

# INDIGENOUS LANDS AS CULTURAL PROPERTY: A NEW APPROACH TO INDIGENOUS LAND CLAIMS

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## INTRODUCTION

Over the course of the last several decades, public awareness of the plight of indigenous peoples has grown rapidly, but they are still perhaps the most disadvantaged segment of the world's population.<sup>1</sup> Among the many factors contributing to that ignoble title, indigenous peoples and their advocates have identified their rights to the lands they occupy as a key issue.<sup>2</sup> Scholars and indigenous peoples themselves argue that "rights to lands and resources are property rights that are prerequisites for the physical and cultural survival of indigenous communities."<sup>3</sup> Both the physical territory and the perpetuation of land tenure systems developed by those groups are necessary for the continuation of indigenous societies in their existing forms. "For many indigenous cultures, continued utilization of traditional systems for the control and use of territory is essential to their survival, as well as to their individual and collective well-being."<sup>4</sup>

International law currently protects the land rights of indigenous peoples in several ways,<sup>5</sup> the most effective of which are found in the property rights protection provisions of several human rights

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1. Julian Burger, *An International Agenda, in* STATE OF THE PEOPLES

dispossessed are beyond the scope of this N  
to regain control over lands of which they h  
*Relief for Ancient Deprivations of Property,*

KRON L. REV. 245 (2003).

3. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 53 (2001).

4. Rudolfo Stavenhagen, *Indigenous Peoples: Emerging Actors in Latin America, in* ETHNIC CONFLICT AND GOVERNANCE IN COMPARATIVE PERSPECTIVE 1, 11 (1995).

5. *See infra* note 45 and accompanying text.

instruments.<sup>6</sup> Indigenous peoples, however, often have difficulty proving that they have a cognizable property interest in their traditional lands, making the human rights instruments futile. Arguing that indigenous lands are the cultural property<sup>7</sup> of indigenous groups may be a useful way of proving the necessary property interest.

This Note explores the possibility of bringing together the divergent fields of indigenous land rights and cultural property to provide more expansive protection for indigenous lands. The combination is not a panacea, but it can both demonstrate a property interest in the land—thereby bringing it within the protection of human rights treaties—and focus the discussion on the fundamental interest underlying indigenous land claims: cultural survival. Part I discusses who indigenous peoples are and why they are searching for new ways to protect their traditional lands. Part II introduces the idea of cultural property and the two ways in which it is conceptualized. Part III applies those cultural property concepts to indigenous land claims, showing that cultural property can be a useful way of conceptualizing and demonstrating indigenous land claims.

## I. WHO INDIGENOUS PEOPLES ARE AND WHY THEY ARE LOOKING FOR MORE PROTECTION FOR LAND CLAIMS

### A. *Indigenous Peoples, Indigenous Lands, and Their Historical Treatment*

Before delving into the legal protections currently given to indigenous peoples and their lands, it is important to understand who indigenous peoples are, what indigenous lands are, and the historical treatment of both by the Western World. When one hears “indigenous peoples,”<sup>8</sup> the images that first come to mind are often of

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6. See discussion *infra* Part I.

7. See discussion *infra* Part II.

8. Indigenous peoples are referred to by a variety of different names in international legal circles. Other than indigenous, the most common adjective used is tribal. Various authors and organizations demonstrate a preference for one term or another. For example, the International Labor Organization (ILO) refers to “tribal populations” and their lands, whereas the UN uses “indigenous peoples.” Convention Concerning the Protection and Integration of Indigenous Populations and Other Tribal and Semi-Tribal Populations in the Independent Countries, June 2, 1959, 107 I.L.O. 1957, art. 11.; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). Some terms have different meanings in different academic disciplines. For example, in anthropology the word “tribe” connotes a

hunters and gatherers in the Amazonian rainforests or herders on the African Savannah, but indigenous peoples can be found in at least seventy-four countries around the world and are estimated to account for 6 percent of the world's population.<sup>9</sup> Creating a definition of such a large and diverse group is a difficult task. Although there is no widely accepted definition of indigenous peoples under international law,<sup>10</sup> many attempts at a definition have been put forward.

At the most basic level, "indigenous peoples are best defined as . . . groups traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond." They "are, and desire to be, culturally, socially and/or economically distinct from the dominant groups in society."<sup>11</sup>

The International Labor Organization (ILO) laid out one of the most widely cited<sup>12</sup> definitions of indigenous peoples.<sup>13</sup> The ILO created a two-part definition; a group needs to satisfy only one part to be considered an indigenous people. The first part includes those "whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations."<sup>14</sup> The second part includes those who are "descen[d] from the populations which inhabited the country . . . at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain

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specific type of social organization, so an anthropologist would not use "indigenous" and "tribal" interchangeably. THE COLUMBIA ENCYCLOPEDIA (6th ed., 2001), available at <http://www.bartleby.com/65/>. These organizational preferences and discipline-specific definitions are generally ignored in the legal literature and will be ignored in this Note.

9. Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 1, 2 (1994).

10. Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations—Emergent International Rights and Wrongs*, 38 VA. J. INT'L L. 331, 346 (1998).

11. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 60 (1999). It is worth noting that all of these definitions exclude some of the most well-known land disputes, such as the one fueling the Israeli-Palestinian conflict.

12. See, e.g., Anaya & Williams, *supra* note 3, at 56; Wiessner, *supra* note 11, at 111–12 (citing the ILO definition of indigenous peoples).

13. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 169 I.L.O. 1989, art. 1(1). See *infra* note 51 and accompanying text.

