Foreigners in Their Own Land: Cultural Land And Transnational Corporations—Emergent International Rights And Wrongs

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Ecuador, Peru, Colombia and other countries are
looted by transnationals with the co-operation of gov-
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for the rights and needs of indigenous owners.

U.N. Commission on Human Rights\textsuperscript{1}

The whole world must come and see how the Huaorani
live well. We live with the spirit of the jaguar. We do
not want to be civilized by your missionaries or killed
by your oil companies. Must the jaguar die so that you
can have more contamination and television?

\textit{Moi, Huaorani Tribesman}\textsuperscript{2}

I. INTRODUCTION

Unique and vital components of human culture and the envi-
ronment are struggling for survival in the Amazon River basin.
The rain forest of Amazonia\textsuperscript{3} is shared by indigenous peoples and
an immensely diverse tropical flora and fauna. This unique cul-
tural and physical ecology, however, is threatened by transnational
oil corporations which are irreparably devastating Amazonia and
its native cultures through oil production activities.\textsuperscript{4}

\begin{enumerate}
\item \textit{Study of the Problem of Discrimination Against Indigenous Populations}, U.N. Com-
mision on Human Rights, Sub-Commission on Prevention of Discrimination and Protec-
Sub.2/1983/21/Add.4 (1983) (Jose R. Martínez Cobo, Special Rapporteur) [hereinafter Fi-
nal Cobo Report].
\item \textit{Joe Kane, Savages} 4 (1995) (reprinting letter from Moi to the U.S. President). In
addition, the letter asked the President of the “United States of North America” why his
country “was trying to destroy them,” and invited the President to visit the Huaorani peo-
ple. \textit{Id.}
\item Amazonia refers to the 2.7 million square mile region drained by the Amazon River
and over 1,000 tributaries, 70% of which lies within Brazil and the other 30% in neigh-
boring Venezuela, Colombia, Ecuador, Peru, and Bolivia. \textit{Marion Morrison, Amazo-
non Rain Forest and Its People} 4 (1993). The heart of the Amazon Basin is
covered by the world’s largest tropical rain forest. \textit{See Tony Hare, Rainforest Destruc-
tion} 8 (1990); \textit{Paul Henley, Amazon Indians} 13 (1980). See also Map of
Amazonia, \textit{infra} Appendix, for a partial list of the indigenous inhabitants of Amazonia.
\item The threat to indigenous peoples is real and, for many groups, time is short. \textit{See Re-
port on Discrimination Against Indigenous Peoples, Transnational Investments and Op-
erations on the Lands of Indigenous Peoples}, U.N. Commission on Human Rights, Sub-
Commission on Prevention of Discrimination and Protection of Minorities, 43d Sess.,
\end{enumerate}
The words of the Huaorani tribesman quoted above articulate the concerns of all the imperiled peoples of Amazonia. Under both international and domestic law, these "foreigners in their own land" are potential plaintiffs if legal claims can be articulated in a forum where they can be heard. The potential defendants, in turn, are private entities—transnational corporations (TNCs) engaged in extracting natural resources from Amazonia.

The consequences of natural resource exploitation in Amazonia have been evaluated through a wide variety of legal per-


On the impact of oil exploration upon indigenous peoples living in the Ecuadorian Amazon, see OAS Report, supra note 4, at 98 ("One leader stated to the Commission that, although their peoples had inhabited these lands for thousands of years, the imposition of a European language and legal practices, without concomitant respect for their own culture and traditions, made indigenous Ecuadorians feel like foreigners in their own land.") (emphasis added).


spectives: indigenous peoples' rights, international environmental protection law, international human rights standards, sustainable development, and the domestic laws of countries home to the victims and the foreign-based TNCs. These analyses, however, have yet to definitively answer whether international law can curtail the devastation of cultural lands.

The failure of public international law to address the post-World War II emergence of TNCs as a major international force has been the subject of significant review by scholars and policy makers. TNCs, often unregulated in foreign host countries, have

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8. See generally infra Part II; supra notes 1, 4–5.
9. See infra Part III.E
10. See infra Part III.A–D., Part IV.
12. See infra Part III.G; supra note 6.

[G]rowth in corporate power raises a significant problem for traditional international law. First, it means that whatever the international legal status of states may be, the sovereign has less power, measured in terms of control over human, natural, financial and other resources, than those corporations that it is supposedly regulating. This suggests that in fact the sovereign is no longer "master of its own territory."

The growing power of the TNCs also poses a challenge to the notion that the primary focus of international law should be relations between states. Such a narrow view of international law allows TNCs to evade accountability for their actions at the domestic level by shifting production between different sites. The absence of clear international standards means that they can also avoid regulation at the international level. Thus, TNCs are able to operate in an unregulated manner. This regulatory situation is not beneficial for the TNCs and the multitude of stakeholders in their operations. The absence of an effective regulator complicates the efforts of TNCs to establish universally recognized standards of conduct for the host state-foreign investor relationship.

been free to extract natural resources through methods that would never be permitted in their home countries. Neither public international law nor international agencies effectively manage the globally powerful TNCs.

Legal development in this area is, however, moving at a relatively rapid pace. Recent rulings in U.S. courts have gone beyond finding that human rights are part of the "law of nations" as customary international law, and have found that private actors may be the subject of such claims by parties injured on foreign soil. This Article maps out a context for international legal rights analysis in which the role played by transnational oil corporations in the "ethnocide" of indigenous groups can be reviewed.

A. Potential Defendants: Transnational Corporations

This Article argues that TNCs are the primary international actor in the devastation of Amazonia and that the domestic laws and policies of Amazonian states do not provide adequate remedies for the peoples and environment at risk. Given the deeply em-
bedded legal principles developed during European colonization of the New World,\textsuperscript{18} new norms, fora, and strategies for the protection of cultural land rights of indigenous peoples must be found. The rights at issue are both "international" and "human," not solely sovereign-based rights subject to redefinition when crossing national boundaries.\textsuperscript{19}

This Article reviews the sources of customary international law to determine whether there are cognizable human rights claims against TNCs for the continuing devastation. The Article also considers whether any such claims are likely to be heard in U.S. courts.\textsuperscript{20}

B. Potential Plaintiffs: Imperiled Indigenous Peoples

The 1990's is the United Nation's Decade of Indigenous People. Emergent U.S. domestic law, in tandem with the relatively rapid development of treaty and customary international law\textsuperscript{21} for the

\begin{footnotesize}
\textsuperscript{18} See, e.g., Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823) (Marshall, C.J.) (holding that European colonizing nations had the "exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest"); see generally Mark Frank Lindley, The Acquisition and Government of Backward Territory in International Law 124–206 (1926) (describing the legal bases for the acquisition of indigenous lands in the United States, including, inter alia, discovery, papal grants, conquest, effective occupation, prescription, and cession); Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest 227–317 (1990) (describing the "settling of United States colonizing legal theory").


\textsuperscript{20} Party domicile in the United States is not a requirement under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), the primary jurisdictional basis in U.S. courts for international human rights violations occurring in other countries. Domicile status does, however, impact upon other judicial doctrines, such as forum non conveniens, in which a court considers the proximity of the parties to the forum in determining proper venue. A discussion of this and other doctrines is beyond the scope of this article. See supra note 6 and infra note 226 (regarding application of these doctrines in recent cases); see generally Gary Born, International Civil Litigation in United States Courts 287–458 (3d ed. 1996) ("Part Two: Choice of Forum"); Beth Stephens & Michael Ratner, International Human Rights Litigation in U.S. Courts 139–54 (1996) (Chapter 12, "Miscellaneous Defenses").

\textsuperscript{21} Further opening of the current window of opportunity is provided by a recent and ground-breaking decision with direct relevance to the plight of Amazonia's peoples. In July 1997, the Inter-American Commission on Human Rights of the Organization of American States (OAS) issued a report in response to complaints of injuries to indigenous peoples and their environment in the Amazon rain forest as a result of oil exploration by TNCs. See OAS Report, supra note 4, at 77–95. The Commission found that fundamental human rights protections under the OAS's American Convention have been violated. Id. at 87–92. This decision is a major shift for the OAS and represents a significant development in international human rights for the protection of indigenous peoples. The decision
\end{footnotesize}
protection of indigenous peoples, provide a crucial opportunity for the legal advocates of indigenous peoples.22

In the context of either legal scholarship or advocacy, analysis of the potential human rights claims of indigenous peoples requires professional care and collaboration. Both clients and scholarship are ill-served by less than thorough legal evaluation and premature conclusions. In this analysis, even the consequences of framing the legal problem in a particular way must be considered.23 One objective of this Article is to explore how this ethic of legal care is vital to translating indigenous peoples’ problems into legal solutions.24

C. Overview

This Article first sets forth common definitions for several key terms, proceeds with an evaluation of rights in the context of international norms, and concludes with a perspective on those rights as the basis for claims in U.S. courts.

also demonstrates the effectiveness of collaborative strategy in this area: local and international non-governmental organizations (NGOs) representing indigenous peoples and environmental rights groups, working together, pursued this case on behalf of the Huaorani people and their fragile environment.

22. The author was co-counsel in the early stages of litigation on behalf of an indigenous group in its claims against a U.S.-based TNC.

23. For example, the consequences of categorizing the legal problem as one of “racism” instead of “environmental destruction” are discussed in Williamson Chang’s, The “Wasteland” in the Western Exploitation of “Race” and the Environment, 63 COLO. L. REV. 849 (1992). Chang concludes that indigenous peoples’ struggles may be a catalyst for a new world order throughout the Americas and much of the Third World:

[T]here is an underground war being fought for the soul of the planet. On one side are the proponents of Western assimilatory economics, on the other are indigenous people—those who apply different frameworks to the destruction of rain forests.

More than anything, labeling the struggles of these people as ones of “race” and “environmental” has disarmed the transformative power of indigenous people.

Id. at 869–70. The consequences of the characterization of the problem at hand must be reviewed in any remedial planning. Appropriately drafted claims must be based upon rights and interests recognized by customary international law standards. See also Benita Ramsey, Introduction to Excluded Voices: Realities in Law and Law Reform, A Symposium, 42 U. MIAMI L. REV. 1, 1–5 (1987). Ramsey describes the Symposium as “about how differences in opinions, motivations and language can construct social and political ideas that may form the basis for law reform[,] . . . about language’s power to shape perceptions of the world.” Id. at 1.

Part II describes, in important detail, the environment and cultures at risk. Without an understanding of the contextual complexities, a task often given short shrift in legal analysis, the unique legal interests will be lost. For example, a primary legal interest at issue is "cultural land," a concept that requires an appreciation of the symbiotic ties between a people, culture, and ancestral lands. The ecosystem of the Amazonian rain forest also requires an understanding of its unique importance as a cultural and global resource. Part II also develops operative terms because the policy and legal discourse is replete with varying definitions of important components.

Part III then reviews the question of whether any identified human rights have reached the status of customary international law. This analysis is a prerequisite to determining if international human rights claims may be brought against TNCs. One must determine if there is a cognizable right before deciding if it is justiciable. This analysis yields a cautiously positive answer. Part III also reviews and applies commonly accepted principles of customary international law, as well as treaties and international declarations specifically addressed to indigenous peoples and the environment. Finally, this Part discusses the roles that the Organization of American States (OAS), an important regional organization, and its human rights conventions play in the protection of indigenous peoples' rights.

Part IV summarizes the analyses of the previous parts of the Article, emphasizes the importance of collaborative legal efforts by international advocates and scholars in promoting emerging hu-


man rights, and suggests that U.S. courts provide a window of opportunity for achieving some remedies. The Article stresses that international human rights law is in a shifting and fragile state, and that normative development must be pursued with caution.

II. THE INTERNATIONAL LEGAL CONSEQUENCES OF OIL EXPLORATION IN AMAZONIA

A. Introduction

This Article focuses upon groups indigenous to the Amazonian rain forest who have been subjected to the injuries of oil exploration and who share a common colonial experience that altered their ancestral land rights. Corporate extraction of natural resources and the consequential devastation of rain forests, water supplies, and indigenous peoples are graphically portrayed in scholarship and the popular media. The penetration of Amazonia by exploration roads has also opened up the rain forest to migration by the urban poor, compounding the devastation wrought by corporate enterprises.

A United Nations case study succinctly summarizes the tragic effects of one major TNC activity—oil production:

Petroleum development elsewhere in Amazonian Ecuador already has had a destructive impact on other in-

27. Other types of natural resource extraction exist in this region, such as mining and logging, with similar impact. See OAS Report, supra note 4, at 92 n.44, 94.
28. See generally, supra note 18.
indigenous groups such as the Cofan, whose lands have been so reduced by oil wells, roads and colonists that they can no longer make a sustainable living from it. They have grown dependent on selling handicrafts, and on selling what remains of their forest and wildlife.

Every stage of petroleum development has been costly to Ecuador's people and environment. Seismic exploration begins with construction of a network of access roads and heliports. Test wells require larger clearings, and produce drilling muds which contain toxic heavy metals and aromatic hydrocarbons. Producing wells are pressurized with fresh water, which turns into a toxic "brine." TNCs in Ecuador have had a poor record for disposal of muds and brine, and there have been a large number of spills from waste pits, while an estimated 17 million gallons of oil have spilled from poorly maintained pipelines. Burning waste oil produces toxic soot and acidifies lakes and streams, adding to the destruction of wildlife and fisheries, and to the deterioration of indigenous peoples' food supplies and health. Access roads attract loggers and colonists, drug abuse, prostitution and disease.

