covenant, supra note 123, at art. 1.
\end{itemize}
that "all peoples have the right of self-determination."\textsuperscript{145} The extent of such self-determination, though, is unclear.\textsuperscript{146} While article 1(2) of both Covenants indicates that self-determination enables all peoples "freely [to] dispose of their natural wealth and resources," it fails to define the term "peoples," and does not indicate whether there are any limits upon the exercise of self-determination when it directly conflicts with the territorial integrity of a state. Indigenous groups used the open-ended nature of the principle of self-determination as a legal justification for their demands to determine their political future and to rule themselves according to their traditions without unnecessary intervention by the state.\textsuperscript{147}

In a number of cases, indigenous groups, especially in Guatemala and Nicaragua, have invoked the provisions of the Genocide Convention.\textsuperscript{148} Aboriginal advocates have sought to apply the Convention's provisions and definitions retroactively, arguing that colonial policies in North, Central and South America constituted genocide. This attempted inclusion of remote events gives greater strength and urgency to indigenous concerns. The advocates complemented their invocation of the Genocide Convention with reliance on the International Convention on the Elimination of All Forms of Racial Discrimination.\textsuperscript{149}

C. Crystallization of the Norm: The 1980s and Indigenous Rights

1. Sources of the Norm

The statements and interactions of relevant parties involved in aboriginal questions provide evidence of the emergence of an indigenous norm in the

\textsuperscript{145} See, e.g., \textit{INDIGENOUS PEOPLES, supra} note 14, at 36 (noting that World Council of Indigenous Peoples bases its claim to this right on these two articles).


\textsuperscript{147} However, the aborigines could base their article 1 claims not only on a broad belief in self-rule for any group of people, but also on the peculiar nature of indigenous-state interactions. They could argue that their occupation of the state's territory before the creation of the state and, in some cases, their reservation of sovereignty, gives them a right to self-determination that is not limited to political participation within the dominant society, but includes the right to seek and obtain autonomy from the state. See, e.g., \textit{Introduction}, in \textit{PATHWAYS, supra} note 75, at xiv. This claim served to distinguish indigenous concerns from those of other minority groups that often lacked a discrete land base and the colonial history of subordination.

\textsuperscript{148} Genocide Convention, \textit{supra} note 126. Simply because a state is accused of genocide does not mean that the accusation is true. For example, while Indian massacres have been documented in Guatemala, Nicaragua did not follow a deliberate policy of Indian extermination although, to be sure, the Sandinistas did commit acts of violence against Indians. See \textit{supra} note 134 and accompanying text; \textit{INDIGENOUS PEOPLES, supra} note 14, at 118.

\textsuperscript{149} Racial Discrimination Convention, \textit{supra} note 125; see also G. NETTHEIM, \textit{supra} note 146, at 124.
Although the context of each particular case largely determines the details and scope of the principles expressed, these declarations and interactions show that advocacy groups and domestic governments now recognize the special needs of indigenous populations for cultural protections, recognition of indigenous land rights, welfare rights (e.g., housing, education, and healthcare), and self-rule. The proliferation of domestic and international declarations, the publication of various studies, the creation of international bodies dealing exclusively with indigenous issues, and the attention given by states to indigenous concerns are all evidence of the crystallization of a norm protecting indigenous rights.

While many indigenous declarations were drafted during the 1970s, they received greater attention in the 1980s. These declarations include: the Resolutions of the Inuit Circumpolar Conference, the Draft Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere prepared by the International Non-Governmental Organizations Conference on Discrimination against Indigenous Populations, Resolutions of the First Congress of Indian Movements of South America, Conclusions and Recommendations Regarding the Rights of Indigenous People by the Seminar on Human Rights in the Rural Areas of the Andean Region, Recommendations of the Fourth Russell Tribunal on the Rights of

150. Most of these declarations have been issued by indigenous advocacy groups. They are not binding on states because, unlike covenants, they are not open to ratification. Nevertheless, to the extent that these instruments receive significant attention in the various proceedings and discussions of indigenous concerns at the United Nations, they indicate the attitude and behavior of the states and indigenous groups toward indigenous issues.


152. This declaration calls for: the recognition of indigenous nations and of their international identity, or if the aboriginal peoples no longer form a nation, the recognition of indigenous peoples as subjects of international law; the recognition of treaties; the exercise of state jurisdiction over indigenous peoples pursuant only to valid treaties; the granting of independence to indigenous peoples if they so desire; the recognition of indigenous land claims; the establishment of a mechanism for the settlement of disputes between states and native groups; the protection of indigenous cultural and national integrity; and the environmental protection of indigenous resources. Id. at Annex IV.

153. This resolution encourages Indian nations to take a more active and aggressive role in creating their own strategies to further their interests. It suggests that if Indians make up a majority of the population, their goal should be to take over the state's political power. It also recommends recognition of aboriginal land rights, revival of indigenous culture, indigenous education in the Indians' language, and elaboration of a national indigenous policy to provide an infrastructure for autonomous aboriginal communities. Id. at Annex V.

154. This report lists a wide variety of indigenous grievances, including the state's disregard of indigenous land rights, freedom of association, welfare (educational, health and security) rights, and cultural protections. It also recommends the adoption of measures to remedy these grievances, including guarantees
the Indians of the Americas, the San José Declaration of 1981, and a Universal Declaration on the Rights of Indigenous Peoples: A Set of Draft Preambular Paragraphs and Principles. In general, these declarations emphasize the right to cultural protections (with particular emphasis on educational and religious freedoms), aboriginal land, welfare protections under existing state social security programs, and self-determination. By focusing on the most pressing problems faced by indigenous populations throughout the world and noting indirectly that these problems are unique to aboriginal groups, these declarations contributed to the emergence of the indigenous norm.

of indigenous peoples' right of association, modification of the educational system to meet the special needs of indigenous populations, extension of national social security programs to indigenous populations, protection of indigenous peoples' religious freedom, establishment of a body to coordinate efforts to implement human rights protections, and improvement of the standard of living for rural indigenous groups. Id. at Annex VI.