14. *Id.* art. 1(1)(a).

some or all of their own social, economic, cultural and political institutions.”<sup>15</sup>

Defining “indigenous lands” poses similar problems,<sup>16</sup> primarily in creating a definition that accommodates the variety of uses and land tenure systems utilized by indigenous peoples. The Brazilian Constitution contains one of the most expansive definitions.<sup>17</sup> It defines indigenous lands as those used by indigenous peoples in any of four ways: those “occupied by [indigenous peoples] on a permanent basis, those used for their productive activities, those indispensable for the preservation of environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions.”<sup>18</sup>

15. *Id.* at art. 1(1)(b). Although this is the most common definition, other definitions of indigenous peoples abound. Another commonly cited definition states:

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

Jose R. Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations* para 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1986). Similarly, but not identically, another scholar asserts:

Most definitions agree that indigenous peoples descend from pre-colonial inhabitants, that they have a close connection to traditional lands and other natural resources, and that they maintain a strong sense of cultural, social, economic and linguistic identity. Indigenous peoples include native peoples, tribal peoples, aboriginals, and ‘first nations.’

John Alan Cohan, *Environmental Rights of Indigenous Peoples Under the Alien Tort Claims Act, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution*, 20 UCLA J. ENVTL. L. & POL’Y 133, 136 (2001/2002) (citations omitted). Many scholars, advocates, and experts prefer not to establish a definition of indigenous peoples but to allow for self-definition, typically with a list of indicia of indigeness. *See, e.g.*, Benedict Kingsbury, “Indigenous Peoples” in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT’L L. 414, 455 (1998) (listing the following four essential criteria: (1) self-identification as a distinct ethnic group; (2) experience of or vulnerability to “severe disruption dislocation or exploitation”; (3) historical connection with the region; and (4) the wish to maintain an identity as a distinct ethnic group).

16. The lands that indigenous peoples inhabit are called indigenous lands, tribal lands, or traditional lands. These labels are essentially interchangeable. *See supra* note 8.

17. Constituição Federal [C.F.] [Constitution] (Braz.) art. 231, § 1, *translated in* CONSTITUTIONS OF THE WORLD: FEDERAL REPUBLIC OF BRAZIL 125 (Gilbert H. Flanz & Patrice H. Ward eds., 2004).

18. *Id.*

Indigenous peoples have been struggling to protect their lands for centuries. When Europeans began colonizing other parts of the world, few protections were granted to indigenous peoples and their lands. John Locke articulated the quintessential European position on the rights of indigenous peoples: that they had no rights to lands they did not cultivate.<sup>19</sup> Because the land tenure systems of many indigenous groups did not reflect the cultivation patterns established in Europe,<sup>20</sup> many settlers believed they had free rein to take control of many indigenous lands.<sup>21</sup> The colonizers saw themselves not as dispossessing indigenous peoples but as creating economic use out of wasted land.<sup>22</sup>

However, not all European scholars were convinced that their compatriots could deprive indigenous peoples of their land so easily. Some believed that indigenous Americans were legitimate owners of their traditional lands<sup>23</sup> and argued that “those ambitious European States which attacked the American Nations and subjected them to their avaricious rule, in order, as they said, to civilize them, and [to] have them instructed in the true religion . . . justified themselves by a pretext equally unjust and ridiculous.”<sup>24</sup>

These two perspectives, articulated centuries ago, are essentially the two voices heard in the debate surrounding indigenous land rights today. Whereas indigenous groups continue to claim that they are the legitimate owners of their traditional lands,<sup>25</sup> dominant groups argue

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19. JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 102–03 (Prometheus Books 1986) (1690).

20. Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363, 365 (1999).

21. SHAUNNAGH DORSETT, *Land Law and Dispossession: Indigenous Rights to Land in Australia*, in *LAND LAW: THEMES AND PERSPECTIVES* 279, 280–1 (Susan Bright & John Dewar eds., 1998).

22. *Id.* at 281.

23. FRANCISCUS DE VICTORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* [On the Indians Lately Discovered] 128 (John Pawley Bate trans., Ernest Nys ed., Oceana Publications 1964) (1557); E. DE Vattel, *LE DROIT DE GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* [THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW, APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS] 116 (Charles G. Fenwick trans., James Brown Scott ed., Oceana Publications 1964) (1758).

24. DE Vattel, *supra* note 23, at 116.

25. See, e.g., *Final Written Arguments of the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights: In the Case of the Mayagna (Sumo) Indigenous Community of Awastigni Against the Republic of Nicaragua* (Unofficial

that indigenous peoples do not have any rights to land to which they do not hold title under national law and that indigenous land use should bow to the forces of economic development.<sup>26</sup> When dominant groups help indigenous peoples secure their land rights, it is often to stimulate economic development for the benefit of the state<sup>27</sup> or to protect the environment,<sup>28</sup> rather than to benefit the indigenous groups. Although not unchallenged, the Lockean position on the land rights of indigenous peoples continues to influence the practices of many governments.<sup>29</sup>

### *B. Protection of Indigenous Land Rights Under Domestic Law Today*

In recent decades, activists, legal scholars, and indigenous groups themselves have challenged the traditional Lockean conception of indigenous peoples' property rights. As a result, protection for indigenous peoples' lands is generally increasing, but not all efforts to

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Translation), 19 ARIZ. J. INT'L & COMP. L. 325, 327 (2002) [hereinafter *Final Written Arguments of the Inter-American Commission*].

26. See, e.g., *Reply of the Republic of Nicaragua to the Complaint Presented Before the Inter-American Court of Human Rights in the Case of the Mayagna Community of Awas Tingni* (Submitted Oct. 21, 1998) (Unofficial Translation), 19 ARIZ. J. INT'L & COMP. L. 101, 120–25 (2002) [hereinafter *Reply to Awas Tingni Complaint*].

27. Property rights programs have been used in attempts to spur economic growth, on the theory that people with secure property rights are more likely to invest in improvements on their land. See, e.g., Jean O. Lanjouw, *A Difficult Question in Deed: A Cost-Benefit Framework for Titling Programs*, 45 WM. & MARY L. REV. 889, 950 (2004) (“There is good reason to believe that a formal system of property rights can spur economic growth.”) The efficacy of such programs, however, has been challenged. See, e.g., ANNA KNOX ET AL., *Property Rights, Collective Action, and Technologies for Natural Resource Management: A Conceptual Framework*, in INNOVATION IN NATURAL RESOURCE MANAGEMENT: THE ROLE OF PROPERTY RIGHTS AND COLLECTIVE ACTION IN DEVELOPING COUNTRIES 12, 19 (Ruth Meinzen-Dick et al. eds., 2002) (observing that where indigenous property rights persist, title does little to strengthen land rights of community members).