Ecuador's oil boom will be short-lived, as known reserves will be exhausted in 15 years. The adverse impacts on indigenous peoples, and on the sustainable productivity of the forest, are irreversible.30


To put the problem of damage from spills alone in perspective, consider the following contrast:

Oil spills from the Trans-Ecuadorian Pipeline (SOTE) and smaller secondary pipelines have had far-reaching and devastating impacts in the Oriente. The Ecuadorian government has recorded approximately 30 major spills from SOTE alone, mostly within the Amazon watershed, with an estimated loss of 16.8 million gallons of oil. By comparison, the Exxon Valdez spilled approximately 10.8 million gallons into Alaska's Prince William Sound.

Judith Kimerling, Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon, 14 HASTINGS INT'L & COMP. L. REV. 849, 871–72 (1991) (citations omitted) [hereinafter Kimerling, Disregarding Environmental Law]; see also OAS Report, supra note 4, at 91 ("According to the [Ecuadorian] Government's own figures, billions of gallons of untreated toxic wastes and oil have been discharged directly into the forests, fields and waterways of the Oriente.

The corporate "transnational linkages" to these problems are recognized by the international community. However, Amazonian states have given TNCs unregulated carte blanche to use oil production methods that would not be permitted in their home countries.

The conflicts pose at least two legal questions for advocates of the indigenous peoples of Amazonia. First, how can this story/problem be brought into a forum where it can be effectively heard? Second, what options are most promising for extending legal remedies to the indigenous peoples of Amazonia under international human rights law?

B. Working Definitions Under International Law

The legal analysis necessary to answer these questions can proceed effectively only after the issues and actors have been identified and defined. A working vocabulary supports the goals of encouraging ideas to flow constructively in understanding both the human story and the legal problem.

The resulting consequences for the inhabitants of the affected areas have been and remain grave.

31. See Final Cobo Report, supra note 1, at 141; Transnational Operations on Lands of Indigenous Peoples, supra note 4, at 17–18; see also KIMERLING, supra note 29, at 43–69 (discussing the role of U.S., British, and Canadian corporations in the devastation of the Oriente region of Ecuador); see generally OAS Report, supra note 4, at 94.

32. Some scholars have argued that oppressed groups are often harmed by the discourse on "rights" in fora removed from the victims. See Kimberlé Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1332–56 (1988). However, Crenshaw later states that "attempts to harness the power of the state through the appropriate rhetorical/legal incantations should be appreciated as intensely powerful and calculated political acts. In the context of white supremacy, engaging in rights discourse should be seen as an act of self-defense." Id. at 1382.

Other authors have suggested that public interest lawyering often disempowers the very people for whom it purports to advocate. See Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 YALE L.J. 2107, 2119–21 (1991); Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470 (1975–76). But see Lucie E. White, To Learn and Teach: Lessons from Driefontein on Lawyering and Power, 1988 WIS. L. REV. 699, 737–69 (1988).

The central story at issue here is the impact of oil exploration on indigenous peoples in Amazonia. What exactly are “indigenous peoples”—and who, therefore, are the potential plaintiffs? What is the Amazonian environment? The story also centers on a conflict of property interests: it is a story of “cultural land.” What, under legal norms, is “cultural land”? This story is one of oil exploration and production. Who engages in and what is the nature of such activities? What are the legal consequences? Can TNCs be defendants? Do the activities and injuries implicate international human rights? If so, are they cognizable by adjudicators who can issue effective remedies?

Answering these questions in a way that will benefit the indigenous peoples of Amazonia involves an exercise in translation, as “[a] lawyer’s primary task is translating human stories into legal stories and retranslating legal story endings into solutions to human problems.” A transformation of a “local narrative” concerning the reality of life of the indigenous people into a “legal narrative” that may support legal claims is required. The concepts of law, however, are rooted in the “sacred narratives of our world” and therefore both the scholar and advocate face obstacles in this translation task. The language of traditional legal analysis, scholarship, and modern international human rights discourse, or “rights talk,” must permit the “local narrative” of indigenous peoples to survive in legal fora.


35. For a discussion of the problems posed in translating the “story” in a legal forum of the dominant class, see Gerald Torres & Kathryn Milun, Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case, 1990 DUKE L.J. 625, 629 (1990). See also id. at 658 (“In fact, the reality of Indian life is, in a real sense, untranslatable.”).


37. But see Milner S. Ball, Stories of Origin and Constitutional Possibilities, 87 MICH. L. REV. 2280, 2300 (1989) (“I want to credit the American story of origins and its polyphonic potential for the tribal voice. However, I believe that it cannot be told in such a way that the tribes speak and are heard. Even the goodness of the story—especially the goodness—is bad for Indians. I hope I am wrong.”).
To help achieve the goals of narrative translation and the understanding of both the human story and the legal problems, the following concepts are defined below: (1) Amazonia; (2) Indigenous Peoples; (3) Cultural Land; and (4) Transnational Corporations.

1. Amazonia

The Amazon River basin is a vast South American land area enclosed by the Guiana highlands to its north, the Andes to the west, and the Brazilian highlands to its south. The river system, containing one-sixth of the world's fresh water, is composed of the "Amazon proper" (the Napo River in Peru to Brazil's Marajo Island on the Atlantic Coast) and over 1,000 tributaries. The western Amazon basin, comprised of the western part of Brazil's "Legal Amazon," southern Colombia, eastern Ecuador, and Peru, contains the Amazon's longest tributary and source—the Apurimac River. The term Amazonia is used in this Article to reference this western basin region.

Eastern Ecuador is a particular focus, as oil exploration in that region has been extensively reviewed. The eastern half of Ecuador, known as the Oriente, encompasses over 32 million acres of tropical rain forest and is home to eight indigenous peoples—the Quichua, Shuar, Achuar, Cofan, Huaorani, Shiwiar, Secoya, and Siona—totaling between 85,000 and 250,000 persons. The Ecuadorian Amazon is also home to between 9,000 and 12,000 species of plants (some endangered and found nowhere else on earth), over 600 species of birds, 500 species of fish, and 120 species of mammals, establishing it as one of the richest biologically diverse areas on earth.

As a tropical rain forest, Amazonia draws attention from international environmentalists concerned with its vulnerability to ir-

38. See HENLEY, supra note 3, at 4.
39. Amazonia Legal in Brazil is a statutorily created region under Brazil's Ministry of the Environment. It is comprised of the states of Amazonas, Acre, Para and Amapa, parts of Mato Grosso, Gaias, and Maranhao, and the territories of Roraima and Rondonia. See ALEX SHOUMATOFF, THE RIVERS AMAZON 11 (1978); see also Map of Amazona, Infra Appendix.
40. See, e.g., OAS Report, supra note 4, at 77–116 (reviewing the impact of development activities in the Oriente); Transnational Operations on Lands of Indigenous Peoples, supra note 4, at 21–22; KANE, supra note 2, at 15–18; KIMERLING, supra note 29, at 33–42 (discussing the Oriente rain forests and homelands at risk).
41. See OAS Report, supra note 4, at 77; see also Kimerling, Disregarding Environmental Law, supra note 30, at 853–56. Members also live in neighboring Peru and Colombia. Id. at 853 n.14.
42. See Kimerling, Disregarding Environmental Law, supra note 30, at 888.
reparable damage from deforestation, the monocrop agriculture of colonizers, and other land use trends such as road construction. One serious consequence of rain forest destruction is non-regeneration because of a thin topsoil and the fragile ecological balance existing among its diverse cohabitants.

As a river system, the Amazon cannot be viewed independently from its headwaters, which include large rivers in their own right. The headwaters influence pollution, flooding, and erosion that occur elsewhere in the river system, including areas that cross national borders. The interconnected river system establishes this area as a transnational ecosystem, connected by an international watercourse, thus bringing it under the rubric of international environmental laws.

43. The term "colonizers" in this article refers to settlers who relocate on cultural forest lands. See OAS Report, supra note 4, at 108–13; see also Case 7615, Inter-Am. C.H.R. 24, OEA/Ser.L./V/II.66, doc.10 rev.1 (1985) [also referred to as the "Yanomami Case" or Res. No. 12/85] (finding that Articles I, VIII, and XI of the American Declaration of the Rights and Duties of Man were violated when Brazil failed to protect the Yanomami after their territories were invaded by groups of garimpeiros); Esperanza Martínez, Indicadores Sociales y Culturales de los Impactos Producidos por la Actividad Petrolera, in AMAZONIA POR LA VIDA 41 (Acción Ecológica 1994) (analyzing the breakdown of indigenous cultures after new contacts with non-indigenous colonizers).

44. See William T. Vickers, Declaration Concerning the Planned Road Construction Through the Yasuni National Park and Huaorani Indian Territory (May 2, 1990) and James A. Yost, Assessment of the Impact of Road Construction and Oil Extraction Upon the Waorani Living on the Yasuni (April 1989), submitted as Anexo 7 and Appendix C respectively to Petition Submitted to the Inter-American Commission on Human Rights, Organization of American States, by Confederacion Amazonia Ecuatoriana (CONFENIAE) On Behalf of the Huaorani Nation Against Ecuador, June 1, 1990.

45. See Kimerling, Disregarding Environmental Law, supra note 30, at 852.

46. For instance, flood levels of the Amazon River at Iquitos, Peru have been correlated with runoff caused by deforestation in the upper parts of the Amazonian watershed in Ecuador. See id. at 851 n.7.


48. The International Water Tribunal found three corporations responsible for polluting the water table in the Ecuadorian Amazon through negligent oil production methods. See CORDAVI v. Petroecuador, Texaco Petroleum Co. and City Investing Co., Amsterdam, February 20, 1992, reprinted in SECOND INTERNATIONAL WATER TRIBunal, POLLUTION 63 (1994). This opinion is advisory as the Tribunal has no binding jurisdiction over the parties.
2. **Indigenous Peoples**

Worldwide, indigenous peoples number over 300,000,000 and comprise roughly five percent of the world's total population.\(^{49}\) Despite many proposed definitions of "indigenous peoples,"\(^ {50}\) there is no commonly accepted definition in contemporary international law discourse:\(^ {51}\) "Efforts at a formal definition have not been generally accepted by indigenous peoples and their advocates who participate in the international human rights standard-setting process. Generally, indigenous peoples have insisted on the right to define themselves."\(^ {52}\)

This Article adopts the following working definition, developed by the leading United Nations study on indigenous populations:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present nondominant 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 contin-

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52. Williams, *supra* note 32, at 663 n.4.
ued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.\textsuperscript{53}

This definition is consistent with the primary principles in other modern definitions\textsuperscript{54} and, importantly, is the product of many years of discourse in which indigenous peoples from throughout the world have actively participated.\textsuperscript{55}

\begin{quotation}
\textsuperscript{53} Jose R. Martinez Cobo, Study of the Problem of Discrimination Against Indigenous Populations, at 29, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1987) (emphasis added) [hereinafter COBO CONCLUSIONS, PROPOSALS AND RECOMMENDATIONS]. With this definition, the study attempts to distinguish indigenous populations from other minority groups. See discussion of the U.N. Working Group on Indigenous Populations (U.N. Working Group), infra Part III.D.2; see also Kastrup, supra note 49, at 99; Preliminary Discrimination Report, supra note 50. Kastrup abstracts from the Preliminary Discrimination Report a comparison of earlier U.N. Working Group definitions, which limited inclusion to groups who have been reduced “to a non-dominant or colonial situation,” to later definitions, which include those isolated or marginal groups who “have not suffered conquest or colonization” or who have escaped from colonizing forces by hiding in the distant forests. Kastrup, supra note 49, at 99.


Closely related to the definition of “indigenous peoples” is “cultural affiliation”—where cultural is synonymous with indigenous in many U.S. state jurisdictions. A typical definition is found in a Maryland statute: “a relationship of shared group identity that can be reasonably traced historically between a present-day group, tribe, band, or clan and an identifiable earlier group.” Md. Code Ann., Real Prop. § 14–121 (1997). This definition is used to define a “person in interest” with access rights to burial sites.


The Working Group atmosphere during the last session was like a true and democratic assembly, in which Government representatives, Indigenous People’s representatives, representatives of the specialized agencies, members of the Working Group, scholars and other individuals openly and freely exchanged their views. In this assembly pluralism, freedom of opinion and expression and the principles of equality and non-discrimination have prevailed throughout the session.
\end{quotation}
Indigenous peoples\textsuperscript{56} can be a "majority" population in a particular country, as in Guatemala (60\%) and Bolivia (59\%).\textsuperscript{57} and must be distinguished from "minority groups."\textsuperscript{58} (However, the International Covenant on Civil and Political Rights was found to protect a Canadian Indian from discrimination\textsuperscript{59} as a "minority" under Article 27.\textsuperscript{60}) The other population percentages of indige-
nous peoples in Amazonia are as follows: Peru 37%; Ecuador 34%; Colombia 2%; Brazil less than 1%.\textsuperscript{61}

This Article focuses upon the particular indigenous peoples of Amazonia who have been subjected to the injuries of oil exploration in their ancestral cultural lands.\textsuperscript{62}

3. \textit{Cultural Land}

Land is the essence of many indigenous peoples’ self-definition and cultural survival. An understanding of the relationship that indigenous peoples have with their land is vital to appreciating the need for a defined international legal right to cultural land:\textsuperscript{63}

[\textit{I}ndigenous peoples’ oft-repeated concern that their distinct cultural identity and existence depends on protection of their unique relationship to their traditional territories has been translated into a central principle of indigenous peoples’ human rights under modern international law.\textsuperscript{64}]

The seminal study on indigenous peoples’ rights in the Western hemisphere concludes that cultural land rights are paramount:\textsuperscript{65}

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\textsuperscript{61} Transnational Operations on Lands of Indigenous Peoples, supra note 4, at 6 tbl.1; \textit{see also} INDIGENOUS PEOPLE AND POVERTY IN LATIN AMERICA: AN EMPIRICAL ANALYSIS (George Psacharopoulos & Harry Anthony Patrinos eds., 1994).