This body, organized by Great Britain's Russell Peace Foundation and composed of international experts and jurists, asked Indian groups to submit cases to the tribunal and then to choose fourteen cases to be argued in full. After the presentation of these cases, the tribunal issued recommendations. These included state recognition of aboriginal land rights, an end to forced religious conversion of indigenous populations, cultural protection for indigenous communities, the establishment of a permanent committee to deal with indigenous affairs, and an end to state violations of indigenous groups' human rights. Id. at Annex VII.


This declaration of principles states, among other things, that: indigenous peoples have a right to life and freedom from oppression, a right to self-determination, and a right to self-defense against a state whose acts are contrary to indigenous self-determination; no state may assert jurisdiction over an indigenous nation except in accordance with the wishes of that nation; indigenous peoples are entitled to exercise permanent control over their aboriginal territories and to receive just compensation where their lands have been taken illegally; indigenous populations should not be displaced; and indigenous customs and culture should be recognized by the state. Sub-Commission on Prevention of Discrimination and Protection of Minorities: Study of the Problem of Discrimination Against Indigenous Populations, Report of the Working Group on Indigenous Populations on Its Fifth Session, U.N. Doc. E/CN.4/Sub.2/1987/22 Annex V (1987).

This draft declaration emphasizes the collective nature of aboriginal rights. It stresses, for example, the natives' right to: preserve their culture, their traditional economic way of life, and the integrity of the indigenous environment; own or reclaim the lands they traditionally occupied (or, where this is not possible, to seek compensation); participate fully in the economic, political and social life of the state; enjoy access to fair proceedings for the resolution of conflicts with the state; and exercise autonomy in their own internal and local affairs and decide upon the structure of their autonomous institutions. The latest draft emphasizes the collective nature of indigenous rights and adds the right to require that the state consult with indigenous populations and with domestic and transnational corporations prior to the commencement of large-scale projects of exploitation of subsoil resources. Sub-Commission on Prevention of Discrimination and Protection of Minorities: Discrimination Against Indigenous Peoples, First revised text of the Draft Universal Declaration on Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1989/33 (1989).
A wide variety of universities, research institutions, advocacy groups and scholars have conducted studies on the current status of indigenous populations. The nonprofit organization Cultural Survival, for example, publishes a periodical that covers indigenous concerns. Independent scholars and advocates have also published pieces on the problems of indigenous peoples. In addition, the Cobo Report examines the conditions of indigenous populations all over the world and proposes possible solutions to aboriginal problems. By presenting a detailed discussion of indigenous affairs and policies in many states, the Cobo Report provides empirical evidence for many of the claims presented by indigenous advocacy groups. It demonstrates that numerous indigenous peoples are losing many of their cultural traditions in the absence of programs designed to protect aboriginal culture, and lends support and credibility to indigenous demands for such protections.

International bodies have also contributed to the crystallization of an indigenous norm. In 1982, the Sub-Commission on Prevention of Discrimination and Protection of Minorities established the Working Group on Indigenous Populations. The Working Group was the first United Nations group formed to deal exclusively with indigenous concerns. Because United Nations sub-committees establish working groups when they recognize that an issue is unique to a particular group or political situation, the establishment of the Working Group suggests that after 1982 the United Nations considered indigenous concerns to be substantially different from those faced by other minorities.

A number of governments have also recognized the unique nature of indigenous problems. Many states, such as Nicaragua, are currently abandoning their integrationist policies and are discussing the creation of special aboriginal programs to protect indigenous rights. Other countries, like Canada, while still not recognizing all indigenous rights, are at least consulting with indigenous peoples and creating special indigenous programs. Such developments have led, albeit indirectly, to the crystallization of an indigenous norm.

2. The Norm

The four sources previously discussed -- declarations, studies, working groups, and state policies dealing with indigenous concerns -- demonstrate an emerging indigenous norm in the protection of cultural, land, welfare, and self-determination rights within the particular context of each aboriginal group.


160. See supra note 3 and accompanying text.

161. See supra note 136.
Rights of Indigenous Populations

a. **Cultural Protections**

Most indigenous groups seek cultural protections, and many states recognize the need for such protections. While the cultural protections category includes a variety of concerns, the norm focuses primarily on the protection of traditional subsistence patterns and indigenous religions and languages. This norm cannot be fulfilled by mere state nonintervention in indigenous cultural affairs; it requires positive measures by the state to foster and preserve indigenous traditions. Appropriate measures may include the teaching of native languages, the provision of economic subsidies to stimulate traditional economic activities such as the production of handicrafts, and the protection of aboriginal burial grounds and sacred artifacts to prevent their use or removal without the consent of the indigenous population. For example, the Nicaraguan Constitution provides for the protection of indigenous traditions, and the Panamanian Constitution commits the state to "establish an institution for the study and preservation of [indigenous communities] and their languages and for promotion of the comprehensive development of Indian groups."

b. **Land Rights**

Demands for cultural protections are often closely linked to demands for the recognition of indigenous land rights. Aboriginal groups base their land

162. See supra notes 31-60 and accompanying text.
163. According to the Cobo Report:

[i]the fact that the State has clear positive responsibilities in matters of cultural rights is generally recognized today ... While of course, individuals, groups and communities have primary roles in the development of their own culture, it has been recognized that at least some form of financial assistance is needed from the local, regional and national authorities in order to maintain adequate improvement of economic and social conditions and the rate of technical developments which will make it possible for everyone, without discrimination, to take part in the cultural life of his community and that of the nation at large.