28. *C.f.*, e.g., Convention on Biological Diversity, U.N. Conference on Environment and Development, UNEP.Bio.Div./CONF. L2.1992, art. 8 (1992) (stating that, “[s]ubject to [their] national legislation,” the signatories shall “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”).

29. See, e.g., Wayne T. Brough & Mwangi S. Kimenyi, *Property Rights and the Economic Development of the Sahel*, in THE REVOLUTION IN DEVELOPMENT ECONOMICS 163, 166–75 (James A. Dorn et al. eds., 1998) (documenting colonial efforts to change land use patterns in the Sahel); Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, in PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 69, 70 (G.E. van Maanen & A.J. van der Walt eds., 1996) (arguing that the traditional conception “remains powerful and exerts substantial determinative force in adjudicating and developing the rules of property law”).

expand protection have been successful. Those countries attempting to secure indigenous land rights are doing so primarily in two ways. The first approach is to register and title indigenous lands either to communities as a whole or to certain individuals within the group.<sup>30</sup> The second approach is to set up a reserve system whereby indigenous groups do not receive formal title to their lands, but the lands are demarcated and protected as reserves for the indigenous groups.<sup>31</sup> Neither approach is necessarily preferable to the other across the board because each country and indigenous group has its own unique needs and circumstances. Hunters and gatherers that forage lands also used by other groups might best be served by a reserve system. Primarily agrarian groups settled in a specific location, on the other hand, might benefit most from land titling; some groups might be best served by individual title and other groups by communal title.

Even in those countries that have been making great strides in the legal protection of indigenous land rights, actually implementing those policies has been difficult. In Australia, for example, the courts made a dramatic about-face from their traditional holding that the annexation of the continent to the British Empire vested the Crown with ownership of all lands on the continent, including those inhabited by indigenous peoples.<sup>32</sup> In an effort to implement this new holding and formalize indigenous groups' rights to lands that previously had been believed to have vested in the Crown, the legislature enacted the Native Title Act to register land titles for indigenous peoples.<sup>33</sup> In interpreting the Native Title Act, the Australian High Court created strenuous qualification requirements.<sup>34</sup> For example, to receive title, a group must prove that its members are the direct biological descendants of the original inhabitants, have maintained a close connection to the land, and live according to substantially the same customs as their ancestors did at the time of

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30. For example, Mozambique allows the registration of land titles in the name of the local community. Jon D. Unruh, *Land Dispute Resolution in Mozambique: Evidence and Institutions of Agroforestry Technology Adoption*, in INNOVATION IN NATURAL RESOURCE MANAGEMENT, *supra* note 27, at 166, 182.

31. For a survey of approaches taken by countries around the world, see Wiessner, *supra* note 11, at 66–92.

32. *Milirrpum v. Nabalco*, 17 F.L.R. 141, 245 (Sup. Ct. N. Terr. 1971); *Mabo v. Queensland [No.2]* (1992) 175 C.L.R. 1, 58 (Austl.).

33. Native Title Act, 1993 (Austl.).

34. *Mabo*, 175 C.L.R. at 61.

colonization.<sup>35</sup> Thus, the Australian courts first found a legal basis for indigenous land rights by reinterpreting the effect of Australia's annexation to the British Empire, then later curtailed the ability of indigenous peoples to gain title to their lands under the Native Title Act.

In 1997, Bangladesh began registering land titles to indigenous individuals in its Central Highlands, an area historically comprised of communal lands.<sup>36</sup> The program has allowed indigenous farmers to secure both their land tenure and their livelihood, but less communal land has meant that poorer members of the indigenous community, who did not have their own lands to title, have fewer places to gather food and other necessary supplies.<sup>37</sup> Privatization in the Central Highlands has also contributed to the decline of traditional methods of helping the poor and indigent, as individual needs have taken new priority relative to communal needs.<sup>38</sup> Despite the best efforts of a program designed to make indigenous peoples more secure, the Bangladeshi titling program has contributed to the further impoverishment of the indigenous poor and the collapse of the traditional means by which the indigenous society took care of its needy members.

Despite the considerable difficulties in implementing the programs in Australia and Bangladesh, many other attempts have faced even more serious problems. Some countries have passed laudable new laws only to have deep-seated discrimination on the part of the dominant group impede implementation.<sup>39</sup> In other places, indigenous groups themselves have refused to accept the new system<sup>40</sup>

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35. *Id.*

36. Raja Devasish Roy, *Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh*, 21 ARIZ. J. INT'L & COMP. L. 113, 122 (2004).

37. *Id.* at 153.

38. *Id.* at 154.

39. Wiessner, *supra* note 11, at 84–86 (documenting the difficulties faced by countries such as Bolivia and Guatemala).

40. In Kenya, for example, the government established group ranches with borders that conflicted with traditional migration patterns; the Maasai disregarded ranch boundaries and have continued their traditional, semi-nomadic patterns. Jean Ensminger, *Culture and Property Rights*, in *RIGHTS TO NATURE: ECOLOGICAL, ECONOMIC, CULTURAL AND POLITICAL PRINCIPLES OF INSTITUTIONS FOR THE ENVIRONMENT* 179, 193–94 (Susan S. Hanna et al. eds., 1996). Indigenous peoples in Papua New Guinea responded to a 1995 proposal to register traditional lands with protests and riots, forcing the initiative to be postponed. Wiessner, *supra* note 11, at 91.

because new land regimes and institutions that do not fit with existing norms are not easily incorporated into indigenous society.<sup>41</sup> Critics argue that some attempts to secure indigenous land rights are not actually intended to benefit indigenous peoples; creating a land tenure system that conflicts with traditional practices can cause changes in the indigenous society that can be used by governments to force social change within the indigenous group.<sup>42</sup>

Throughout the world, domestic governments are trying to find ways to protect indigenous peoples and their land rights.<sup>43</sup> Many domestic laws, however, do not give indigenous communities the protections they purport to ensure.<sup>44</sup> Indigenous peoples and their advocates have accordingly turned to international law for help.