\textsuperscript{62} \textit{See OAS Report, supra note 4, at 97 (emphasis added)}:

Although the figures available vary widely, the percentage of the population described as indigenous is most frequently cited as between 35 and 45\%. The indigenous peoples of Ecuador are situated throughout the country in the northern coastal areas, the Sierra and in the Oriente. \textit{Ecuador is a major indigenous population center in Latin America.}

\textsuperscript{63} For the purpose of this article, “cultural” refers to indigenous cultures, and “land” refers to real property and interests, including natural resources. “Property” refers to territorial property and interests.


\textsuperscript{64} Williams, supra note 32, at 691.

\textsuperscript{65} The United States has acknowledged the tie of cultural land to survival of indigenous peoples: “The cultural survival of Brazil’s indigenous people depends on their ability...
It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture.

For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.66

The cultural land concept encompasses collective ownership67 between tribal peoples and the living ecosystem of the rain forest, and is the primary basis of cultural identification.68

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66. Final Cobol Report, supra note 1, at 26. See ILO Convention No. 169, supra note 25, art. 13(1) ("[G]overnments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."); see also Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 460-61 (1988) (Brennan, J., dissenting) ("Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land."). The Lyng court upheld the U.S. Forest Service's right to put a logging road through sacred Native American land despite the fact that the road "sacrifices a religion at least as old as the Nation itself." Id. at 476. For a thorough discussion of this ruling in light of international human rights standards, see Christopher P. Cline, Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After Lyng v. Northwest Indian Cemetery Protective Association, 42 Hastings L.J. 591 (1991).

67. Collective ownership is a concept familiar to U.S. law. As early as 1893, the U.S. Court of Claims described an owner of community property as one who loses ownership if he moves from the community of which he is a member. Journeycake v. Cherokee Nation, 28 Ct. Cl. 281, 302 (1893), aff'd, 155 U.S. 196 (1894). The right of a community property "owner" is that of enjoyment, and his children after him will enjoy that which he enjoyed, not as heirs, but as communal owners. Rights of property do not descend upon death, and an owner has nothing to convey if he wishes to dispose of his communal property. Yet such owners have rights of property "as perfect as that of any other person." Id.

On the efforts of the U.N. Working Group to establish a "collective" right to property as an international norm, see Williams, supra note 32, at 685-91.

68. Rafael Pandam, one of the directors of CONAIE (Confederacion de Nacionales Indigenas del Ecuador), an indigenous peoples' NGO, was asked if his group had made efforts to have the transnational oil companies drilling in the Oriente region of Ecuador share their profits with the indigenous peoples as a possible resolution to the problem. He responded: "I'm not looking for money for my children to inherit. It is the land that I want to leave them. That is where our cultural roots are buried." He even described his NGO work, still in an early stage of development, as "planting a seed for my
This Article again adopts a definition from the U.N. Working Group on Indigenous Populations, a definition of "cultural land rights" that represents the basic principles of the concept accepted by a consensus of indigenous groups:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.69

This definition precludes a need to review colonization and title history, occupational status, and a strict interpretation of domicile, which may not reflect the unique survival activities of a population, such as hunting and fishing.

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4. Transnational Corporations

The rich natural resource base of Amazonia includes oil, which attracts TNCs to the region. This Article adopts the definition of a TNC found in the U.N. Draft Code of Conduct on Transnational Corporations:

[An enterprise] comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others.

The principal role played by TNCs in underdeveloped Latin American countries was extensively addressed in the Final Cobo Report: “Ecuador, Peru, Columbia and other countries are looted by transnationals with the co-operation of governments who sell these resources with total disregard for the rights and needs of indigenous owners.” The TNCs link to the problems of environmental damage and cultural survival has been well documented. These activities stand in sharp contrast to the TNCs Code of Conduct: “Transnational corporations should respect the social and cultural objectives, values and traditions of the countries in which

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70. TNCs have actively extracted other natural resources in the Amazon River basin through mining, rubber tapping, and timber harvesting. See OAS Report, supra note 4, at 79–86.
72. Final Cobo Report, supra note 1, at 141.
73. See OAS Report, supra note 4, at 92–94 (describing the impact of oil development on indigenous peoples in the Ecuadorian Amazon River basin); Transnational Operations on Lands of Indigenous Peoples, supra note 4, at 17–18 (U.N. study of injuries to indigenous peoples’ land and the failure of domestic and international public regulation of TNCs). For a discussion of the role of Conoco and Texaco in the Oriente region of Ecuador, see Kimerling, Disregarding Environmental Law, supra note 30, at 858, 870–71, 884–93. Regarding the failure of international public law to effectively address the role of TNCs as major international economic and political forces, see generally Grossman & Bradlow, supra note 13.
they operate)”74 and “shall respect human rights and fundamental freedoms in the countries in which they operate.”75

74. TNCs Code of Conduct, supra note 71, para. 13 (Adherence to Socio-Cultural Objectives and Values):

Transnational corporations should respect the social and cultural objectives, values and traditions of the countries in which they operate. While economic and technological development is normally accompanied by social change, transnational corporations should avoid practices, products or services which cause detrimental effects on cultural patterns and socio-cultural objectives as determined by Governments. For this purpose, transnational corporations should respond positively to requests for consultations from Governments concerned.


75. TNCs Code of Conduct, supra note 71, para. 14.
As an international trade activity, the extraction of oil for global commerce dramatically impacts upon the environment; it is also the subject of international environmental law. TNCs are one among several major legal actors in this international legal arena. TNC activities include: (1) managing enterprises, such as governmental and local companies; (2) researchers, scientists, engineers and other "agents" planning exploration sites; (3) regulators, such as nation-states, local governments, and voluntary corporate codes of conduct; and (4) international assessment.

A basic outline of the TNCs' "order of business" can be delineated as: (1) site identification; (2) cost-benefit and scientific analyses; (3) obtaining governmental approval; (4) infrastructure construction, including roads for the initial exploration; (5) exploration and drilling, with accompanying introduction of substantial changes in local economies and social structure, including labor relations and cash economies; and (6) production—extracting, primary source processing, storage, and transportation of crude oils.

The TNCs are private actors, even though their activities are often authorized by or are in cooperation with governments. As such, TNCs are potential defendants in claims by indigenous peoples whose survival and cultural land is imperiled.

Utilizing the definitions put forth above, a vital legal question is: can an indigenous population in a foreign country bring a viable claim under customary international law in U.S. courts for protection against the destruction of cultural lands by TNCs? Part III below reviews international instruments and customary law in evaluating any basis for such a claim.

76. See infra, Part II.E.
77. See, e.g., Judith Kimerling, The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice or Business as Usual?, 7 HARV. HUM. RTS. J. 199 (1994) [hereinafter Kimerling, The Environmental Audit]. In the spring of 1992, in response to growing national and international concern about the environment and human impacts of Texaco's activities, Petroecuador announced that a Canadian consulting firm, HBT Agra Limited, would conduct an "independent and impartial" environmental audit of Texaco's activities. Id. at 199–200.
78. See Kimerling, Disregarding Environmental Law, supra note 30, at 861–63.
79. Id. at 860, 864, 871.
80. In Beanal v. Freeport-McMoRan, Inc., 969 F. Supp 362 (E.D. La. 1997), the court found that for most international human rights torts, a corporation is liable only if it is "jointly engaged with state officials in the challenged action." Id. at 376 (quoting Dennis v. Sparks, 449 U.S. 24, 28 (1980)). See also Carmichael v. United Technologies Corp., 835 F.2d 109, 112–13 (5th Cir. 1988) (discussing when torture conducted by a private corporation can be considered "official torture" in violation of the "law of nations").
81. See discussion of party domicile under the Alien Tort Claims Act, supra note 20.
III. APPLICATION OF THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS

International humanitarian law provides another source of law for human rights organizations and advocates. Worldwide recognition of the human rights and humanitarian law norms should, in turn, lead to more widespread acceptance and implementation of fundamental rights.\(^{82}\)

There are two primary sources of international law: treaties and customary law.\(^{83}\) The parties to the various international human rights treaties are exclusively states. States have a responsibility under international law to implement their treaty obligations domestically.\(^{84}\) Those duties may require regulation of TNC activities\(^{85}\) and a state's failure to do so may be actionable in international adjudicatory bodies.\(^{86}\)

In the United States, "[i]nternational law is part of our law."\(^{87}\) International human rights law is most often reviewed with regard

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83. See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory Note §§ 101-03 (1987); see also THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 3 (1989).


85. See, e.g., OAS Report, supra note 4, at 92-94.


87. The Paquete Habana, 175 U.S. 677, 700 (1900) (Gray, J.). This was not a new concept in U.S. law even then. See U.S. CONST. art. I, § 8, cl. 10 (giving Congress the power to define and punish offenses against the "Law of Nations"); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (where Chief Justice Marshall refers to the "law of nations."). The Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), is the most common basis for international human rights claims for torts committed in other countries and is derived from the Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77. See generally Louis Henkin, International Law as Law in the United States, 82 MICH. L. REV. 1555, 1555-59 (1984) (providing a general analysis of how and why international law is part of our law).
to its application to nation-states. Some U.S. courts have held that customary international human rights law is only applicable to recognized nation-states. These rulings have been criticized by scholars, and some recent court decisions have held to the contrary. To date, there is no definitive U.S. Supreme Court ruling on the issue.

Customary law and treaty law have received historically distinct treatment in U.S. courts. When the U.S. Congress uses its constitutional authority to legislate in this area, which is rarely, it may provide domestic judicial remedies for international human rights violations. Simple ratification of a treaty, on the other hand, does not automatically establish the treaty as binding authority in U.S. courts. In general, the ability of individuals or groups to enforce treaties in U.S. courts has proven to be prohibitively difficult.

As an illustration, the United Nations Charter, to which virtually all countries are parties, provides for the right of "self-determination." Although the U.N. Charter, like all treaties "made under the Authority of the United States," is part of the "supreme Law of the Land," this may not have any enforcement

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90. See, e.g., Koh, supra note 16, at 2382-83 (arguing for a broader judicial doctrine on private causes of action for international torts).


94. The U.S. Constitution states that "[a]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of
impact in U.S. courts. Under long-standing U.S. Supreme Court doctrine, only so-called "self-executing" treaties that supersede all state or federal law are justiciable. The record of U.S. courts shows a clear unwillingness to find the self-determination provision of the U.N. Charter, or international human rights treaties generally, to be "self-executing." When articulated as a matter of treaty enforcement, the international human rights set forth in treaties that the United States has ratified are, as a practical matter, non-justiciable in our courts.

Treaties can be evaluated both for their potential to directly provide a cause of action and for their contribution to the creation of rights that reach the status of customary international law. The analysis of treaties in this part of the Article is confined to determining whether any human rights violations arising out of the conflicts in Amazonia have reached customary international law status. In particular, this part of the Article addresses whether customary international human rights norms are violated by the activities of TNCs. This Article does not address the equally important questions of (1) whether treaties directly provide a cause of action for indigenous groups in U.S. courts, and (2) how claims of human rights violations can be brought against private parties in U.S. courts.

This Article contends that customary international law may provide indigenous peoples the most viable jurisprudential route for protection from extinction. Customary international law "results from a general and consistent practice of states followed

any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2. See also The Paquete Habana, 175 U.S. 677, 700 (1900).
96. Foster, 27 U.S. at 254.
98. Nor does this Article review the complex federal judicial hurdles litigants may face such as the doctrines of Act of State, political questions, separation of powers, forum non conveniens, necessary parties, choice of law, various forms of diplomatic immunity, and the application of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (1994), and the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994). See generally BORN, supra note 20, at 545-682, 685-742 (discussing choice of law and Act of State doctrines); STEPHENS & RATNER, supra note 20, at 139-54 ("Miscellaneous Defenses"); Koh, supra note 16, at 2375-94 (offering critique of using "vertical" approach to deciding transnational legal issues).
by them from a sense of legal obligation.”99 U.S. courts, in determining customary international law, review a variety of sources:

What the law of nations on this subject is, may be ascertained by consulting the work of jurists, writing professedly on public law, or by the general usage and practice of nations, or by judicial decisions recognising and enforcing that law.100

The Restatement (Third) of the Foreign Relations Law of the United States defines the customary international law of human rights:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones
(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.101

Under current federal common law jurisprudence, U.S. courts also look to international conventions, agreements, and declarations of bodies such as the United Nations and the OAS, in addition to domestic judicial precedent.102

99. Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987); see also, Henkin, supra note 87, at 1565 (stating that customary law is not law made by U.S. judges; rather, it is made by the political processes of nation-states, of which the United States is one).


The following sub-parts of the Article review the various documents, decisions, and scholarly writings that may serve to help protect the indigenous peoples’ group and cultural land rights at risk in Amazonia.