164. See supra note 51.


166. In the third session of the Working Group on Indigenous Populations:

[i]the idea was expressed by all the observers from indigenous populations who attended the meeting, that the preservation of the life and culture of the indigenous populations was indissolubly linked to their lands and natural resources ... The restoration of at least some of their land base to indigenous communities was considered not only to represent a necessary compensation for years of oppression, but also as the only basis for ensuring the future of the indigenous populations.

requests on their original occupation of the territory in question and on the state’s failure, in many instances, to obtain a legal surrender of their sovereignty through treaties. Indigenous groups also allege that their land rights have been recognized in a number of treaties and proclamations, such as the Canadian Proclamation of 1763, and that these treaties should be honored. While most states are unwilling to grant all the land claims asserted, which may encompass vast territories, they sometimes recognize the aborigines’ right to live within a designated territory. Canada, for example, has established reservations for Status Indians in designated areas, while Nicaragua has recognized the Miskitos’ right to remain along Nicaragua’s Atlantic Coast. Although these designated areas often do not satisfy indigenous claims -- either in size or quality -- these land grants do illustrate various states’ recognition of their indigenous peoples’ need for their own territory.

c. Individual and Welfare Rights

Indigenous peoples demand greater state protection in a variety of economic and social issues such as housing and health care. In countries without extensive welfare programs, indigenous advocacy groups seek recognition of their economic and social rights. In those countries with more extensive welfare programs, such as the United States, aboriginal groups seek greater access to existing state programs. Indigenous peoples often assert that they do not have full access to existing state welfare programs because the state discriminates against them and because the programs are rarely designed to meet their particular needs.

Housing and health have been two major welfare concerns for indigenous populations. Housing shortages are due both to the natives’ lack of economic power to finance housing projects independently and to their inability to wield greater political power within the dominant society. Governments, however, have become increasingly aware of the specific housing problems faced by aboriginal populations, admitting that such problems are aggravated by discrimination against indigenous peoples, and conceding that meeting

167. See Introduction, in PATHWAYS, supra note 75, at xiv.
168. Similarly, the Peruvian Constitution states that: [the lands of peasant and native communities are unattachable and imprescriptible. They are also inalienable except for the provisions of the law based on the interest of the community and petitioned by a two-thirds majority of the latter’s qualified membership, or in case of expropriation on account of public necessity and convenience. POLITICAL CONSTITUTION OF PERU, reprinted in CONSTITUTIONS, supra note 48, at art. 163.
170. See id. at ¶ 7.

160
indigenous needs requires special housing programs. Many states have also taken steps to meet the demands of indigenous peoples for the expansion of indigenous educational programs. Some states have established special schools in indigenous areas that teach communal traditions in the indigenous language. For example, Scandinavian governments have established a wide variety of school programs designed to preserve native culture through native language instruction.  

Health care, another welfare concern shared by all aboriginal peoples, is one area in which states have not responded adequately to meet indigenous needs. Most countries lack sufficient medical units located near indigenous reservations, making it difficult for aboriginal peoples to have access to adequate medical care. Furthermore, indigenous peoples are sometimes reluctant to attend nearby clinics and hospitals. Because such facilities are designed to serve the dominant social groups, they often do not administer the traditional medicinal treatment to which aborigines are accustomed. To ease indigenous distrust of western medicine, some commentators have suggested that specially trained staff in hospitals serving indigenous tribes could assuage indigenous patients’ concerns about their treatment. While states often recognize this problem and attempt to employ more indigenous individuals in hospitals that serve aboriginal populations, most indigenous health care problems have not been resolved.

d. Self-Determination

The fourth aspect of the current indigenous norm is the recognition, to a greater or lesser extent, of an aboriginal right to self-determination. In 1988, at the sixth session of the Working Group on Indigenous Populations:

[A]ccording to the overwhelming majority of indigenous representatives, [it was established that] self-determination and self-government should be amongst the fundamental principles of the draft declaration [of indigenous rights] . . . Many

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171. See Baer, supra note 11, at 20.
173. See id. at ¶ 15.
174. The Cobo Report observes that "[c]losely related to the failure to consider traditional practices and beliefs is the lack of attention to the more general cultural differences which may create psychological barriers to the acceptance of governmental services." Id. at ¶ 89; see generally id. at ¶¶ 80-93.
speakers underlined that it was essential for the draft declaration to guarantee in the strongest language possible free and genuine indigenous institutions.\textsuperscript{175} Even member states were willing to discuss indigenous requests for self-rule as long as these demands did not include the secession of indigenous peoples from the existing state.

A request for self-determination may take many forms. Self-determination guarantees a people's right to choose its political destiny, but it need not manifest itself through independence or decolonization. Instead, indigenous groups may choose from a wide spectrum of possibilities.\textsuperscript{176} Indigenous demands for self-determination usually stop short of seeking independence from the existing state, but instead ask for limited sovereignty (i.e., for the power to create and enforce laws without consulting with nonindigenous authorities). Only a small and extreme minority of indigenous groups demand independence.\textsuperscript{177} Most indigenous groups are aware that states are unlikely to grant them full independence peacefully. First, while most states are willing to concede some degree of control over indigenous affairs, such as the power to administer special programs designed by the state,\textsuperscript{178} states will not generally recognize self-determination claims involving secession. States may favor self-determination claims, provided that international boundaries are not altered and the self-determination is exercised only within the framework of the existing state.\textsuperscript{179}


\textsuperscript{176} See supra note 89 and accompanying text.