### C. *Protection of Indigenous Land Claims under International Law*

International intergovernmental organizations have tried to protect indigenous land rights in a variety of ways,<sup>45</sup> but those

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41. Ensminger, *supra* note 40, at 183.

42. Joel M. Ngugi, *Re-Examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration*, 25 MICH. J. INT'L L. 467, 485-86 (2004).

43. See generally Wiessner, *supra* note 11.

44. Geer, *supra* note 10, at 387.

45. Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189, 190 (2001). Indigenous groups also make claims based on political self-determination, historical sovereignty, minority status, and indigenous status. *Id.*

Political self-determination is essentially the right of a group to determine the rules by which it will live; it can mean anything from complete sovereignty as an independent state to the autonomy of a minority group within a larger state, such as the position of Native American nations in the United States. Wiessner, *supra* note 11, at 116. Indigenous groups seeking sovereignty usually seek to find autonomy within a larger state. Kingsbury, *supra* at 244. This self-determination without sovereignty finds little support in international law, Geer, *supra* note 10, at 385, so it is largely dependent on the dominant group's willingness to cooperate in the establishment of such a regime.

An example of a claim based on the historic sovereignty of the group, although not made by an indigenous group, is Lithuania's claim that it was never legally annexed to the Soviet Union and, therefore, never lost its sovereignty. Kingsbury, *supra* at 234-35. The international community, however, never fully accepted that argument, and those who did accept it acknowledged that the rule on which it was based was recently developed. *Id.* at 235. Claims based on historic sovereignty typically do not succeed when sovereignty is traced to precolonial times, because at the time of colonization conquest was a valid means of acquiring territory. See *id.* ("[T]here are not necessarily legal implications for groups forcibly incorporated into existing states in earlier periods.").

Claims made as minority groups are quite common, and include claims by Native Americans in the United States seeking affirmative action treatment on the same grounds as

focusing on human rights claims have proven the most effective, finding acceptance in both domestic and international courts.<sup>46</sup>

Two types of human rights provisions are used: those that protect the right of indigenous peoples to maintain their cultural system<sup>47</sup> and those that protect the right to property.<sup>48</sup> Indigenous peoples have used the former category by arguing that their cultural system cannot be maintained without securing rights to traditional lands.<sup>49</sup> This Note, however, focuses on the latter category and the possibility of using cultural property arguments to establish the requisite property interest. Protections for property rights themselves fall into two categories: those with generally applicable property protection

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other minorities. Internationally, these claims are most often based on Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which protects “all those characteristics necessary for the preservation of their cultural identity” and states that “persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” ICCPR, adopted Dec. 19, 1966, art. 4, S. Exec. Doc. E, 95-2, at 24 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The UN Human Rights Committee has affirmed that enjoyment of this right requires protection of traditional lands, recognizing that “culture manifests itself in many forms including in a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.” General Comment No. 23 (50), U.N. GAOR, Hum. Rts. Comm., 50th Sess., 314th mtg., ¶ 7 U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994). However, many indigenous leaders protest simply being dubbed minorities, believing the term fails to recognize their unique situation. Kingsbury, *supra* at 204.

Claims based on indigenous status emphasize the “wrongful deprivation, above all, of land, territory, self-government, means of livelihood, language and identity.” *Id.* at 244. For many, both within and outside indigenous groups, this appeal to history and identity is the strongest argument indigenous peoples can make, but it is not yet fully supported by international law. *Id.* A number of proposed documents following this approach, if approved, would essentially create a special subset of human rights applicable only to indigenous peoples. *See, e.g.*, United Nations Draft Universal Declaration on the Rights of Indigenous Peoples (UDRIP), 11th Sess., U.N. Doc. art. 4, 25–26, E/CN.4/Sub.2/1994/2/Add.1 (1994) (recognizing the right of indigenous peoples to “own, develop, [and] control” traditional lands); Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., 133d Sess., Art. 18, OEA/Ser L/V/II.95.doc.7, rev. 1997 (1997) (“Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as the use of those to which they have historically had access for their traditional activities and livelihood.”).

46. Kingsbury, *supra* note 45, at 202.

47. *E.g.*, ICCPR, *supra* note 45, at 24.

48. *See infra* notes 50–51 and accompanying text.

49. “Territorial rights are a central claim for Indigenous Peoples around the world. Those rights are the physical substratum for their ability to survive as peoples, to reproduce their cultures, and to maintain and develop their productive systems.” Osvaldo Kreimer, *Indigenous Peoples’ Rights to Land, Territories and Natural Resources: A Technical Meeting of the OAS Working Group*, 10 HUM. RTS. BR. 13, 13 (2003).

provisions and those that specifically protect indigenous property rights.