A. The Genocide Convention and Its Progeny

Unfettered oil exploration in Amazonia will undoubtedly result in the extinction of certain indigenous groups. Do these circumstances prompt protections against “genocide” under international law? The Convention on the Prevention and Punishment of the Crime of Genocide provides in pertinent part:

[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

Over 100 countries are parties to the Convention. In 1988, the United States ratified the treaty with a number of “reservations”

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103. The term “genocide” was coined by Raphael Lemkin, a Holocaust survivor and diligent advocate for the passage of the Genocide Convention. See RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE (1944).


and "understandings" after a long and strained history in Senate Foreign Relations committees beginning in 1950.\textsuperscript{108}

Several other human rights declarations and conventions prohibit genocide. The International Covenant on Civil and Political Rights incorporates the Genocide Convention's prohibitions.\textsuperscript{109} The Draft U.N. Declaration on the Rights of Indigenous Peoples includes "cultural genocide" in its protections:

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the \textit{aim or effect} of depriving them of their integrity as distinct peoples, or of their cultural or ethnic identities;

(b) Any action which has the \textit{aim or effect} of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has the \textit{aim or effect} of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them.\textsuperscript{110}


\textsuperscript{108} The Senate struggled with objections to the language in Article II. There were many failed attempts to agree upon an "understanding," in reality a "reservation," to be submitted with any ratification. The Senate records indicate primary concern with the "whole or in part" language rather than the meaning of "intent" under the Convention. Perhaps reflecting the times, the Senate records from the early 1950's reflect concern about the Convention being used for "driving five Chinamen out of town" and the fact that the persistent proponent of ratification was Raphael Lemkin, a Holocaust survivor, whom one annoyed committee member characterized as "a man who comes from a foreign country who speaks broken English." \textit{See EXECUTIVE SESSIONS OF THE SENATE FOREIGN RELATIONS COMMITTEE HISTORICAL SERIES, S. EXEC. DOC. NO. 2, at 645-49 (1953); see generally Lawrence J. LeBlanc, The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding, 78 Am. J. Int'l L. 369, 370-81 (1984).} In later years, Senate committees expressed fears that the Convention might be used against the United States for its actions in Vietnam in the late 1960s and early 1970s. \textit{See LeBlanc, supra, at 381 (this occurred in the Russell International War Crimes Tribunal); see also AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL 653 (John Duffet ed., 1968) (on the Russell Tribunal that found the United States guilty of genocide in Vietnam after hearings in Stockholm and Copenhagen in 1966-67); JEAN-PAUL SARTRE, ON GENOCIDE (1968) (assessment of whether the United States possessed a "genocidal intent" during the Vietnam War).}

\textsuperscript{109} ICCPR, supra note 60, art. 6, para. 3.

\textsuperscript{110} Draft United Nations Declaration on the Rights of Indigenous Peoples, \textit{supra} note 69, art. 7 (emphasis added).
In addition to the above conventions, modern history strongly supports the position that genocide is a matter of universal concern and jurisdiction. The post-World War II actions of the international community concerning activities in Bosnia, Rwanda, Cambodia, Iraq, Iran, Vietnam, and the United States demonstrate the international acceptance of the concept of genocide, including the Genocide Convention’s “intent to destroy” standard as customary international law. Genocide is one of the few human rights violations that has reached universal jurisdiction or *jus cogens* status.

The U.S. courts have recognized the protection from genocide as an international human right. One court recently addressed a claim of “cultural genocide” with respect to actions against the Amungme, an Indonesian indigenous group, by a foreign based mining corporation. The court pointed out that “[g]enocide is an intentional tort,” citing the Genocide Convention, and that pri-

111. Ironically, the Genocide Convention limits its jurisdiction to the country whose acts are at issue unless the state accepts the jurisdiction of an “international penal tribunal.” Convention on the Prevention and Punishment of the Crime of Genocide, supra note 104, art. VI.

112. Despite the finding of the Russell Tribunal, many scholars on this issue have concluded that the United States’ actions in Vietnam were not directed towards a "separate national, ethnical, racial or religious group" as required by Article II of the Genocide Convention. See G. LEWY, AMERICA IN VIETNAM 299–304, 400, 413 (1978); H.A. Bedau, *Genocide in Vietnam?*, in PHILosophy, Morality and International AFFAIRS 46 (V. Held et al. eds., 1974) (different models were applied to determine “intent” which resulted in a “Scottish verdict. Not proven, not quite”); M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT’L J. 2d 231, 274 app. B (1979).

113. Bassiouni, supra note 112, at 271 app. A.

114. Jean Paul Sartre's argument on the notion of intent noted “that the Genocide Convention 'was tacitly referring to memories which were still fresh,' namely to Hitler's 'proclaimed... intent to exterminate the Jews.'” LeBlanc, supra note 103, at 381. Because most countries would not be as open about their "demonic intentions," the question then became, "would it be possible, by studying the facts objectively, to discover implicit in them such a genocidal intention?" *Id.*


116. *Beanal*, 969 F. Supp. at 372. One of the “understandings” that the United States attached to its ratification of the Genocide Convention deals specifically with the issue of “intent”:

The purpose of this understanding is to distinguish between the crime of genocide and other acts. It does so by specifying the type of intent that must be present for an act to constitute genocide and by requiring that an act be aimed at destroying the group as a viable entity. . . .

. . . During the negotiations on the Convention, an amendment was offered to extend the definition of genocide to acts which resulted in the destruction of a group. It was rejected. . . . A distinction was thus maintained between acts
vate corporations may be liable under such a claim. The court then dismissed the "cultural genocide" claim, without prejudice, stating that its basis was "less than crystal clear." The court went on to grant plaintiffs leave to amend their complaint to allege more specific facts in support of this claim.

Can the elimination of indigenous peoples through the oil exploration activities of TNCs constitute "genocide" under international law? The "intent to destroy" scienter is vital to determining the answer. The Drafters of the Genocide Convention (known as the "Sixth (Legal) Committee of the U.N. General Assembly") entertained a Soviet proposal to change the phrase "intent to destroy" to "aimed at the physical destruction" in an attempt to apply the Convention to acts "that resulted in the destruction of groups." This proposal lost. Both the "plain meaning" of the Convention's language and its legislative history thus make clear that the Drafters' position on the meaning of "intent to destroy" requires a "specific intent" to destroy a distinct group of people.

The "intent to destroy" element of the crime of genocide is therefore the most significant legal hurdle for victims in the sce-

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committed with the purpose of destroying a group and all other acts, whatever their consequences.


118. Id.
119. Id. at 373.
120. See generally Christopher P. Cline, supra note 66, at 592-97, 617-32 (arguing that the U.S. Forest Service's act of building a logging road through sacred lands violated Northwest Tribes' fundamental human rights and may ultimately lead to cultural genocide).
121. LeBlanc, supra note 108, at 371-72 (citations omitted):

The proposal was supported by some representatives, most notably the French delegate, who argued that it would "guard against the possibility that the presence in the definition of the word 'intent' might be used as a pretext, in the future, for pleading not guilty on the ground of absence of intent." This argument, as we shall see later, proved prophetic. For the moment, suffice it to say that the Soviet proposal received scant attention from the Sixth Committee despite its important implications.

... [The drafters' intent then, was] that the destruction of parts of groups, not only entire groups, could constitute genocide, and that the crime of genocide itself had to be defined in terms of an intent to destroy groups as such.
122. The vote was 41 to 8. Id. at 371.
enario posed by this Article.123 Over twenty years ago, the Brazilian "model of development" in the Amazon River basin124 was characterized as a "silent war" being waged against indigenous peoples.125 Contemporaneously, a compelling argument was presented to the world that the Ache and other indigenous groups in Paraguay were the victims of genocidal acts by the government seeking to promote TNC oil exploration on ancestral lands. The Ache are now considered an extinct cultural group.126 These fact situations likely meet the elements of the international tort of genocide and would be cognizable in U.S. courts. With regard to the TNC oil production activities described in this Article, however, there is, to date, insufficient proof of "intent" to support a claim.

The U.N. Draft Declaration of the Rights of Indigenous Peoples contains a different standard of scienter to prove culpability. The Declaration substitutes "intent to destroy" with "aim or effect" for acts of cultural genocide.127 By its own terms, however, the Decla-

123. See Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 38th Sess., Provisional Agenda Item 4, at 19, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 1985) (Prepared by Mr. B. Whiltaker) ("It is the element of intent to destroy a designated group wholly or partially which raises crimes of mass murder and against humanity to qualify as the special crime of genocide. ... Evidence of this element of subjective intent is far harder to adduce than an objective test. Not all genocidal régimes are likely to be as thoroughly documented as the Nazi one was.")

124. Regarding ethnocide of indigenous groups as a result of their colonial experience and a modern resurgence predated significant oil exploration activities, see NORMAN WHITTEN, JR., ECUADORIAN ETHNICIDE AND INDIGENOUS ETHNOGENESIS: AMAZONIAN RESURGENCE AMIDST ANDAN COLONIALISM 4-12 (1976).

125. SHELTON H. DAVIS, VICTIMS OF THE MIRACLE: DEVELOPMENT AND THE INDIANS OF BRAZIL 167-68 (1977). Davis argues that the mining ventures and deforestation activities supported by the Brazilian government were a part of an economic plan under a military regime that identified indigenous groups in the Amazon as "obstacles to be removed." See also DAVID MAYBURY-LEWIS, FROM SAVAGES TO SECURITY RISKS: THE INDIAN QUESTION IN BRAZIL, IN THE RIGHTS OF SUBORDINATED PEOPLES 38-63 (Oliver Mendelsohn & Upendra Baxi eds., 1994) (the chapter entitled From Savages to Security Risks: The Indian Question in Brazil describes the history of the treatment of Brazil's indigenous population 1964-85).

126. GENOCIDE IN PARAGUAY 132-71 (Richard Arens ed., 1976). In the epilogue to this book, Elie Wiesel, a Holocaust survivor, Nobel Peace Prize recipient, and author, concludes that the Ache situation in Paraguay included all of the elements of intentional genocide. Id. at 165-71. The last chapter, A Lawyer's Summation, is law professor Are's closing argument that the government of Paraguay committed genocide against the Ache. Id. at 132-64.

127. Draft United Nations Declaration on the Rights of Indigenous Peoples, supra note 69, art. 7 (emphasis added). Article 6 provides protections against genocide without reference to the element of scienter. See id. art. 6; see also Revised and Updated Report on
ration is not binding upon the U.N. member states and does not currently represent the customary international human rights law of genocide, cultural or otherwise.

B. The International Labour Organisation Conventions

Although the mandate of the International Labour Organisation (ILO) is focused upon labor matters, it has a long history of addressing the rights of indigenous peoples:

[The ILO has] been addressing the issue since its inception. A Committee of Experts on Native Labor was set up as early as 1926, and a number of early conventions dealt with indigenous peoples. The ILO's biggest contribution, however, came in 1957 with Indigenous and Tribal Peoples Convention Number 107 ("Convention No. 107"), the international community's first instrument to address comprehensively and specifically the needs of indigenous and tribal peoples.128

Although Convention No. 107129 is considered an "assimilationist" document,130 it reflects an important early effort to recognize indigenous peoples' rights. It was ratified by a diverse group of primarily Third World states.131

Regarding "cultural land" rights, Convention No. 107 provides:

The right of ownership, collective or individual, of the members of the populations concerned over the lands

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the Question of Prevention and Punishment of the Crime of Genocide, supra note 123, at 17 (the Ad Hoc Committee preparing the Convention proposed a provision prohibiting cultural genocide, but it was left out of the final text).


129. See ILO Convention No. 107, supra note 25.

130. The Convention's stated purpose is "to assure the protection of the populations concerned, their progressive integration into their respective national communities and the improvement of their living and working condition." ILO Convention No. 107, supra note 25, at 250; see also S. James Anaya, Indigenous Rights Norms in Contemporary International Law, 8 ARIZ. J. INT'L & COMP. L. 1 (1991) (discussing the significant progress reflected in the new Convention, No. 169).

which these populations traditionally occupy shall be recognised.

The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or the health of the said populations.

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Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected.\textsuperscript{132}

This convention recognizes qualified cultural land rights contingent upon the state’s self-determined “interest” in the land. Principles of “eminent domain” are the only clear legal standard referenced.\textsuperscript{133} This traditional property principle does not protect indigenous peoples’ unique relationship to cultural lands. Convention No. 107 was, however, an important step, taken over forty years ago, recognizing indigenous people’s special cultural land rights. It began a continuing evolutionary process toward acceptance of this right by the international community.

In 1989, after years of toil, the ILO revised Convention No. 107 by adopting the Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries.\textsuperscript{134} Regarding cultural land rights, Convention No. 169 provides more developed conceptual standards:

\textit{Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands} or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

\textsuperscript{132} ILO Convention No. 107, \textit{supra} note 25, arts. 11–13 (emphasis added). The Convention also states: “Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.” \textit{Id.} art. 13 (emphasis added).

\textsuperscript{133} \textit{Id.} art. 12, para. 2.

\textsuperscript{134} \textit{See} ILO Convention No. 169, \textit{supra} note 25.
... [T]he concept of territories ... covers the total environment of the areas which the peoples concerned occupy or otherwise use.

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators...

...

Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.\textsuperscript{135}

Convention No. 169 also contains more specific language than Convention No. 107 regarding the removal of indigenous peoples from their land, permitting “eminent domain” only in cases reaching a “necessity” threshold.\textsuperscript{136}

ILO Convention No. 169 reflects many of the emerging norms regarding indigenous rights, particularly those developed through the U.N. Working Group on Indigenous Populations.\textsuperscript{137} These developing norms move away from “assimilationist” theories and towards autonomy, group self-determination, and recognition of “cultural land” as vital to the continued existence of indigenous peoples.

Although ILO Convention No. 169 delineates many important concepts, it equivocates in providing effective protections. For example, with respect to the removal of subsurface resources such as oil, Convention No. 169 states that “[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall

\textsuperscript{135} \textit{Id.} arts. 13, 14, 17 (emphasis added).

\textsuperscript{136} See \textit{id.} art. 16.

\textsuperscript{137} See Draft United Nations Declaration on the Rights of Indigenous Peoples, \textit{supra} note 69; see generally Anaya, \textit{supra} note 130, at 10 (“The process leading to the adoption of the Convention was part of a larger effort to identify and promote indigenous rights that had been going on for some time within international human rights bodies, particularly within the United Nations Working Group on Indigenous Populations (‘Working Group’).”).
be specially safeguarded. *The rights include the right of these peoples to participate in the use, management and conservation of these resources.*” 138 The efficacy of this provision, however, is severely limited:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, *governments shall establish or maintain procedures through which they shall consult these peoples*, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. 139

Since governments often retain rights to sub-surface resources, the only “right” for most indigenous peoples is to be “consulted.” Such rights are meaningless in states whose domestic policies are inconsistent with the treaty’s underlying principles. 140 The methods of implementation are effectively left in the hands of the state, providing little solace for indigenous groups whose land use problems result primarily from a lack of meaningful control over their cultural lands. With respect to cultural land rights, Convention No. 169 improves upon its predecessor, Convention 107, only in articulating the concepts more clearly. 141 Convention No. 169 contains few clear norms and virtually no sanctions.

Convention No. 169’s rapporteur has responded to this criticism:

The Committee had to find a balance between language which would, on the one hand, have expressed aspirations of the indigenous and tribal peoples themselves, as well as the concern felt by the international community for their problems; and, on the other hand, the need to

139. *Id.* (emphasis added).
have a realistic text that could be ratified and provide a basis for national and international action. . . .

In evaluating the effect of this compromise, two potentially conflicting consequences emerge:

While the convention has its shortcomings, wide ratification would have the effect of establishing a legally binding floor upon which the further evolution of standards in the United Nations system—by the Working Group on Indigenous Populations, for example—can build. *Failure to adopt and implement the new ILO standards could well have the opposite effect: legitimizing the assimilationist regime of the old convention.*

Convention No. 169, regardless of ratification, echoes norms on cultural land rights expressed elsewhere in the international le-

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142. *Id.* at 235 (remarks of Hans-Jakob Helms to the plenary session). The drafters had great difficulty in adopting language regarding "land rights" that was consistent with domestic law and policies towards marginalized groups. *Id.* at 216–18. One scholar summed up the process:

The adoption of Convention No. 169 was not easy. It took place in a climate of severe conflict, struggle for understanding, and offstage maneuvering. It is natural that it should have been like this, since the ILO was debating nothing less than survival for indigenous and tribal peoples around the world—conscious at every step that it could not resolve by itself the terrible problems that face them.


144. Professor D'Amato submits that when two or more states conclude a treaty setting forth generally applicable norms, the treaty-making act itself generates customary international law. Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1130–35 (1982) [hereinafter D'Amato, *The Concept of Human Rights*]. Professor Sohn observes that government practice in negotiating the text of a normative treaty may generate customary law even in advance of signature or ratification: "The Court is thus willing to pay attention not only to a text that codifies preexisting principles of international law but also to one that crystallizes an 'emergent rule of customary law.'" Louis B. Sohn, "Generally Accepted" *International Rules*, 61 WASH. L. REV. 1073, 1077 (1986) (citing Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 38 (Feb. 24)); see also Louis B. Sohn, *Unratified Treaties as a Source of Customary International Law*, in
gal community, including the Draft Declaration of the Rights of Indigenous Peoples. As such, it provides evidence of an emerging customary international law of cultural land rights.

The remainder of this part of the Article reviews other relevant U.N. and regional human rights declarations, the effect of international human rights decisions, and the importance of regional organizations, particularly the OAS, in defining emerging rights of indigenous peoples. The protections focus upon two categories of wrongs: destruction of cultural land and extinction of indigenous groups.

C. The Organization of American States

The sheer number of United Nations member states often creates insurmountable obstacles in reaching consensus on international human rights norms. With cultural land rights, policy difficulties are exacerbated because they implicate sensitive issues of sovereignty considered by many states to be internal matters. Further, the issues often have economic implications for Third World international debt obligations.\(^{145}\)

In some instances, the smaller international regional organizations have greater flexibility to address these issues. The Organization of American States, whose members include the sovereign states with Amazonian territory, is one example. The United States, Ecuador, Peru, Columbia and Brazil are all members of the OAS, the world’s oldest regional organization, and are parties to the American Declaration of the Rights and Duties of Man.\(^{146}\) Of these countries, only the United States has yet to ratify the more recent American Convention on Human Rights.\(^{147}\) This alone, however, does not preclude the American Convention from being an important source of customary international law.\(^{148}\)

\(^{145}\) See McAllister, supra note 11, at 690.

\(^{146}\) See American Declaration of the Rights and Duties of Man, supra note 26.

\(^{147}\) See Annual Report of the Inter-American Commission on Human Rights 1996, supra note 54, at 771. The United States has yet to ratify other OAS human rights conventions as well, including the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Woman and The Inter-American Convention to Prevent and Punish Torture. Id. at 788, 792. The Inter-American Commission on Human Rights continues to recommend that the United States and other members take steps to adopt these important instruments. Id. at 763, 767.

\(^{148}\) See supra note 144. The United States has also not “acceded” to the provisions of the American Convention. See Vienna Convention on the Law of Treaties, May 23, 1969,
The OAS treaties protect rights pertinent to the survival of indigenous groups. The Preamble to the American Declaration provides: "Since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power." The American Convention, in turn, states: "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society."

In 1981, the OAS's Inter-American Commission on Human Rights became involved in a dispute concerning actions of the Nicaraguan government towards the Miskito Indians in the Atlantic coastal region. The Miskito peoples' autonomy, including their right to ancestral lands, became a legal issue after complaints about forced relocation reached the Commission. In addressing the American Convention's property rights provision, the Commission sidestepped the issue by stating that it was "not in a position to decide on the strict legal validity of the claim of the Indian communities to their ancestral lands." The Commission then weakly suggested that it would be helpful to other countries in the region if the Nicaraguan government resolved this issue internally. Until July 1997, no other OAS opinion, either of the Commission or its Court, had specifically addressed a cultural property right under the American Convention.

Given this sparse history, the 1997 Inter-American Commission Report on the Situation of Human Rights in Ecuador, referenced throughout this Article, represents a significant step in addressing indigenous peoples' rights and creating a body of customary law on cultural land rights. The Commission's interpretation of the

art. 15, 1155 U.N.T.S. 331 (rules for expressing consent to be bound to a treaty by accession).
149. American Declaration of the Rights and Duties of Man, supra note 26, pmbl..
150. American Convention on Human Rights, supra note 26, art. 21(1).
152. Id.
153. Cf. Case 7615, supra note 7, at 31 (citing the International Covenant on Civil and Political Rights in determining that the government of Brazil had violated the human rights of the Yanomami people).
154. See OAS Report, supra note 4; see also supra note 21 (discussing the findings of the OAS Report).
155. In addition, the OAS's proposed American Declaration of the Rights of Indigenous Peoples was approved by the Inter-American Commission on Human Rights in Feb-
rights to life, property, cultural identity, and health under the OAS's two primary human rights conventions reflects an evolving pro-indigenous peoples rights attitude in interpreting the treaties and applying them to current conflicts within the region. Unfortunately, this regional decision is not yet supported by decisions from other international regional organizations. In part, this is because the controlling conventions do not vigorously define, or do not define at all, the rights of the indigenous inhabitants of a particular region.

The European Convention for the Protection of Human Rights and Fundamental Freedoms has relatively well-developed mechanisms for reviewing claims under its Convention. It does not, however, contain specific provisions regarding indigenous rights or cultural land. The more recent African Charter on Human and Peoples' Rights, adopted by the Organization of African Unity, has taken the lead in textual recognition of "peoples" and "group rights" among the various regional human rights conventions. However, the Charter's enforcement mechanism is advisory only. Under the Charter's review process, virtually no opinions have been issued that further the development of the customary international law of indigenous peoples' rights and cultural land.

D. Cultural Land As A Human Right

As noted above, cultural land is central to indigenous peoples' self-definition and essential to their survival. Recognition of the indigenous peoples' relationship to their land is vital to appreci-
ing the need for a specially defined international human right to cultural land.\textsuperscript{163}

In the seminal and voluminous Cobo Report, cultural land rights were considered to be of paramount concern. The Final Report concluded:

It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture.

For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.\textsuperscript{164}

Given the impact that oil exploration has on ancestral indigenous lands in Amazonia, the cultural land rights concept must encompass effective ownership or control of subsurface mineral rights.

1. The Right To Property Under Public International Law

Private land ownership by individuals or groups other than traditional states has never been thoroughly fleshed out in the human rights arena. Generally, when private property rights exist, the rights attached are related to protections from governments from arbitrary takings, interference with use, enjoyment, and privacy, or discrimination in exercising the rights that traditionally accompany ownership. Historically, private property ownership has not been included in the international economic and social rights documents and doctrines. Recent events in the former Soviet Union and Central and Eastern Europe, however, have resulted in the right to

\textsuperscript{163} See Williams, supra note 32, at 691. Under the terms of the Working Group's Draft Declaration on the Rights of Indigenous Peoples, the indigenous groups' oft-repeated concern that their distinct cultural identity and existence depends on protection of their unique relationship to their traditional territories has been translated into a central principle of indigenous peoples' human rights under modern international law. \textit{Id.}

\textsuperscript{164} See COBO CONCLUSIONS, PROPOSALS AND RECOMMENDATIONS, supra note 53, at 26; \textit{see also} supra note 66 (discussing Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 460–61 (1988), in which Justice Brennan wrote in dissent: "Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land.").
private property becoming the focus of increased discussion in the international legal community.\textsuperscript{165}

A review of the International Bill of Rights, which is composed of The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Political Rights (ICESPR), reflects the delicate definitional history surrounding private property ownership. Article 17 of the UDHR provides: "Everyone has the right to own property alone as well as in association with others" and "[n]o one shall be arbitrarily deprived of his property."\textsuperscript{166} Article 17, however, does not to create a "right to property;" rather, it simply addresses restrictions on property ownership.\textsuperscript{167} Given the consensus nature of this important document (the UDHR is not a treaty that automatically binds party states or anyone else\textsuperscript{168}), the omission is perhaps understandable. Property rights are notably absent from both the ICCPR and the ICESCR.\textsuperscript{169} Although these two principal human rights conventions contain some limited enforcement mechanisms, cultural territorial rights are not specifically protected.\textsuperscript{170}

\begin{itemize}
\item \textsuperscript{167} See Economic, Social and Cultural Rights 146 (Asbjorn Eide et al. eds., 1995).
\item \textsuperscript{168} For a contrary view, see D'Amato, The Concept of Human Rights, supra note 144, at 1132--36, discussing the \textit{jus cogens} impact of the UDHR. This result would not require ratification nor traditional customary international law recognition to be applicable to states.
\item \textsuperscript{169} One noted scholar has stated that "the absence of such a provision, however, can hardly be construed as rejecting the existence in principle of a human right to own property and not be arbitrarily deprived of it." Louis Henkin, Introduction, in The International Bill of Rights: The Covenant on Civil and Political Rights 21 (Louis Henkin ed., 1981).
\item \textsuperscript{170} Both of these instruments do, however, contain language relevant to the cultural survival of peoples. See ICCPR, supra note 60, arts. 1(1), (2), 6(1), 9(1), 23(1), 27; International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 19, 1966, arts. 1(1), (2), 10(1), 11(1), 12(1), 15(1), 25, 593 U.N.T.S. 3, reprinted in 6 I.L.M. 360 (1967) [hereinafter ICESCR].
\end{itemize}
2. The U.N. Working Group and the Draft Declaration on the Rights of Indigenous Peoples

The Working Group on Indigenous Populations was formed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities after the issuance of the initial Cobo Report. The Working Group has been an effective forum for the "voices" of indigenous peoples and has concentrated much of its work on the Draft Declaration on the Rights of Indigenous Peoples. The Final Draft, adopted by the United Nations General Assembly, provides definitive language on cultural land rights:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws,

172. As stated by one commentator:

The emergence of indigenous rights in contemporary international legal discourse is a direct response to the consciousness-raising efforts of indigenous peoples in international human rights forums. Specialized international and regional bodies, non-governmental organizations (NGOs), and advocacy groups are now devoting greater attention to indigenous human rights concerns. By far the most important of these specialized initiatives to emerge out of the indigenous human rights movement is the United Nations Working Group on Indigenous Populations (Working Group). The Working Group is composed of five international legal experts drawn from the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The Working Group was created by the Sub-Commission's parent body, the United Nations Economic and Social Council (ECOSOC) in 1982 and given a specific mandate to develop international legal standards for the protection of indigenous peoples' human rights.