\textsuperscript{177} Some indigenous organizations argue that aboriginal groups should be granted any measure of self-determination requested, including independence. For example, the International Indian Treaty Council has advocated the principle that "[a]ll indigenous nations and peoples shall be accorded such degree of independence, both political and economic, as they desire in accordance with international law." Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Indigenous Populations: Consideration of the Evolution of Standards Concerning the Rights of Indigenous Populations, (information received from nongovernmental organizations), U.N. Doc. E/CN.4/Sub.2/AC.4/1983/5/Add.2 ¶ III ¶ 4 (1983).

\textsuperscript{178} State objections to indigenous independence "do not necessarily exclude indigenous populations from the enjoyment of self-determination ... since self-determination can also include various forms of regional autonomy or federalism within existing States, as suggested by the General Assembly in its Resolutions 1514 (XV) and 1541 (XV)." Study of the Problem of Discrimination Against Indigenous Populations: Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Written statement submitted by the Four Directions Council (a nongovernmental organization in consultative status), U.N. Doc. E/CN.4/Sub.2/1985/ NGO/9 at 2 (1985).

Second, indigenous groups fear that such independence, even if it were granted, would not necessarily be in their best interest. The lands that have been designated for natives are often lacking in economic resources. Furthermore, since many indigenous groups have become dependent on manufactured goods and have abandoned some of their subsistence economic activities, they may find it difficult to survive without aid or subsidies from the dominant state. Therefore, instead of independence, most indigenous peoples seek "the right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing" this autonomy. 180

D. Evaluation of the Norm

The emerging norm addresses the basic needs confronting indigenous groups, 181 namely: cultural protections, land ownership, self-determination, and the recognition of individual and welfare rights. The norm's most apparent shortcoming is its recognition of indigenous issues in the abstract, without specifying a program of action through which these needs can be met. For example, although the norm requires that states recognize and act on the need for cultural protections, it does not specify whether a state should establish schools where all subjects are taught in the indigenous group's language, or whether indigenous children should attend integrated state schools where indigenous languages are taught separately.

The norm's failure to prescribe specific programs is advantageous in one respect. By recognizing indigenous needs in the abstract, the norm provides great flexibility. States, while receiving guidance from the international community about which indigenous issues they must address, can tailor different programs that comply with these standards and conform to the particular historical context of the state. Individualized programs can be more successful than programs designed and implemented in strict adherence to a

180. See supra note 158.
181. Of course, the norm cannot prevent all abuses against indigenous peoples. States may choose to ignore the norm, or they may repress indigenous demands, often by resorting to violence against native communities. Such behavior, however, does not imply that the norm is inadequate. While laws and norms are adopted to prescribe or proscribe certain conduct, there may always be some individuals or states that violate them. For example, murder will still occur despite laws prohibiting it. The occurrence of these murders is not an argument for repealing the law, but rather for enforcing it more vigorously. The same could be said about the indigenous norm.
rigid international norm to the extent that they respond to an indigenous group's particular needs and concerns.

Additionally, the flexibility of the norm makes it more attractive to a wider range of states. Because states realize that following the norm affords them a wide range of options, they do not fear that its adoption will force them to adopt a program that is incompatible with their perceived interests. For example, a multiethnic state is unlikely to grant an indigenous population extensive self-determination and political autonomy for fear that other minority groups may make similar requests. Nevertheless, the state may recognize the right of an indigenous group to some degree of self-determination by giving it the power to control the mineral resources within its territory, without granting it the power to establish independent laws concerning all local matters. If the norm mandated that recognition of self-determination be accompanied by a large grant of political power, multiethnic states would be reluctant to follow the norm and indigenous groups within such states would receive no rights of self-determination. Consequently, the norm's flexibility enhances the likelihood that it will be adopted to some degree by a greater number of states.

Although not all states have fully adopted the emerging norm, the norm has had a significant impact on the interaction between states and aboriginal groups. By providing a framework in which indigenous groups can articulate their demands and states can design programs to meet those concerns, the norm encourages both sides to negotiate. For example, when the Miskitos were negotiating with the Sandinistas in Nicaragua, they benefitted from the existing norm that called on states to protect aboriginal culture. Widespread acceptance of and remedial action pursuant to this norm by countries such as Canada and Norway made it difficult for Nicaragua to deny the Miskito demands. Moreover, since the Sandinistas could look to the success of the norm of indigenous cultural protection in other states, they were less reluctant to meet some of the Miskito demands than they would have been in the absence of such international compliance with the norm. This pattern of behavior is not limited to the cultural dimensions of the indigenous norm, but applies to all its aspects.

IV. MECHANISMS FOR THE IMPLEMENTATION OF THE INDIGENOUS NORM

Prior to the emergence of the indigenous norm, indigenous groups relied on existing domestic and international mechanisms when seeking redress for grievances. The emergence of the indigenous norm led to the establishment of new enforcement mechanisms designed to monitor aboriginal concerns and

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182. See supra notes 41-42 and accompanying text.
183. See supra note 57 and accompanying text.
184. See supra notes 137-48 and accompanying text.
Rights of Indigenous Populations
to recognize indigenous rights. Currently, indigenous groups rely on both pre-
norm and post-norm mechanisms to address their concerns. While the available
mechanisms do not guarantee full compliance with the norm, they contribute
to the slow but steady achievement of indigenous goals.

A. Domestic Mechanisms of Implementation

Aboriginal groups have attempted to safeguard their rights by informing
and educating the public and domestic governments about the emerging
indigenous norm, by monitoring violations of indigenous rights, and by seeking
legislation and implementation of indigenous policy goals that conform to the
norm. Advocacy groups, the media, constitutional provisions, legislation, and
courts and tribunals, all constitute domestic implementation mechanisms.