Generally applicable provisions may be used to protect the property rights of indigenous peoples because such provisions protect the property rights of all people. The most broadly applicable of those protections is in the United Nations' Universal Declaration of Human Rights. The Declaration states simply, "Everyone has the right to own property alone as well as in association with others," and "no one shall be arbitrarily deprived of his property."<sup>50</sup>

Other international treaties specifically call for the protection of indigenous peoples' property rights. For example, one ILO convention speaks directly to the rights of indigenous peoples, stating, "The rights of ownership and possession of the [indigenous] peoples concerned over the lands which they traditionally occupy shall be recognized."<sup>51</sup>

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50. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). The OAS provides similar protection in its American Declaration on the Rights and Duties of Man and the American Covenant on Human Rights. American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/ser.L/V./II.23, doc.21 rev.6, art. 23 (1948) (giving all peoples the right "to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home"). Read in combination with the American Declaration's preamble, which states that it is "the duty of man to preserve, practice and foster culture by every means within his power," *id.* at prmb., Article 23 can be interpreted to require the recognition of communal lands as well as individual property rights as a means of preserving and fostering culture, American Convention on Human Rights, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, art. 21 (entered into force July 18, 1978). The American Convention is more protective of indigenous land rights than is the American Declaration, but it also binds fewer states. The Inter-American Court for Human Rights (IACHR) has held that the nondiscrimination provision in Article 1(1) of the Covenant requires that Article 21 protect indigenous lands. The Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at 75 (Aug. 31, 2001) [hereinafter *Awas Tingni Case*].

51. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 13, art. 14(1). This provision is especially potent for indigenous peoples when framed by Article 13(1), which provides special protections for cultural and spiritual values related to land. *Id.* art 13(1). Convention 169 replaced an earlier version, 107, which called for indigenous group ownership of traditionally occupied lands. Convention Concerning the Protection and Integration of Indigenous Populations and Other Tribal and Semi-Tribal Populations in the Independent Countries, June 2, 1959, 107 I.L.O. 1957, art. 11. Other international organizations have provided similar protection. The UN specifically addressed indigenous land rights in the UN Convention on the Elimination of Racial Discrimination. See 11th Sess., U.N. Doc. art. 26, E/CN.4/Sub.2/1994/2/Add.1 (1994) ("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."). The OAS's Inter-American Charter of Social Guarantees requires states to protect the "lives and property" of their indigenous peoples. Inter-American

*D. Difficulties in Securing Protection for Indigenous Lands under International Law*

Although international human rights law protects property rights, several hurdles face indigenous groups attempting to secure land rights under these provisions. The primary difficulty lies in establishing that their interests in land rise to the level of property interests. This difficulty derives from basic differences in the understanding of what constitutes property.<sup>52</sup>

The term “property,” as used in international treaties and conventions, has a meaning independent of that in domestic legal systems, but the exact definition is unclear.<sup>53</sup> The traditional Western model of property, which dominates both international law and the domestic laws of many countries around the world, centers on the idea of a single owner holding rights to property to the exclusion of all others.<sup>54</sup> This Western construction of property differs greatly from that of many indigenous systems, in which property rights, especially those with respect to land, do not vest in individuals<sup>55</sup> but rather in the community as a whole. “Communal, land-based peoples conceive of and interpret ownership in ways that are foreign to, and diminished by, [Western] property regimes.”<sup>56</sup> Communal claims not only do not fit within the traditional Western conception of property,<sup>57</sup> but must

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Charter of Social Guaranties, Art. 39 (1948), *reprinted in* ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 432, 433 (Edmund Jan Osmanczyk ed., 1990). The OAS is also working on the Proposed American Declaration on the Rights of Indigenous Peoples, which would give indigenous peoples wider rights to traditional lands than they currently enjoy under international law:

(1) Indigenous people have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property. (2) Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood. . . . (3) . . . (iii) Nothing . . . shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.

Proposed American Declaration on the Rights of Indigenous Peoples, *supra* note 45, art. 18.

52. Hutt & McKeown, *supra* note 20, at 365.

53. Awas Tingni Case, *supra* note 50, para. 146.

54. Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 83 (2002).

55. Wiessner, *supra* note 11, at 120–21.

56. Riley, *supra* note 54, at 93.

57. Wiessner, *supra* note 11, at 121.

also confront the traditional Western belief that communal ownership is economically inefficient.<sup>58</sup> Further compounding the problem, replacing communal rights with individual rights may frustrate the adaptive purposes for which the indigenous society developed the practice.<sup>59</sup> The collateral effects of registering individual titles in Bangladesh's Central Highlands are a clear example of this. Titling land increased security for some individual land farmers, but it also contributed to the collapse of the society's mechanism for caring for its poor.<sup>60</sup>

These conceptual difficulties can be exacerbated by indigenous land tenure systems that are foreign to Western legal systems.<sup>61</sup> For example, it is common for indigenous groups to engage in practices that would fail to demonstrate ownership in Western legal systems, such as migration or overlapping land use with other groups.<sup>62</sup> “[S]uch traditional land and resource use patterns create forms of property that are recognized and functional within and among indigenous communities,”<sup>63</sup> but which are foreign to, and thus not easily handled by, the Western legal tradition.

Indigenous peoples and their advocates have forced both domestic and international legal communities to reevaluate the protections given to indigenous lands. Although many countries have attempted to deal with this issue domestically, shortcomings in those attempts have led indigenous peoples to turn to international human rights law for protection. Demonstrating that an indigenous group's interest in the lands it uses is a property interest has been difficult. In this effort, the concept of cultural property can be a useful tool to help indigenous groups establish property interests in their traditional lands and thereby come within the property protection provisions of international human rights laws.

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58. HENRY G. MANNE, *THE ECONOMICS OF LEGAL RELATIONSHIPS* 31 (1975). This argument, based on the tragedy of the commons theory, contends that individuals in a collective system will misuse land because no one individual bears the full cost of such misuse; the argument presumes that the use of communal property is uncoordinated. *Id.* at 30.

59. Wiessner, *supra* note 11, at 121.

60. *See supra* notes 36–38 and accompanying text.

61. Hutt & McKeown, *supra* note 20, at 365.

62. Anaya & Williams, *supra* note 3, at 45.

63. *Id.* at 43.