Williams, supra note 32, at 665 (citations omitted) (emphasis added); see generally Torres, supra note 55 (arguing for the development of an "indigenous norm").
traditions and customs, land-tenure systems and institutions. 

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation.

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources ... particularly in connection with the development, utilization or exploitation of mineral, water or other resources.174

An important goal of the Working Group was to facilitate the development of international norms for the protection of indigenous peoples.175 The Declaration's definitions of cultural land rights are consistent with the stated goals of indigenous peoples, though it does not create any immediate binding legal obligations under international treaty or customary law.176 Nevertheless, this

174. Id. arts. 25–28, 30.
176. See Oscar Schachter, Editorial Comment, The Twilight Existence of Nonbinding International Agreements, 71 AM. J. INT’L L. 296 (1977). During the Bush administration, the United States State Department took the position that even treaties are not legally binding in their international operation, but only for domestic purposes. See Statement of
document is exceedingly important. Beyond its political mobilization impact, it reflects consensus among a wide range of indigenous groups. As such, it will likely influence future language in multi-state treaties and may, over time, become a basis for a customary international law of cultural land rights.

3. **Cultural Land Rights as Customary International Law**

As previously discussed, customary law is a source of rights under international jurisprudence. Perhaps the most highly respected authority in the United States for defining customary international law is the *Restatement (Third) of the Foreign Relations Law of the United States.*\(^{177}\) According to the Restatement:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
> (a) genocide,
> 
> (f) systematic racial discrimination, or
> (g) a consistent pattern of gross violations of internationally recognized human rights.\(^{178}\)

The *Restatement* concludes, however, that the right to private property has not achieved the status of a customary international norm; rather, it is an *emergent* right recognized in *some* treaties and human rights conventions.\(^{179}\)

Should the “right to property” ripen into future recognition, this general right would still not provide indigenous peoples with the type of protection required to sustain their relationship to their cultural land. The establishment of property ownership rights as customary international law may even create more questions than it answers. What is meant by the “right to property?” Does it vest full title without state regulation? Is it subject to the state’s right of eminent domain? Does it include sub-surface minerals? Should ancestral or cultural property receive special protections?

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178. Id. § 702.
179. See id. § 702, cmt. K.
Many states currently recognize a specific right to property for indigenous groups under their constitutions and statutes. These states also provide for varying property interests in their land rights definition. For example, the Huaroni people in Ecuador hold land rights to designated territories. However, the state's reserved rights to "management" and "sub-surface minerals"\textsuperscript{180} of these lands has permitted leases to TNCs that have pushed this indigenous group to the brink of extinction.\textsuperscript{181}

The right to property under customary international law, if it exists at all, does not include the protections to cultural land found in the Draft Declaration on the Rights of Indigenous Peoples.\textsuperscript{182} Nor does it wipe out five hundred years of colonialist-influenced international law doctrines on land rights and sovereignty. Thus, cultural land rights must find support in areas of international law other than the traditional property ownership arena. One related area is international environmental law.

E. \textit{International Environmental Human Rights}

There is no definitive norm establishing an international human right to a particular environment, but the recognition of the critical importance of environmental protection to international human rights is now recognized.\textsuperscript{183} Although some environmental protection proponents suggest that a distinct "international environmental human right" exists, they agree that there are no internationally accepted definitions, legal obligations, or remedies.\textsuperscript{184} The general concepts of the proposed rights to the environment are of-

\begin{footnotesize}
\begin{enumerate}
\item See OAS Report, \textit{supra} note 4, at 99-103.
\item See Kimerling, \textit{Disregarding Environmental Law}, \textit{supra} note 30, at 877-81; OAS Report, \textit{supra} note 4, at 92.
\item See ICESCR, \textit{supra} note 170, art. 12.
\item See Sierra Club Legal Defense Fund, \textit{Human Rights and the Environment: The Legal Basis For a Human Right to the Environment}, Report to the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, April 1992. Two common terms used to characterize injuries to the environment include "geocide" and "ecocide." These terms particularly applicable to rain forest damage because it is irreparable. For excellent discussions of the history and elements of the crime of geocide/ecocide, which includes violations of a right to a healthy environment through intentional species destruction, see Lynn Berat, \textit{Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law}, 11 B.U. INT'L L.J. 327 (1993); Mark A. Gray, \textit{The International Crime of Ecocide}, 26 CA. W. INT'L L.J. 215 (1996); Ludwik A. Teclaff, \textit{Beyond Restoration—the Case of Ecocide}, 34 NAT. RESOURCES J. 933 (1994).
\end{enumerate}
\end{footnotesize}
ten presented as extensions of the rights to life or health\textsuperscript{185} or as a distinct human right.\textsuperscript{186} For purposes of this Article, procedural and adjudicatory forum access rights\textsuperscript{187} are not included in the international environmental human rights discussion.

This part of the Article explores human rights that are related to the environment, including the right to a safe and healthy environment. These rights fit into two categories related to the issues in this Article. The first category is the right of indigenous peoples to protect and safeguard their cultural lands. Indigenous peoples, as inhabitants of their cultural lands, are the most immediate "stewards" or "trustees" of the environments they inhabit. This puts them in the unique position of "environmental protectors," keeping the Amazonian rain forest healthy for themselves and the world. The second category consists of the right of indigenous peoples to survive as a cultural group. Implicit within this category is the "right to a safe environment" free of pollutants, hazardous wastes, and other dangers that accompanies development. Absent a safe environment, indigenous peoples can not survive as cultural groups.

I. \textit{Environmental Rights Grounded In International Law}

International environmental instruments impact Amazonia, its rain forests, and the economic and political actors in this region. At least three major non-binding multilateral instruments address the general international right to a safe and healthy environment:\textsuperscript{188} (1) the Stockholm Declaration of the United Nations

\textsuperscript{185} See ICESCR, supra note 170, art. 12 (indicating that for member states to achieve the "highest attainable standard of physical and mental health" for individuals, they must improve "all aspects of environmental and industrial hygiene").

\textsuperscript{186} See ILO Convention No. 169, supra note 25, art. 7, para. 4 ("Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit"); id., art. 15, para. 1 ("The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded.").


\textsuperscript{188} A detailed analysis addressing these environmental agreements is beyond the scope of this article. For more information on these agreements and the broad and complex environmental concerns involved, see LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER (1994); ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW (1991); ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: A COURSEBOOK ON NATURE, LAW, AND SOCIETY (1992).
Conference on the Human Environment (1972);189 (2) the Rio Declaration of 1992;190 and (3) Agenda 21 of the Rio Declaration.191 In addition to these broad and general international environmental agreements, other conventions specifically address: (1) protection of waterways and international rivers of economic, political, and ecological importance;192 (2) protection of forests as ecosystems vital to all natural life on earth;193 (3) prevention of transfrontier marine pollution;194 (4) civil liabilities for oil pollution damage;195 (5) preservation of endangered fauna and flora (biodiversity);196 (6) protection of natural resources shared by na-


191. See Agenda 21, supra note 187 (adopted by the U.N. Conference on Environment and Development (UNCED) at Rio de Janeiro, June 13, 1992). Of particular significance is Section II, “Conservation and Management of Resources for Development,” which outlines an agenda for the conservation and management of resources for development. Other portions of Agenda 21 include: Social and Economic Dimensions (Section I); Strengthening the Role of Major Groups (Section III), including indigenous groups (Chapter 26, Recognizing and Strengthening the Role of Indigenous People and Their Communities); and Means of Implementation (Section IV). Id.


tions;\textsuperscript{197} and (7) the environmental impact and self-regulation of TNCs.\textsuperscript{198}

2. \textit{The Stockholm Declaration}

The Stockholm Declaration\textsuperscript{199} articulated early international rights to a safe and healthy environment.\textsuperscript{200}

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being. \ldots

The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations. \ldots

\ldots

Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on


\textsuperscript{198} See \textit{TNCs Code of Conduct, supra} note 71, paras. 43-45 (adopted by the U.N. Economic and Social Council, Feb. 1, 1988).

\textsuperscript{199} Although the organizing activities were directed at responding to some of the most urgent environmental problems, a special committee of twenty-seven states advising the United Nations Secretary General conducted ambitious preparations for the Stockholm Conference. As a result, the 1972 Stockholm meeting brought together some 6,000 persons, including delegations from 113 states, representatives of nearly every large intergovernmental organization, 700 observers sent by 400 NGOs, invited individuals, and approximately 1,500 journalists. The Conference achieved global recognition and significance. David A. Wirth, \textit{The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?}, 29 GA. L. REV. 599 (1995).

the environment and obtaining maximum social, economic and environmental benefits for all. In this respect projects which are designed for colonialist and racist domination must be abandoned.

. . . .

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.201

The non-binding Stockholm Declaration202 represents a major milestone, though one of paper, on the road towards international acceptance of the right to a healthy and safe environment.203 Another of its important accomplishments was the creation of the Governing Council for Environmental Programs. Acting on its recommendation, the United Nations General Assembly established the U.N. Environment Program (UNEP), an intergovernmental institution with a mission uniquely environmental in nature.204

3. The Rio Declaration

Twenty years after Stockholm, the international environmental community convened in Rio de Janeiro and “forged a new consensus on international environmental policies to protect the world’s biological diversity and its most fragile ecosystems.”205 The Rio “Earth Summit” reaffirmed the Stockholm Declaration.206 Principle 1 of the Rio Declaration echoed its Stockholm counterpart, declaring that human beings “are entitled to a healthy and produc-

201. See Stockholm Declaration, supra note 189, Principles 1–2, 15, 22 (emphasis added).
202. For various perspectives on the effect of non-binding agreements in establishing customary international law, see D’Amato, The Concept of Human Rights, supra note 144; Schachter, supra note 176; Sohn, supra note 144.
204. See Wirth, supra note 199, at 601 n.4.
206. For a thoughtful and entertaining journey from Stockholm to Rio, see Wirth, supra note 199.
tive life in harmony with nature."\textsuperscript{207} Other principles, however, distinguish the Rio Declaration from its predecessor.

First, the rights of "indigenous people," and their special role and knowledge are recognized as a basic principle: "[I]ndigenous people and their communities, and other local communities, have a vital role in environmental management and development \textit{because of their knowledge and traditional practices}. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."\textsuperscript{208}

Second, the Rio principles reflect an evolution in awareness of the import and unique nature of the environmental problems faced by indigenous groups and communities.\textsuperscript{209} The conflicting perspectives reflected in the "North versus South" and "sustainable development" debates were addressed:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

\ldots

\textsuperscript{207} See Rio Declaration, \textit{supra} note 190, Principle 1.
\textsuperscript{208} \textit{Id.}, Principle 22 (emphasis added).
\textsuperscript{209} Examples of these principles include:

The environment and natural resources of people under oppression, domination and occupation shall be protected.

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

\textit{Id.}, Principles 23, 10.
... Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.  

This attempt to “lighten the load” of underdeveloped states raises serious concerns regarding the adequacy of protections extended to the cultural land rights of indigenous peoples living in a fragile ecosystem.

4. **Agenda 21**

Agenda 21 is essentially a plan of action for carrying out the principles in the Rio Declaration, addressing three major areas: (1) social and economic situations, including protecting human health, promoting sustainable economic development, and integrating environment and development in decision-making; (2) integrated planning and management of land resources, combating deforestation, conservation of biological diversity, environmentally sound management of biotechnology, and protection of the quality and supply of freshwater resources; and (3) the means of implementation, including international legal instruments, mechanisms and information access for decision-making. As with the Rio Declaration, Agenda 21 recognizes “indigenous people and their communities,” as well as other groups. This recognition has little practical utility for indigenous peoples, however, since they are identified for the undefined purpose of “strengthening the role of [these] major groups.”

5. **Summary of International Environmental Rights Instruments**

The three international agreements discussed above present broad principles and implementation plans. One might conclude from these principles and plans that there is a general “right to the environment,” with specific acknowledgment of duties and responsibilities associated with that right. A human “right to a safe environment,” however, has not yet ascended to the level of customary international law. Although the activities between Stockholm and Rio show a growing recognition of indigenous peoples’ unique relationship to vulnerable environmental areas, any protec-

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210. *Id.*, Principles 7, 11.


212. The groups are: (1) women; (2) children; (3) indigenous peoples; (4) non-governmental organizations; (5) local authorities; (6) workers and trade unions; (7) business; (8) the scientific and technological community; and (9) farmers. *Id.* § III, chs. 24–32.

213. *See id.* § III.
tion of cultural lands that exist are indirect and have not emerged by design. The environmental debates still wrestle with fundamental questions such as "protectionism" versus "sustainable development." Even basic definitions clarifying environmental goals such as biodiversity, safe environments, and ecological integrity are far from resolution.

Nevertheless, there appears to be a "coming together" of environmental and international human rights law.\textsuperscript{214} The Huaorani case before the Inter-American Commission on Human Rights exemplifies this trend.\textsuperscript{215} This coalescence, while primarily coincidental, has political "down the line" benefits of marshaling necessary forces.

Three divisions of environmental legal regulation and advocacy are emerging: (a) preservationists (strong proponents of biodiversity and ecotourism); (b) legal advocates and justice seekers (focused on defining human rights, legal duties, and civil liabilities); and (c) title holders and environmental resource managers (focused on environmental standards, sustainable development, intellectual property law, and stewardship). Each of these forces provides momentum facilitating future recognition of environmental rights within international human rights norms.