The formation of aboriginal advocacy organizations has accelerated since
1970. The most vocal organizations include: the Indian Law Resource Centre,
the Inuit Circumpolar Conference (ICC), and the Indian Council of South
America (CISA). These organizations operate at the domestic, regional and
international level and rely upon domestic institutions to further indigenous
causes. Indigenous advocacy groups alert the media to violations of indige-
nous rights to dramatize the need for recognition and implementation of
indigenous rights and proposals. These proposals range from constitutional
amendments recognizing self-determination to legislative programs securing
funding for indigenous schools. In addition, advocacy groups litigate indige-
nous cases in national courts. Such litigation usually involves indigenous
treaties and land claims, violations of constitutional or statutory rights, and
conflicts between tribal and state law.

Along with advocacy groups, the media contribute to the recognition and
implementation of the indigenous norm. Both print and broadcast media have
examined the demands and treatment of indigenous peoples worldwide. Reporters do not simply rely on existing studies of indigenous matters, but
often conduct their own investigations of indigenous rights violations. This

185. While most organizations use all available domestic resources to advance their cause, some
specialized organizations focus either on some, but not all, indigenous interests or on only one governmental
arena. For example, the Indian Law Resource Centre, while also engaging in indigenous advocacy,
concentrates mainly on pursuing aboriginal claims in the American judiciary system.
186. See, e.g., supra note 133 and accompanying text. Because indigenous groups usually do not
constitute a majority of the population and often do not exercise their voting rights, state and local
representatives may feel less compelled to pursue indigenous matters. See supra note 33 and accompanying
text. Therefore, indigenous advocacy groups often must resort to alliances with other communities, usually
other minority groups, to raise the political costs to public officials who ignore aboriginal claims.
187. For example, the news show Prime Time Live broadcast a story on the Yanomamo Indians in
Venezuela and Brazil on November 29, 1990. See also supra notes 132-36 and accompanying text (media
coverage of indigenous activities in the United States and Nicaragua).
coverage disseminates information about indigenous affairs among the general public and facilitates the monitoring of indigenous rights.

Indigenous groups have also relied on national constitutions to establish and implement indigenous rights. Some constitutions recognize an indigenous community's collective ownership of land and establish a state duty to respect and promote indigenous cultures.\textsuperscript{188} For example, the constitutions of several Latin American countries with sizeable aboriginal populations have entire chapters devoted to the recognition and protection of Indian communities. The Guatemalan Constitution has an entire chapter dealing with indigenous affairs.\textsuperscript{189} The Peruvian Constitution declares that peasant and native communities are "autonomous in their organization, communal work, and use of the land," and that the state "respects and protects" their traditions.\textsuperscript{190} In Panama's Constitution, the "[s]tate recognizes and respects the ethnic identity of national indigenous communities, and shall carry out programs to develop the material, social and spiritual values of each of their cultures."\textsuperscript{191} In countries whose constitutions do not expressly protect indigenous rights, aboriginal groups often struggle to gain constitutional recognition of their rights. For example, before the passage of Canada's Constitution Act of 1982, indigenous groups struggled to incorporate their rights, particularly the right to self-determination, into the Constitution.\textsuperscript{192}

The legislature provides an additional forum for the discussion and protection of indigenous rights. Legislative responses range from statutes defining the relationship between the state and indigenous groups to programs establishing special funds for the protection of traditional indigenous enterprises such as handicrafts. For example, the Costa Rican government has passed some decrees enumerating indigenous rights, while Brazil has enacted a series of special statutes dealing with aboriginal peoples.\textsuperscript{193} In the United States, Con-

\begin{itemize}
\item \textsuperscript{188} See, e.g., \textit{Political Constitution of the Republic of Guatemala}, reprinted in \textit{Constitutions}, supra note 48, at arts. 66-68. These rights often exist in theory only since governments do not fully protect them. Nevertheless, the mere articulation of these rights is evidence of the emergence of an indigenous norm since these states recognize the importance of at least acknowledging indigenous problems and embedding possible solutions in their constitutions.
\item \textsuperscript{189} \textit{Political Constitution of the Republic of Guatemala}, reprinted in \textit{Constitutions}, supra note 48, at arts. 66-70.
\item \textsuperscript{190} \textit{Political Constitution of Peru}, reprinted in \textit{Constitutions}, supra note 48, at art. 161.
\item \textsuperscript{191} \textit{Political Constitution of the Republic of Panama}, reprinted in \textit{Constitutions}, supra note 48, at art. 85.
\item \textsuperscript{192} These efforts met with only partial success. While the Indians prevailed in gaining recognition of "existing aboriginal rights," these rights remained undefined and did not include the right to self-determination. J. Miller, supra note 67, at 239-40.
\end{itemize}
Rights of Indigenous Populations

Congress has created indigenous statutory rights through a wide variety of legislation.\textsuperscript{194}

Indigenous groups often go to court to secure state-recognized rights and to enforce broken treaties. In the United States, Native Americans have litigated a wide variety of issues ranging from land claims\textsuperscript{195} to the recognition of hunting and fishing rights in areas where these activities are restricted for environmental reasons.\textsuperscript{196} They have met with little success in this forum, especially when pursuing their land claims.\textsuperscript{197}

B. International Mechanisms of Implementation

Indigenous groups do not rely solely on domestic mechanisms to further their goals. They also use international mechanisms to create fora for the study, dissemination, and discussion of information about indigenous populations, to monitor violations of indigenous rights, and to draft conventions on indigenous rights. The main international mechanisms are the media, international bodies, nongovernmental organizations (NGOs), and international conventions.

1. Nongovernmental Organizations

Nongovernmental organizations contribute to the dissemination and implementation of an indigenous norm in both the domestic and international arenas. Internationally active nongovernmental indigenous organizations, such as the International Working Group for Indigenous Affairs (IWGIA), Survival

\textsuperscript{194} See, e.g., statutes cited supra note 115.