## II. CULTURAL PROPERTY

Cultural property is a term often used but not clearly defined. The basic idea behind it, though, is quite simple: some things are of such great cultural significance that they deserve special protection outside of traditional property law.<sup>64</sup> A classic example of the question posed by cultural property is, “Should we allow the owner of a Rembrandt to use it as a dartboard?”<sup>65</sup> Traditional doctrines of property law say yes, because one of the rights of ownership is the right to destroy the property.<sup>66</sup> Most people, however, cringe at the idea of the owner of a Rembrandt sitting at home, casually tossing darts at it. That cringe is the seed that grew into the concept of cultural property. The idea behind cultural property is that a cultural treasure, like a Rembrandt, is taken out of the regular property regime and accorded special treatment to protect and preserve the item or to ensure its public availability. The special treatment might involve government ownership of the cultural treasure<sup>67</sup> or the placement of limitations on the owner’s ability to alter, destroy, or transport the item.<sup>68</sup>

Section A will examine the two schools of thought on why cultural property should be protected, and Section B will then examine the place of cultural property in international law.

*A. The Property and Culture Schools of Cultural Property*

Although the basic idea of cultural property is easy to understand, determining the precise contours of what is protected and why is substantially more difficult. There are two different schools of thought on why cultural property is protected: the Property School and the Culture School.<sup>69</sup> These two schools are distinguished by their

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64. LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 110 (2003).

65. See JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 10 (1999) (querying whether anyone should “be allowed to destroy a great artist’s work”).

66. JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 772 (2001).

67. SAX, *supra* note 65, at 185.

68. *Id.*

69. The names of these schools come from Roger W. Mastalir, *A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under International Law*, 16 *FORDHAM INT’L L.J.* 1033, 1058–59 (1992–1993). Mastalir, in turn, based his schools on the two conceptions of cultural property discussed by John Henry Merryman, in *Two Ways of Thinking About Cultural Property*, 80 *AM. J. INT’L L.* 831, 832–33 (1986).

focus on protecting either the property itself or the culture that values the property. The Property School emphasizes protecting the item at issue because of the intrinsic value of the item itself, whereas the Culture School emphasizes protecting the item for the sake of preserving the culture to which the item is significant.<sup>70</sup> Because they each justify a cultural property regime differently, they also differ in what they consider to be cultural property. For that reason, both schools must be examined in detail.

The debate surrounding the Elgin Marbles—friezes from the Athenian Parthenon that were removed and that are currently displayed in the British Museum—provides a relatively clear example of the difference between the two schools. Greece argues that these marbles should be returned because they are an important part of Greek heritage and are valuable because of what they mean to the Greeks.<sup>71</sup> This is the Culture School perspective. The United Kingdom, meanwhile, argues that the Elgin Marbles should remain in the museum, where they can be preserved for posterity, rather than returned to the Parthenon where pollution in the Athenian air would irreparably damage them.<sup>72</sup> The United Kingdom articulates the Property School. Both schools seek to protect items of cultural significance, but their motivations for providing this protection differ. The Property School seeks to protect the item to preserve it so that all people can enjoy it. The Culture School seeks to protect the item for the sake of the culture from which it came.

The Property School represents the most conventional understanding of cultural property; the Rembrandt-as-a-dartboard example fits within this school. Property School theorists define cultural property as “property which, on religious or secular grounds, is . . . of importance for archaeology, prehistory, history, literature, art or science.”<sup>73</sup> To the Property School, the ultimate purpose of a cultural property regime is to protect the object itself. Items of

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70. Mastalir, *supra* note 69, at 1062–63.

71. See Neal Ascherson, *End Exile: For 300 Years We Have Had the Elgin Marbles, but the Case for Their Return Is Now Unanswerable*, THE OBSERVER (London), June 20, 2004, at Review Pages 5 (recounting the history of the Elgin Marbles and the debate currently surrounding them).

72. *Id.*

73. United Nations Education, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 234 [hereinafter UNESCO 1970].

cultural property contribute to a “common human culture”<sup>74</sup> and thus are the heritage of all humankind.<sup>75</sup>

Because the Property School protects culturally significant items as the heritage of all, its primary concern is preserving and disseminating cultural property so that it can be enjoyed by future generations. An individual may own an item of cultural property, but the rights of ownership should be limited to protect, and ensure public access to, the object.<sup>76</sup> In the Elgin Marbles example, the United Kingdom argues that the primary concern should be protecting the Marbles so that they can be viewed and valued by people throughout the world and by future generations.<sup>77</sup> Although the Property School recognizes that “[s]eparated from its context . . . the object and the context both lose significance,”<sup>78</sup> if the proper preservation and dissemination of the object requires that it be removed from its original context, the concerns of preservation and dissemination prevail.<sup>79</sup> Thus, the United Kingdom recognizes that the Elgin Marbles lose something by being in a museum rather than on the Pantheon, but believes that such loss is outweighed by the benefit of preserving the Marbles.<sup>80</sup>

On the other side, the Culture School argues that culturally significant items should be protected for the benefit of the society to which they belong. A central tenet of the Culture School is that “physical objects and other resources can be critical to human attempts to construct cultures, preserve memories, inspire wonder, embody aspirations, and ultimately understand—in some way—the place of individuals in the human and natural worlds.”<sup>81</sup> The Culture School recognizes that certain items are important to a group’s sense of identity.<sup>82</sup> Rather than protecting culturally significant items for the

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74. Merryman, *supra* note 69, at 831.

75. *Id.* at 853.

76. *See id.* (arguing that preservation is the most important element of cultural property policy).

77. *Id.* at 358.

78. *Id.* at 356.

79. *Id.* at 358.

80. *Id.*

81. UNDERKUFFLER, *supra* note 64, at 116.

82. Mastalir, *supra* note 69, at 1039.

sake of the items themselves, the Culture School seeks to protect them for the benefit of the groups to which they are significant.<sup>83</sup>

The central distinction between the Property School and the Culture School lies in what they are trying to protect and for whom they are protecting it. The Property School seeks to protect cultural products that are important in art, history, or science for the benefit of all humankind. The Culture School seeks to protect items for the benefit of the group from which they come.