F. The Right To Self-Determination

Indigenous peoples have asserted the right to self-determination in efforts to protect their cultural existence.\textsuperscript{216} Upon first glance,

\begin{itemize}
\item \textsuperscript{215} See OAS Report, \textit{supra} note 4.
\end{itemize}
this right seems the perfect internationally accepted principle for the protection of indigenous group rights, for “[p]erhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination.” The United Nations Charter established the right to self-determination in its first article. This right also appears in the first articles of both the International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and is found in many of the international human rights treaties and declarations of the last 50 years. It has been the subject of recent attention in the world community in light of the political break-up of the Soviet Union and Eastern bloc countries. “Self-determination” has reached jus cogens status as a group right.

Do the “groups” who hold this internationally recognized right include indigenous peoples internal to existing sovereign states? Generally, the answer is no. The right developed as a response to colonialization and belongs to groups with claims to sovereignty vis-à-vis other foreign sovereign nations. Thus, although the term minorities over the last several decades); Dean B. Suagee, Self-Determination for Indigenous Peoples at the Dawn of the Solar Age, 25 U. Mich. J. L. Reform 671, 691–94 (1992) (exploring the right to self-determination); Williams, supra note 32, at 691–95 (discussing self-determination rights of indigenous peoples).


218. See U.N. Charter, supra note 93, arts. 1(2), 55.


221. See Guyora Binder, The Case for Self-Determination, 29 STAN. J. INT’L L. 223, 223–24 (1993) (focusing upon the meaning of this right in light of the “democratization” of over fifty states in the last five years and the succession of almost twenty within the last year and its impact upon ethnic minorities asserting cultural preservation and autonomy within those former nation-states).
"self-determination" is prevalent in major human rights documents, it has little historical support as protection for oppressed groups within a recognized state.\footnote{See Laurence S. Hanauer, The Irrelevance of Self-Determination Law to Ethnonational Conflict: A New Look at the Western Sahara Case, 9 EMORY INT’L L. REV. 133, 173 (1995).}

G. State Practices: Domestic Law and the Adequacy of Judicial Remedies

A review of the domestic laws and practices of states is important for several reasons. First, international law looks to the practices and customs of states in determining customary law.\footnote{See Henkin et al., International Law 35–68 (2d ed. 1987); Restatement (Third) of the Foreign Relations Law of the United States §§ 102–03 (1987).} The impact of domestic law on customary international law is well summarized by Louis Henkin:

[P]rinciples common to legal systems often reflect natural law principles that underlie international law. . . . [I]f the law has not yet developed a concept to justify or explain how such general principles enter international law, resort to this secondary source seems another example of the triumph of good sense and practical needs over the limitations of concepts and other abstractions.\footnote{Louis Henkin, International Law: Politics, Values and Functions: General Course in Public International Law, 216 RECUEIL DES COURS 61–62 (1989-IV).}

Second, domestic remedies impact upon the jurisdictional requirements of many treaties because a claimant must usually exhaust domestic remedies before the claim can be heard by an international body.\footnote{See, e.g., American Convention on Human Rights, supra note 26, art. 37, and its exception under art. 46. The exhaustion of domestic remedies requirement, as well as the various judicial exemption doctrines, is beyond the scope of this article. The Petitioners in the case reported in the OAS Report, supra note 4, were permitted to proceed despite a technical failure to first exhaust domestic remedies in Ecuador’s courts. Id. at 77. See also sources cited supra note 44.} In addition, domestic laws of foreign states are reviewed by U.S. courts under the doctrine of forum non conveniens.\footnote{This federal common law doctrine is one of venue, not jurisdiction. See generally Piper Aircraft v. Reyno, 454 U.S. 235 (1981) (discussing the forum non conveniens inquiry); In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 845 (S.D.N.Y. 1986), aff’d, 809 F.2d. 195 (2d Cir. 1987) (“The doctrine of forum non conveniens allows a court to decline jurisdiction, even when jurisdiction is authorized by a general venue statute.”). The doctrine requires a judicial determination of the adequacy of judicial remedies in the applicable foreign state in deciding the proper forum. Both the Aquinda and Sequihua cases were dismissed without prejudice on forum non conveniens grounds even without a finding of an adequate remedy.}
1. **Domestic Law and Judicial Practice and Customs in Amazonia**

Major revisions in domestic law related to indigenous peoples and their cultural lands have occurred throughout the world, including Latin America. Not surprisingly, the domestic laws affecting Latin American indigenous peoples and their cultural land vary considerably. With regard to the Amazonian states, significant constitutional and statutory revision has recently occurred providing new legal protections.

Brazil is the clear leader in this area. Constitutional revisions in the 1990s have resulted in protections specifically recognizing indigenous peoples’ "original rights to the lands they traditionally occupy," the communities’ right to sue, and the constitutional obligation to protect the environment. Recent statutes also provide protections for indigenous peoples and their land, including environmental programs to protect the Amazon’s ecosystems.

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though the federal courts had subject matter jurisdiction. See supra note 6. In *Sequihua*, the Ecuadorian government submitted contradictory affidavits from its Attorneys General. It first took the position that its courts provided an adequate forum to adjudicate the claims by indigenous peoples against Defendant Texaco, Inc., domiciled in New York, and then later in the litigation withdrew it objections to jurisdiction, asserting that New York was the better forum to adjudicate the claims. *Sequihua v. Texaco*, Inc., 847 F. Supp. 61, 64 (S.D. Tex. 1994).

The doctrine of *forum non conveniens*, as well as the numerous procedural and federalism issues that a litigant may face (e.g., choice of law, separation of powers, political questions, foreign sovereign immunity, application of the Alien Tort Claims Act, necessary parties) are complex, often discretionary, often unresolved under U.S. law, and beyond the scope of this Article. See generally BORN, supra note 20, at Chapters 1(c), 3–4, 9; STEPHENS & RATNER, supra note 20, at Chapters 1, 3, 7, 9, 11–12; Koh, supra note 16, at 2357.


228. See Rodríguez, supra note 165, at 29, 36–37, 44, 67, 72–74.

229. CONSTITUIÇÃO FEDERAL [Constitution] art. 231 (Brazil).

230. *Id.* art. 232.

231. *Id.* art. 225.

232. Decreto núm. 24, sobre las acciones tendentes a proteger el medio ambiente en territorios indígenas [Decree 24], Diario Oficial, 1991-02-05, núm. 25, pág. 2487; Decreto núm. 96944 por el que se crea el programa de defensa del complejo de ecosistemas de la Amazonía y se dictan otras disposiciones [Decree 96944], Diario Oficial, 1988-10-13, núm. 196, págs. 19941-45; Decreto núm. 22, por el que se establece el proceso de demarcación de tierras indígenas y se dictan otras providencias [Decree 22], Diario Oficial, 1991-02-05, núm. 25, págs. 2485–86.
The 1996 Constitution does, however, leave the government with ownership of all mineral rights, including oil. 233

Similar constitutional and statutory changes increasing the protection of indigenous peoples and their environment have occurred in Ecuador, 234 Peru, 235 and Colombia. 236 Colombia’s new constitution is the first in the world to describe, in detail, territorial rights for indigenous peoples, including self-government and management of natural resources on their cultural lands. 237 The Colombian Constitution also establishes a right to a healthy environment, 238 a “right to collective or associational property,” and an obligation to protect the environment’s “ecological integrity.” 239

These developments reflect the growing recognition of indigenous peoples’ rights to survive as a cultural group on their ancestral lands. However, as discussed below, the reality of effective remedial practice in the domestic judicial fora of this region presents quite a different picture than the written law.

2. Constraints to Domestic Judicial Remedies

U.S. courts, in determining the “law of nations,” 240 may look only to the stated laws of the nations, foregoing an analysis of the

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233. CONSTITUIÇAO FEDERAL [Constitution] art. 176 (Brazil).

234. CONSTITUCION POLITICA DE LA REPUBLICA DEL ECUADOR art. 19; Decreto núm. 1679 por el cual se crea la Secretaria de asuntos indigenas y minorias etnicas, adscrita a la Presidencia de la Republica [Decree 1679], Registro Oficial, 1994-04-25, núm. 427, pág. 3. For a history of the development of Ecuador’s Civil Code, see generally, JUAN LARREA HOLGUIN, 1 DERECHO CIVIL DEL ECUADOR 21–35 (1984). The formal legal definition for indigenous groups is a “comuna,” a legal entity created by Ecuadorian law. See Ley de Organización y Régimen de las Comunas, arts. 1–4, Registro Oficial, 5-X-76, núm. 186, pág. 2 (1976). A “Cabildo” is a five member representative body for comunas. Id. arts. 8, 17, at 2–4. These entities were plaintiffs in Aquinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996) and Sequinda v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994).

235. Convenio Constitutivo del Fondo para el Desarrollo de los Pueblos Indigenas de America Latina y el Caribe [Peru ratifies the Convention establishing a fund for the development of indigenous peoples in Latin America and the Carribean], El Peruano 1993-02-28, núm. 44649, pág. 113825.


237. CONSTITUCION POLITICA DE COLOMBIA arts. 58, 63, 79–88.

238. Id. at art. 79.

239. Id. at art. 58.

effectiveness of implementation of the laws.\footnote{241} In looking at the recent changes in the domestic laws of the Amazonian states, a court is likely to assume that the new laws reflect the customs of the states and provide strong support for indigenous peoples.\footnote{242} The reality, however, is that domestic judicial remedies are often non-existent or ineffective in protecting indigenous peoples' land rights.\footnote{243}

The recent Inter-American Commission \textit{Report on the Situation of Human Rights in Ecuador} is highly critical of the indigenous peoples' general lack of access to judicial process, specifically regarding claims for injuries from oil development on cultural lands.\footnote{244} Similar criticism with respect to Latin American nations has been echoed by scholars\footnote{245} and the United Nations:

Several indigenous organizations stated that treaties concluded in the past between indigenous populations and Governments had not been respected and that in law suits filed by the indigenous populations, the judiciary only applied legislation and patterns imposed by the national society. Indigenous claims to the land and natural resources assured to them by those treaties, were allegedly not respected. The indigenous populations were powerless to prevent encroachment on, or expropriation of, their lands because the law did not recognize their specific rights to land. This was compounded by an absence of legal remedies under violations of indigenous land rights.\footnote{246}

Although efforts to strengthen domestic judicial remedies is one of the goals of indigenous groups and NGOs, there is little likelihood

\footnotetext[241]{As noted above, U.S. courts do look to the inadequacy of access to foreign courts and judicial remedies when dealing with the issues of venue and justiciability. \textit{See supra} note 226.}

\footnotetext[242]{It is, at best, unclear "[w]hether human rights need such backing from State practice and consent in order to be valid." Simma & Alston, \textit{supra} note 102, at 107–08.}

\footnotetext[243]{Indigenous populations often cross national borders, making their status uncertain with respect to the various states.}

\footnotetext[244]{\textit{See OAS Report, supra} note 4, at 93–95, 101, 105–06, 115.}

\footnotetext[245]{\textit{See Findley, supra} note 214, at 1–15.}

of significant change in the immediate future. This is the case even though a government's failure to implement treaties domestically may be actionable under the terms of the treaty.

IV. CONCLUSION

Globalization trends in the law and the activities of new international actors reflect changed international economic and legal realities. This Article has explored the impact of one of these actors—transnational corporations—and their effects on indigenous peoples in Amazonia in the context of international human rights law.

The degree of risk and the immediacy of potential harms requires a thorough, professional critique of potential remedies. This is particularly true in a time of significant evolution in public international law, the legal context addressed here. Professionalism demands that the motivation to pursue remedies be tempered by reflection upon potential consequences. Richard Lillich makes this point: "Despite the encouragement engendered by the approach . . . , here, as elsewhere in the law, one must beware of the wish becoming the parent of the thought." These cautionary words are appropriate regarding the solution suggested here.

247. The problems of weak judicial review in developing nations with civil law traditions has been widely noted. See, e.g., ALLAN BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 243–50, 310–14, 321–26 (1990) (reviewing Panama, Uruguay, Paraguay, Chile, Ecuador, Colombia, Guatemala and Peru); JOHN MERRYMAN, THE CIVIL LAW TRADITION 139–40 (2d ed. 1985) (“In general it can be said that the experience with review by ordinary courts, even where concentrated in one supreme court, has not been encouraging. . . . Concentrated judicial review by the Supreme Court has existed in Chile for forty years, but only a few statutes have been found unconstitutional in that time, and those usually in cases of minor importance.”); Robert S. Barker, Constitutionalism in the Americas: A Bicentennial Perspective, 49 U. Pitt. L. Rev. 891, 905 n.41 (1988) (noting, for example, that Mexico’s Constitution contains a provision that makes the Federal Constitution “the Supreme Law of the Union,” yet jurists have found this provision to be “obscure and incongruous, . . . out of place in our judicial system.”).

248. The ICCPR, for example, requires states to provide adequate domestic remedies for human rights violations. ICCPR, supra note 60, arts. 87–88; see also OAS Report, supra note 4, at 27–34 (on Article 27 of the American Convention on Human Rights and its guarantees of effective domestic judicial remedies); Advisory Opinion of the Constitutional Chamber of the Costa Rican Supreme Court, supra note 140, at 1 (finding I.L.O. Convention No. 169, ratified by the Costa Rican legislature, to be constitutional and “self-executing”).