\textsuperscript{195} See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (free exercise clause does not prohibit government from permitting timber harvesting and road construction in areas of national forest traditionally used for religious purposes by Native Americans); Hodel v. Irving, 481 U.S. 704 (1987) (section of Indian Land Consolidation Act held unconstitutional because it authorized taking of plaintiff's land without compensation); U.S. v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) (tribes receiving fee simple title to riverbed through treaty are subject to government navigational servitude and have no right to be compensated for damages to their interest arising from such servitude).

\textsuperscript{196} See, e.g., United States v. Dion, 476 U.S. 734 (1986) (upholding conviction for shooting four bald eagles in violation of Endangered Species Act despite lack of restrictions on hunting within defendant's reservation in 1858 treaty between United States and defendant's tribe). \textit{See also} Employment Div., Dep't of Human Resources of Ore. v. Smith, 110 S. Ct. 1595 (1990) (government may prosecute Native Americans who use illegal drugs as part of religious rituals).

\textsuperscript{197} One of the reasons Native Americans have met with little success in U.S. courts is the nonbinding character of international documents and statements establishing protections for indigenous populations. While U.S. courts do enforce customary international law and regard treaties as part of the law of the United States, they are not required to enforce nonbinding or non-self-executing covenants. Nearly all documents used to establish the current indigenous norm are nonbinding declarations or conventions that have not been ratified by the United States. Native Americans cannot rely on them to present effectively a claim to U.S. courts, but must instead rely on existing domestic law, which is less generous in its recognition of indigenous rights than is international law.
International, the World Council of Indigenous People (WCIP), the International Indian Treaty Council, and CISA, as well as nonindigenous NGOs, monitor violations of indigenous rights and report them to international bodies. They also conduct studies and disseminate information on indigenous populations and propose alternative mechanisms for the protection of indigenous rights. Their efforts were largely responsible for the establishment of the Working Group on Indigenous Populations in 1982 and for the ongoing drafting of a convention on indigenous affairs.\(^1\)

2. The Media

The media, through their coverage of nondominant native populations, strengthen the norm by focusing public attention on states that do not comply with the norm. Because of the rapid communication made possible by modern technology, discussion of indigenous problems transcends territorial boundaries. In the United States, for example, one can learn about indigenous rights violations in Venezuela, and vice-versa.\(^2\) This monitoring function, although unable to impose any direct sanctions on countries disregarding indigenous rights, can raise a public outcry against such states.

3. International Bodies

International bodies, such as the United Nations, and regional associations provide yet another forum for discussing, articulating and monitoring indigenous rights. For example, the United Nations General Assembly has

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199. See, e.g., INDIGENOUS PEOPLES, supra note 14, at 129 (discussing international NGO conference recommending establishment of working group).

200. See supra note 187 and accompanying text.

201. Regional groups such as the Organization of American States (OAS) also provide implementation mechanisms for indigenous rights. The OAS has investigated human rights violations against indigenous peoples in countries such as Nicaragua and Guatemala. See, e.g., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF GUATEMALA (1983); INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS OF A SEGMENT OF THE NICARAGUAN POPULATION OF MISKITO ORIGIN (1984). The Inter-American Indian Institute was established in 1940 to highlight indigenous concerns, and became a specialized OAS agency in 1953. R. Ortiz, supra note 116, at 46.
furthered the recognition of indigenous rights by approving numerous resolutions on indigenous affairs.\textsuperscript{202} Other United Nations bodies, such as the Security Council and the International Court of Justice,\textsuperscript{203} do not currently operate as effective mechanisms for the protection of indigenous rights. This fact, however, should not preclude their use in the future.

The Sub-Commission on the Prevention of Discrimination and Protection of Minorities has been the most consistently active United Nations body with respect to indigenous affairs. Organized under the Commission on Human Rights and composed of twenty-six experts in the area of discrimination who are selected by the Commission, the Sub-Commission hears and considers minority concerns received from other United Nations agencies, the United Nations Secretary General, member states, and NGOs. The Sub-Commission in turn drafts and recommends resolutions to the Commission on Human Rights and to the General Assembly.

Even before the emergence of the indigenous norm, the Sub-Commission was active in indigenous concerns by addressing indigenous issues within the framework of minority affairs.\textsuperscript{204} During the 1970s, however, it began to recognize the unique nature of indigenous problems and authorized the Cobo Report in 1972. Since the completion of the Cobo report in 1986, the Sub-Commission has continued to address indigenous concerns separately from minority concerns. For example, the Sub-Commission in 1981 emphasized "the need for special measures to be taken urgently in order to promote and protect the human rights and fundamental freedoms of indigenous peoples,"\textsuperscript{205} and

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\textsuperscript{202} Although various indigenous populations assert that they are separate nations since they originally were sovereign and have not yet surrendered their sovereignty to any state, they are not considered states for UN purposes and are not directly represented in the General Assembly. The absence of such direct representation does not mean that the General Assembly never considers indigenous affairs; a member state or an NGO may still raise issues. The General Assembly, for example, has approved resolutions calling for, \textit{inter alia}, the establishment of the Working Group on Indigenous Populations and the creation of a special fund to help indigenous representatives attend the Working Group's meetings. See \textit{infra} notes 207 and 211.