### *B. Cultural Property in International Law*

Although cultural property is often regarded as a new development in property theory,<sup>84</sup> it has had an established place in international law for more than half a century. The first treaty on cultural property, the Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>85</sup> (Hague 1954), was intended to protect cultural property, particularly monumental buildings, in times of war.<sup>86</sup>

After establishing protection for cultural treasures during armed conflict, attention turned to the regulation of trafficking in cultural property. United Nations Education, Scientific and Cultural Organization Convention (UNESCO 1970) was created to oppose the “impoverishment of cultural heritage” through illicit trade in cultural property.<sup>87</sup> In UNESCO 1970, the states parties agreed to prevent the importation of cultural property traded contrary to the laws of the country of origin and to return illicit items found within their borders to their countries of origin.<sup>88</sup> The determination of what constituted cultural property and how to protect it was left up to the states, which responded in one of four ways:<sup>89</sup> blanket prohibitions on exchanges of

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83. *See id.* at 1046 (“In a sense, it is the culture that is being preserved at the expense of the property by this form of protection.”).

84. SINGER, *supra* note 66, at 770.

85. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague 1954].

86. Mastalir, *supra* note 69, at 1047.

87. UNESCO 1970, *supra* note 73, art. 2, 823 U.N.T.S. at 236.

88. *Id.* arts. 7, 9, 13, 823 U.N.T.S. at 240, 242, 244. Although UNESCO is important in the development of the international law of cultural property, its impact is muted by the fact that only two major market countries are party to the UNESCO 1970 agreement, the United States and Canada. Merryman, *supra* note 69, at 843.

89. Mastalir, *supra* note 69, at 1052–53 (citing JOHN H. MERRYMAN AND ALBERT E. ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* 53 (4th ed. 2003)).

cultural property,<sup>90</sup> prohibitions on the export of designated objects,<sup>91</sup> export license regimes in which licenses are routinely granted,<sup>92</sup> and leaving cultural property exportation unrestricted.<sup>93</sup>

UNESCO 1970 arguably advances the Culture School goals of protecting cultural integrity because it leaves the determination of how to handle cultural property and the return of illicit items to their countries of origin up to each individual country. Critics of the treaty, however, have articulated arguments that echo Culture School concerns. UNESCO 1970 is criticized for its focus on the legitimacy of property rights to cultural property rather than concern for the integrity of the cultures from which the property comes.<sup>94</sup> Another criticism is that giving a state the power to designate what will be protected as cultural property will likely protect items significant to the group that controls the government, but it may not protect items significant to minority indigenous groups. Rather than allowing indigenous groups to decide which objects and places are important to them and thus deserve protection, the significance of those objects and places is judged by the government, on the basis of values external to the group for whose cultural integrity they are important.<sup>95</sup>

Cultural property may be foreign to many, particularly to those in the Western legal tradition, but it is based on a shared desire to protect culturally significant items and enjoys an established position in international law.<sup>96</sup>

### III. A CULTURAL PROPERTY ARGUMENT FOR INDIGENOUS LAND RIGHTS

Indigenous peoples seeking protection for their traditional lands under international human rights conventions have had difficulty demonstrating that their traditional lands are in fact their property.<sup>97</sup> Because these difficulties arise from fundamental differences between indigenous practices and the dominant legal regime,<sup>98</sup> new “strategies

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90. This is the route adopted by Mexico and Guatemala. *Id.* at 1052.

91. Italy and France exemplify this approach. *Id.*

92. Great Britain and Canada followed this route. *Id.*

93. The United States opted for this approach. *Id.* at 1052–53.

94. *Id.* at 1054.

95. *Id.* at 1042 (criticizing UNESCO 1970 for this reason).

96. *See id.* at 1047–58 (documenting the development of cultural property law since 1954).

97. *See supra* notes 52–60 and accompanying text.

98. *See supra* notes 53–63 and accompanying text.

for the protection of [traditional] land rights of indigenous peoples must be found.”<sup>99</sup> Treating indigenous lands as cultural property might be just such a strategy.

The concept of cultural property has had an established place in international law for more than half a century.<sup>100</sup> The international law of cultural property, however, largely developed to control the transport of items of cultural significance.<sup>101</sup> Thus far, international cultural property laws have focused on preventing foreigners from destroying cultural property<sup>102</sup> and controlling the transfer of cultural property across borders,<sup>103</sup> leaving states to control domestic use as they see fit. The problem of indigenous land rights, however, springs from domestic governments’ failure to protect indigenous groups’ rights to the lands they occupy. It is the domestic treatment of indigenous lands that is of primary concern, but international cultural property treaties do not control domestic use.

Although existing international laws specific to cultural property cannot protect indigenous lands, the overarching concept of cultural property can and should inform the understanding of the “property” protections afforded by international human rights law. Because the meaning of “property” under international law is independent of its meaning under domestic laws,<sup>104</sup> and because that independent meaning remains unclear, cultural property concepts can be useful in developing that definition in a way beneficial to indigenous groups. By establishing that indigenous lands, like valuable works of art, should be protected under a regime of cultural property, indigenous peoples can bring their claims under the international human rights conventions protecting property rights.

The efficacy of such an argument, and the framing of it, depends on which conception of cultural property one adopts. Section A of this Part examines what that argument would look like from the Property School view; Section B examines it from the Culture School

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99. Geer, *supra* note 10, at 336–37.

100. The first international convention on cultural property entered into force in 1954 and protected buildings such as cathedrals and museums in times of war. Hague 1954, *supra* note 85, 249 U.N.T.S. at 240.

101. See, e.g., UNESCO 1970, art. 2, 823 U.N.T.S. at 236 (restricting the import and export of cultural property).

102. See, e.g., Hague 1954, *supra* note 85, 249 U.N.T.S. at 240.

103. See, e.g., UNESCO 1970, *supra* note 73, art. 2, 823 U.N.T.S. at 236 (prohibiting unauthorized sales of cultural property).

104. Awas Tingni Case, *supra* note 50, at 14.

view. Section C introduces a case study to examine an indigenous land claim through three different lenses: traditional property law, the Property School, and the Culture School.