249. See Lillich, supra note 102, at 7.

250. Simma & Alston, supra note 102, at 84 (quoting John Humphrey, Forward to HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard Lillich ed., 1973)) (“Caution is far from being a characteristic of much of the contemporary human rights literature. Perhaps this has to do with the fact that ‘human rights lawyers are notoriously wishful thinkers.’”).
The ethic of legal care applies equally to the academic and the advocate, as both require equal degrees of objectivity.

A. Human Rights Bundles

The international human rights identified by treaties, NGOs, legal advocates, and scholars that relate to the conflicts that arise in natural resource extraction on cultural lands include: (1) the protection from genocide,\(^{251}\) including ethnocide;\(^{252}\) (2) the right to a culture;\(^{253}\) (3) group and collective rights;\(^{254}\) (4) the right to self-determination;\(^{255}\) (5) the rights of minorities;\(^{256}\) (6) rights specific to

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251. See supra Part III.B.
252. See supra Part III.A.
253. See e.g., ILO Convention No. 169, supra note 25, art. 5(a) ("[T]he social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected. ..."); American Convention on Human Rights, supra note 26, art. 16(1) (freedom of cultural association); African (Banjul) Charter on Human and Peoples’ Rights, supra note 86, art. 22(1) ("All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., art. 4, U.N. Doc. A/Res/47/135 (1993) (requiring states to allow persons to express and develop their culture); Declarations of the Principles of International Cultural Co-operation, General Conference of UNESCO on 2 November, 1966, art. V ("Cultural cooperation is a right and duty for all peoples and all nations, which should share with one another their knowledge and skills."); The Mexico City Declaration on Cultural Policies World Conference on Cultural Policies, Final Report, UNESCO, November 1982 ("1. Every culture represents a unique and irreplaceable body of values since each people’s traditions and forms of expression are its most effective means of demonstrating its presence in the world."); see generally R. STAVENHAGEN, THE ETHNIC QUESTION: CONFLICTS, DEVELOPMENT AND HUMAN RIGHTS (1990); ECONOMIC, SOCIAL AND CULTURAL RIGHTS, supra note 167, at 229–40 ("Cultural Rights as Individual Human Rights,” Chapter 14).


indigenous peoples; the rights to stay and to not be displaced; the right to life; the right to property; the right to cultural property; (11) the right to development; (12)


259. See American Convention on Human Rights, supra note 26, art. 4; OAS Report, supra note 4, at 92 ("Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being."); ICCPR, supra note 60, arts. 1, 6; American Declaration of the Rights and Duties of Man, supra note 26, ch. 1; Novena Conferencia Internacional Americana, supra note 26; The Right to Life in International Law 33–61 (B.G. Ramcharan ed., 1985). Article 6 of the ICCPR states:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

ICCPR, supra note 60, art. 6.


261. See ILO Convention No. 107, supra note 25, art. 3; see also ILO Convention No. 169, supra note 25, art. 23.

262. See generally Question of the Realization of the Right to Development, Global Consultation on the Right to Development as a Human Right, U.N. Commission on Human
religious rights;263 (13) the right to association;264 (14) rights to a safe and healthy environment;265 and (15) "internal refugee rights" when mass displacement occurs because of environmental or development causes.266 Collectively, the list suggests a critical mass of wide-ranging support for a human rights claim for the injuries described in this Article.267 Ironically, however, advocacy of a "laundry list" of emerging rights may have the effect of slowing down the process of reaching international consensus and customary law status for specific rights within this "bundle."

However well meaning the voices in this discourse, quality control of the growing list is required to protect the credibility of the human rights approach to this serious problem and to avoid dissolution of the more evolved rights as they move toward customary law status. Regarding scholarship in the area of developing indigenous peoples' rights, Ian Brownlie observes:

Many writers ... are specialists in human rights, rather than general international law, and specialists in indigenous peoples rather than human rights. Some ... of these super-specialists suffer from super tunnel vision. It does not seem to occur to them that their subject of special interest belongs to a much wider world of normative development and, what is more, a world in which the


263. See Draft United Nations Declaration on the Rights of Indigenous Peoples, supra note 69, art. 12 ("religious and spiritual property" protections), art. 13 (protections of the practice of "spiritual and religious traditions"); ILO Convention No. 169, supra note 25, art. 7 ("spiritual well-being"); ICCPR, supra note 60, art. 18.

264. See American Convention on Human Rights, supra note 26, art. 16; ICCPR, supra note 60, art. 22.

265. See generally Rio Declaration, supra note 190; ILO Convention No. 169, supra note 25, art. 15.

266. Stavropoulou, supra note 258, recognizes that, "[t]o date, none of these environmental principles represent binding international law, nor do they refer explicitly to displacement. Some might, however, become customary international law." Id. at 735 (emphasis added).

267. I note expressions of skepticism regarding this mission. See, e.g., Robert Laurence, Learning to Live With the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra, 30 ARIZ. L. REV. 413, 428 (1988) ("I have little faith in the ability of public international law to protect any valuable rights. I have no faith in the ability of public international law to put bread on American Indian tables.").
concepts lying to hand have more fluency and political acceptability.268

In fact, a "rights test" has been proposed. International human rights scholars caution against characterizing every problem that merits the attention of the international community as an international human rights issue. Philip Alston, for instance, argues that a proposed new human right should fulfill certain conditions before being accorded international human rights status. According to Alston, such a right should fulfill the following conditions:

- reflect a fundamentally important social value;
- be relevant, inevitably to varying degrees, throughout a world of diverse value systems;
- be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations . . . ;
- be consistent with, but not merely repetitive of, the existing body of international human rights law;
- be capable of achieving a very high degree of international consensus;
- be compatible or at least not clearly incompatible with the general practice of states; and
- be sufficiently precise as to give rise to identifiable rights and obligations.269

One way to exercise quality control is to group the list of applicable human rights into two fundamental categories: (1) the rights of indigenous peoples to protect their cultural lands against destruction by TNCs and other outsiders; and (2) the rights of an indigenous group to continue to survive as a cultural group. Both the rights to life and to safety in one's home are universally recognized social norms. In similar fashion, the collective definition of "cultural land rights" meets the international rights test.

Although the legal perspectives represented by the rights delineated above are diverse and each one potentially dilutes the others, they do share the common goal of promoting the safety and survival of Amazonia's indigenous groups and their unique environment. The diversity of legal perspectives is noted to highlight the potential complexities and conflicts of interest, and to reiterate the responsibility all "voices" have to engage in international human rights law development discourse. As one scholar has succinctly noted, "[t]o address relationships is to resist abstraction and to demand context."

Reflection upon the best means of crafting a remedy for indigenous peoples' protection of their cultural lands does not stop with a decision to bundle rights. The bundle must be appropriate and defined so that it meets the threshold standard under customary international law standards. An "indigenous peoples' right" is insufficient. Although it is clear that international law has developed at a relatively rapid pace with regard to the protection of the environment, indigenous peoples, and their cultural lands, there is no internationally recognized "indigenous peoples' right." There is, however, a right to life. For indigenous peoples, a right to life requires a variety of protections: of cultural lands; of their cultural relationship to the environment; of a healthy environment; and of the multitude of variables that gives a "people" their unique identification and insures viability.

B. Claims of Genocide

Through exploitation of cultural land, TNCs pose a serious threat to the life and viability of indigenous peoples and their cultures. Do such activities constitute genocide? Again, the answer is dependent on context, but the problem is one of proof rather than of justiciability. Current activities of TNCs and the governments in Amazonia regarding oil exploration do not provide convincing evidence of an "intent" to commit genocide within the meaning of the Genocide Convention and as adopted by customary international law. The "intent" requirement of the Convention is clear on its face. Although oil exploration may have the effect of causing the extinction of a group, there is no clear

270. See Ritter, supra note 36 (discussing the "emergent convergence," the "subemergent divergence," the "natural law," the "international voice," the "community" and the "re-speaking" of "rights talk").

indication that TNCs or states have an "intent" to extinguish such groups.\textsuperscript{272} This does not mean that such intent may never be found. The factual situations presented with regard to the Ache in Paraguay and activities by a former Brazilian military regime in the Amazon River basin, for example, appear to meet the elements of the international tort and crime of genocide.\textsuperscript{273}

Present activity by TNCs does meet the threshold of "cultural genocide" under the Declaration of Indigenous Peoples' Rights.\textsuperscript{274} The Declaration, however, is not binding upon U.N. member states.\textsuperscript{275} More importantly, it does not currently comport with internationally accepted definitions of genocide and does not establish a recognized norm of customary international law.

C. Cultural Land and the Right to Life

The TNC activities described in this Article have the impact of destroying cultural land, the environment, and the indigenous groups traditionally occupying these lands. The injuries to the "people" and to the rainforest are irreparable. The TNCs' activities in Amazonia thus violate the "right to life" and the right to "cultural land," which spring from both property law and the variables contained in indigenous peoples' rights and needs for survival.

The recent Inter-American Commission on Human Rights report, finding the rights to life and culture to be overlapping, supports the underlying purposes of the American Convention on Human Rights and is an excellent model of legal analysis. The rights at issue are no more severable or discrete from one another than indigenous peoples are from their ancestral lands and culture. The extinction of the Cofan, Ache, and Tetetes peoples are proof enough of this interdependent dynamic. Do these rights meet the threshold standard of customary international law? The answer is yes, with the caveat that, as a judicial issue, it is highly fact dependent.

The Huaorani case, reviewed by the Inter-American Commission on Human Rights,\textsuperscript{276} is an excellent paradigm for advocacy activities in this fragile area of international law. The petition proc-

\textsuperscript{272} See supra note 116.
\textsuperscript{273} See supra note 124-126 and accompanying text.
\textsuperscript{274} See supra notes 110 & 127 and accompanying text.
\textsuperscript{275} See generally Schachter, supra note 176.
\textsuperscript{276} See OAS Report, supra note 4, at 77–95.
ess directly involved the indigenous peoples impacted by the dev-
estation and documented human rights violations supportable as
claims under the American Convention.277 Despite the diverse or-
organizations involved in the process,278 the rights presentation fo-
cused on the impact on the peoples' survival, regardless of
whether the claims would have been traditionally characterized as
"environmental," "procedural," or as "fundamental" human
rights.279 The hard work necessary for the presentation, the will to
endure, and remarkable collaboration of experts with a common
goal exemplify the required tasks performed in this case.

Moreover, international human rights norms are in significant
flux. The most recent progeny of Filartiga280 provides support and
hope to advocates seeking redress for human rights violations at
the hands of private actors. With the passage of the Torture Vic-
tims Protection Act,281 recent congressional action reflects signif-
ificant change, as do developments in treaty law such as ILO Con-
vention No. 169,282 the declarations and forum of the U.N.
Working Group on Indigenous Populations,283 changes in interna-
tional financial and political policies impacting upon cultural
lands,284 constitutional and other legislative reform in the domestic
law of states, the recent proposed declarations and decisions of re-
geonal based public law bodies, political actions of international
NGOs, world public education on the issues, and, perhaps most
importantly, the development and successes of domestic based in-
digenous group NGOs.

277. Id.
278. These include indigenous peoples' NGOs, The Confederacion Nacionalidades In-
digenas Amazonia Ecuatoriana (CONFENIAE), The Organizacion Nacionalidad Huari-
ani Amazonia Ecuatoriana (ONHAEE), the Sierra Club Legal Defense Fund, Inc., consul-
ting anthropologists, and technical experts. Id.
279. Petition Submitted to the Inter-American Commission on Human Rights, Organiza-
tion of American States by Confederacion de Nacionalidades Indigenas de la Amazonia
Ecuatoriana (CONFENIAE) on Behalf of the Huaorani Nation Against Ecuador (June 1,1990).
280. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); see also Kadic v. Karadzic, 70
F.3d 232 (2d Cir. 1995), cert. denied, 116 S. Ct. 2524 (1996); Hilaic v. Estate of Marcos, 25
F.3d 1467 (9th Cir. 1994); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1090–94 (S.D.
282. See ILO Convention No. 169, supra note 25.
283. See supra Part III.D.2.
284. See Carrasco, supra note 11, at 286–88; Cole, supra note 11, at 75–76; McAllister,
supra note 11, at 690–93, 742–43.
D. Remedies and Challenges in U.S. Courts

Scholars and advocates who take on the responsibility of exploring remedies for indigenous peoples, as well as fora for their "voices," will need to act with both diligence and caution. An important question they must answer is whether the time is ripe for a "test case" to determine if U.S. courts will support an international human rights claim by indigenous peoples against a TNC.

The international legal evolution towards a recognition of human rights must be analyzed with great legal care. In addition to the legal norms involved, scholars and advocates contemplating these issues must understand the goals of the peoples whose human rights and very existence are at stake. As Robert Cover reminds us:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue, a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

While scholars and advocates often serve as mere translators of the "voices" of others, an appropriate translation of the human and legal problems discussed in this Article may hold the key to the survival of the unique cultural identity, environment, and very existence of indigenous peoples in Amazonia and around the world.

APPENDIX: MAP OF AMAZONIA

Selected Indigenous Groups of Amazonia's Rain Forest

1. Metiagenca
2. Coroa
3. Nahua
4. Shipua
5. Achuar
6. Secoya
7. Acrenhua
8. Tami
9. Aquidiva
10. Aguaruna
11. Huaorani
12. Secoya
13. Gachua
14. Tamo
15. Tule
16. Yurupari
17. Yagua

Map Credit: Lucy M. Moran