\textsuperscript{203} As Roxanne Ortiz points out:

\textit{[technically, only states may be parties in cases before the court, but in practice, as indigenous researchers have found, other means for getting there exist. The General Assembly and the Security Council may request advisory opinions from the Court on any legal question. Other organs of the UN and its specialized agencies may seek advisory opinions from the Court if so authorized by the General Assembly.}}

R. Ortiz, \textit{supra} note 116, at 42.


\end{flushleft}
recommended the creation of an indigenous working group. This recommendation reflects the Sub-Commission's recognition that indigenous rights, due to their unique character, could be more effectively addressed by a specialized body dealing solely with them. The Sub-Commission's official proposal to establish a Working Group on Indigenous Populations was endorsed by the Commission on Human Rights in Resolution 1982/19 and authorized by the Economic and Social Council in Resolution 1982/34. The Working Group was finally established in 1982.

Despite its limited mandate, the Working Group has become the main forum for the discussion of indigenous rights. In its first few sessions, the working group has sought primarily "to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations," and to pay special attention to "the evolution of standards" in that respect. The Working Group has also undertaken other initiatives, such as drafting an indigenous convention, designating 1993 the year of indigenous peoples, and establishing an indigenous fund to subsidize the attendance of indigenous representatives at the sessions of the Working Group. The Working Group currently discusses recent measures to protect indigenous rights, outlines any developments concerning indigenous self-determination, suggests studies such as an ongoing examination of indigenous treaties and their role in international law, and recommends development projects for the benefit of indigenous peoples. Both United Nations member states and NGOs that report on the conditions of indigenous populations attend the Working Group's meetings. The creation of the Voluntary Fund for Indigenous Populations has especially encouraged the participation of these NGOs, which often lack sufficient financial resources to cover travelling costs; it was largely due to this monetary support that 380 persons, three

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206. Although the Sub-Commission lacks the power to penalize states that violate indigenous rights, it does make important contributions to the discussion, articulation and monitoring of indigenous rights.

207. Resolution 2 (XXXIV). This resolution authorized the Sub-Commission to: establish annually a Working Group on Indigenous Populations which shall meet for up to five working days before the annual session of the Sub-Commission in order to review developments pertaining to the promotion and protection of the human rights and the fundamental freedoms of indigenous populations ... to analyse such material, and to submit its conclusions to the Sub-Commission bearing in mind the report of the Special Rapporteur [Cobo] of the Sub-Commission. Id. at ¶ 2.


209. See infra note 211.


211. The Fund was established by the G.A. Res. 40/131 and is "administered by the Secretary-General [who] is advised by a Board of Trustees composed of five persons ... at least one of whom shall be the representative of a widely recognized organization of indigenous people." Report of the Economic and
hundred of whom were indigenous observers, attended the Working Group’s sixth session.212

The Working Group, however, is not a complaints tribunal, for it lacks the power to receive and investigate complaints against states.212 But while the Working Group on Indigenous Populations cannot guarantee the full compliance of all states with the indigenous norm, it remains the recipient and distributor of information concerning indigenous rights,214 thus contributing to the clarification and articulation of the norm and to the protection of indigenous rights.

4. International Declarations and Covenants

International declarations and covenants also constitute increasingly important tools in the implementation of the indigenous norm. For years, indigenous organizations and some states have been building a growing consensus for the creation of a declaration and a covenant on indigenous rights. The Working Group on Indigenous Populations has become the main forum for promoting the declaration, and advocates of indigenous rights have already submitted a number of drafts and recommendations. In general, these drafts emphasize the duties of the state toward indigenous populations while advocating aboriginal land rights, cultural protections, indigenous economic and social rights, and in some cases, the right to self-determination.215 These drafts, from their narrative content, indicate those issues that are important to indigenous populations, states and international agencies.

Although these drafts and declarations are not currently binding on any state, they illustrate the relative importance assigned to various indigenous issues by the parties involved. Once the draft declaration is finalized and used as the basis for a covenant binding on all signatories, the covenant itself will

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215. See supra notes 151-58 and accompanying text.
become an additional implementation mechanism for indigenous rights. However, since the current drafts do not provide for the creation of monitoring devices or complaint tribunals, it is unlikely that such provisions will appear in the final covenant. Therefore, while the convention will promote indigenous rights, it will probably not ensure full compliance with the indigenous norm.

C. Mechanisms in Action: Adequate but not Sufficient

Existing national and international implementation mechanisms are adequate to promote the recognition and implementation of the current norm, but are insufficient to guarantee full compliance. The current mechanisms increase awareness of indigenous problems, propose solutions to the problems, and encourage states to adopt those solutions. However, because most of these mechanisms do not provide direct or effective sanctions, they cannot ensure that a state will desist from violations of indigenous rights.

If the effectiveness of implementation mechanisms is measured by whether they guarantee a state’s full compliance with the current indigenous norm, then these mechanisms are not successful. At both the national and international levels, the media and indigenous advocacy groups, lacking the power to force states to recognize indigenous rights, cannot safeguard the existing indigenous norm. While some national entities, such as the legislature and the judiciary, are authorized either to create or to enforce legally recognized rights, they do not always protect indigenous rights. Legislative creation of indigenous programs and recognition of indigenous rights are usually not required by any higher body, but are instead dependent on the legislators’ willingness to accept the current indigenous norm. Similarly, courts in most jurisdictions must enforce indigenous rights only if the state first recognizes those rights.216

International mechanisms, like their domestic counterparts, are also insufficient to guarantee a state’s full compliance with the indigenous norm. International bodies and conventions have no more power than the media and indigenous advocacy groups to cause a state to recognize indigenous rights against its will. The situation is unlikely to change, since the current drafts of declarations and conventions on indigenous populations do not provide for a complaint tribunal with the power to impose sanctions on states that violate indigenous rights.

Domestic and international implementation mechanisms nevertheless prove more successful when their effectiveness is measured by whether they are able to encourage states to adopt the indigenous norm. For example, the media and

216. Even when these rights are recognized, the courts do not always enforce them. See, e.g., cases cited supra notes 195-96.

172
indigenous advocacy groups have contributed to greater public and government- 
tal awareness of indigenous problems. By informing, educating and, in the case 
of advocacy groups, lobbying governmental officers, these institutions are able 
to persuade the public and legislators to recognize indigenous rights. Their 
activities encourage the state voluntarily to accept a number of indigenous 
rights. Recall the example of Nicaragua, in which national and international 
efforts helped persuade the Sandinista government to discuss and recognize a 
number of indigenous rights. In the same way, international bodies con- 
tribute to the voluntary adoption of and compliance with indigenous rights by 
providing a forum for the voicing of adverse publicity against states that violate 
indigenous rights.

A state’s voluntary adoption of the norm is a particularly important step 
in furthering worldwide acceptance of the norm. Currently, the indigenous 
norm requires the recognition of political, economic and social rights that 
impinge upon the state’s power and expand the autonomy exercised by natives 
and which, governments maintain, fall solely within the domestic sphere. 
Recognizing such rights requires that the state relinquish some authority over 
an indigenous people or a particular piece of territory — concessions that most 
states are reluctant to make.

To reduce this reluctance, indigenous groups must often establish and 
maintain cordial relations with their respective states. Currently, the rights 
sought by aboriginal peoples can effectively be granted only by the state. 
International bodies can neither dictate a state’s domestic policy nor grant 
indigenous demands directly. Indigenous groups are thus dependent on the 
state’s good will for recognition of their rights and must rely on the state’s 
willingness to negotiate with natives. This dependence on the state makes it 
counterproductive for an indigenous group to alienate its own government.

Compulsory and punitive mechanisms of implementation, such as a com- 
plaint tribunal, may prove more effective in ensuring full compliance with the 
indigenous norm in the short run. However, they may be counterproductive 
in the long run, since they may increase a state’s reluctance to recognize 
indigenous rights. Assume, for example, that a state has ratified an instru- 
ment that recognizes the four main aspects of the indigenous norm and which

\[217. \text{See supra note 134 and accompanying text.} \]
\[218. \text{Although most countries with nondominant native populations experienced the process of state-}\
\text{building in the nineteenth century, governments remain sensitive to any perceived threats to national unity.}\
\text{This sensitivity is especially strong in multiethnic states, where the granting of privileges to indigenous}\
\text{peoples may prompt nonindigenous minorities to seek concessions of their own.} \]
\[219. \text{Fearing intervention in its domestic affairs, a state may be unwilling to ratify an indigenous}\
\text{convention that imposes strong sanctions on signatories who violate indigenous rights. Furthermore, a state’s}\
\text{particular experience with indigenous complaints tribunals may color its perception of indigenous affairs}\
\text{in general, rendering the state less responsive to indigenous concerns in the future.} \]
Yale Journal of International Law
Vol. 16:127, 1991

establishes a compulsory implementation mechanism. Assume further that the state grants its indigenous populations cultural protections, land rights, and economic and welfare rights, but refuses to grant them a sufficient degree of self-determination, partly because it considers the issue a domestic matter subject to exclusive state control.

In response, indigenous advocacy groups would first allege that the state has violated international law and would then resort to an international complaints tribunal to invoke the convention’s compulsory implementation mechanism, either by sending an international monitoring body to the state or by imposing sanctions. The state, however, jealous of any infringement on its sovereignty, would probably recognize its vulnerability to international intervention in its domestic matters and would revoke its acceptance of the convention. By revoking the treaty, the state could then refuse to recognize all the rights established in the convention, leaving its indigenous populations worse off than if the convention had not had the compulsory enforcement mechanism. Other states, observing this negative experience, would become more reluctant to adopt the indigenous norm or to ratify any future covenants containing such mechanisms.

Nonpunitive implementation mechanisms, in contrast, do not guarantee full compliance with the indigenous norm right away, but are better suited for encouraging voluntary compliance over the long run because they are less likely to threaten a state's sovereignty. Nonbinding mechanisms can encourage states voluntarily to adopt the norm by fostering discussion of indigenous concerns. At the same time, the existence of a flexible, voluntary norm provides states with information about indigenous concerns, while demonstrating that implementation does not necessarily lead to the imposition of political or economic sanctions or to international intervention in matters the state normally considers to be exclusively domestic in nature.

V. CONCLUSION

Despite different historical patterns of development, all indigenous peoples have similar goals, namely: obtaining recognition and guarantees of their rights to cultural protections, land tenure, self-determination, individual security and welfare benefits. These needs arose from the dynamics of the colonial relationship in which indigenous peoples were subjugated by colonial powers. In the last two decades, these indigenous concerns have gained an increasing amount of international recognition in the form of an emerging indigenous norm. This norm is flexible, since it recognizes broad indigenous rights in the abstract without specifying their scope or prescribing a specific program through which states must implement the norm. This flexibility enables states to tailor domes-
Rights of Indigenous Populations

tic programs so as to meet the particular needs of indigenous groups. If the norm required a specific program for all indigenous peoples, states would be forced to choose either to adopt programs that may not work for them or to reject the norm in its entirety.

Although the current nonbinding, noninterventionist implementation mechanisms cannot guarantee full compliance, they may nonetheless be successful in furthering voluntary adoption of the norm over the long run. The noncompulsory mechanisms currently used to enforce the norm are insufficient to deter states from violating the norm, but they do encourage states to adopt the norm by assuaging fears of international intervention if a state fails to follow all of the norm's provisions. Because recognition of indigenous rights impinges on matters that states consider to be exclusively in the domestic preserve, the norm must -- as it presently does -- avoid alienating states, while at the same time making progress in the protection of indigenous rights. As one state after another recognizes these attractive features and adopts the norm, the norm will become increasingly self-enforcing and its prescriptions increasingly hard to violate.