*A. The Property School Applied to Indigenous Lands*

The goals of the Property School, the preservation and dissemination of culturally significant items that are part of a common human heritage,<sup>105</sup> generally call for items to be expertly cared for and made available to all people. Cultural property is protected by the Property School because products of cultures, whether paintings, sculptures, manuscripts, or buildings, are a manifestation of the human experience, and as such are important in art, history, and science.

Indigenous lands themselves are not the product of culture and so do not fit within these goals. The land on which a group resides shapes the way in which that group adapts to its environment and may bear the marks of that group (such as fences erected between agricultural lands or plants and animals brought in by the group), but the land itself was there before the group arrived and will be there after the group leaves. It is part of the always changing environment in which a group resides, but it is not itself the product of that group. This seemingly prevents land from being cultural property under the Property School.

However, the way in which an indigenous group lives, such as its social organization and its adaptation to the environment—the very culture that from which the property comes—constitutes “an alternative construction of the world”<sup>106</sup> that can and should be shared. The group’s access to and use of its traditional lands must be secured to protect that group and the way in which it lives. The Property School should consider culture, the most profound manifestation of the human experience, entitled to protection. As important as artifacts can be to a group’s collective identity, the land that an indigenous group inhabits is more significant. Aside from historical and religious sites that may be located on indigenous lands, indigenous groups have adapted to their environment. Forcing relocation, or even simply a change in the use of the natural resources

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105. See *supra* notes 73–80 and accompanying text.

106. Kreimer, *supra* note 50, at 14 (quoting Azelene Inacio-Kaingang).

in an area, can have a dramatic impact on the people affected.<sup>107</sup> Protecting rights to traditional lands is fundamental to the protection of indigenous cultures themselves. In an indigenous land claim, then, the thing to be protected for posterity is not a painting or an artifact, but the indigenous group's way of life.

Although protection for indigenous lands under the Property School satisfies the goals of the Property School (the preservation and dissemination of those things that reflect the various ways in which people construct the world), it does so for reasons antithetical to the goals of the indigenous peoples seeking protection. The Property School seeks to protect cultural property as the common inheritance of humankind.<sup>108</sup> The concern is not with the group whose culture is expressed in it, but with the harm suffered by the rest of the world if it is deprived of the opportunity to enjoy and learn from the culture. In the case of indigenous lands, this creates a fundamental problem; the protection is not intended to benefit the indigenous group, but rather enriches the rest of the world by preserving the indigenous system. The indigenous group thus loses a measure of control. It is no longer the beneficial recipient of protection, but rather is protected merely for the benefit of others. Some indigenous peoples have expressed their intent to resist any "commercialization" and exploitation of their cultures by refusing to sell artifacts or license their symbols for other nonindigenous uses,<sup>109</sup> a sentiment that would likely be felt even more strongly if traditional lands and the way of life associated with those lands were protected purely for the benefit of others.

Applying Property School ideas to indigenous land claims could cause problems far beyond indignity: the autonomy of indigenous groups may also be threatened. Outside groups would be empowered to determine arbitrarily which lands are protected and to what extent.<sup>110</sup>

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107. EMILIO F. MORAN, HUMAN ADAPTABILITY: AN INTRODUCTION TO ECOLOGICAL ANTHROPOLOGY 56–57 (2d ed. 2000). For a dramatic example of the disastrous effects that well-intentioned development projects can have on indigenous people, see Brough & Kimenyi, *supra* note 29, at 175.

108. See *supra* notes 74–80 and accompanying text.

109. See, e.g., Stephen D. Osborne, *Protecting Tribal Stories: The Perils of Propertization*, 28 AM. INDIAN L. REV. 203, 205–06 (2003–04) (describing the tension within the Native American community over the use of tribal symbols and stories outside the tribe).

110. See Mastalir, *supra* note 69, at 1042 (criticizing UNESCO 1970 because it allows domestic governments, not indigenous groups themselves, to determine which items deserve protection as cultural property).

Carried further, indigenous groups might be converted into “living museums,”<sup>111</sup> forced to keep their society artificially static for the benefit of those who wish to observe the culture.<sup>112</sup> Cultures are not static; they are constantly adapting to changes in the environment and reflecting decisions made by the people who create them.<sup>113</sup> Forcing a society to artificially freeze itself at a moment in time so that it can be preserved and studied takes away the autonomy and control which securing indigenous land rights is intended to ensure.

Although the Property School approach can theoretically protect indigenous land rights, doing so would grant those rights to indigenous peoples only for the benefit of the rest of the world. The basic presumptions underlying this type of cultural property argument deny indigenous peoples the dignity and autonomy that legal rights to traditional land are intended to secure. Rightfully, indigenous peoples “are determined to be part of this world as viable communities—indeed, as self-determining *peoples*—and not to be relegated to histories of conquest or pre-modernity, or to be among the objects of tourists’ voyeurism.”<sup>114</sup>

#### *B. The Culture School Applied to Indigenous Lands*

The Culture School concerns itself with the integrity and well-being of the group: culturally significant items are protected as a means to that end.<sup>115</sup> These goals are furthered by protecting indigenous lands because “rights to lands and resources are property rights that are prerequisites for the physical and cultural survival of indigenous communities.”<sup>116</sup>

The principles underlying the Culture School are aligned with the desires of most indigenous peoples, making the application of the cultural property argument to land rights surprisingly straightforward. Under the Culture School, the indigenous peoples themselves, rather

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111. Wiessner, *supra* note 11, at 127.

112. Forcing a group to maintain its way of life precisely as it is may be an extreme result, but there are examples of indigenous groups copying artifacts and designs from neighboring groups to capitalize on the trendiness of another group’s work or to take advantage of programs designed to benefit particular indigenous groups. G. Nasieku Tarayia, *The Legal Perspectives of the Maasai Culture, Customs, and Traditions*, 21 ARIZ. J. INT’L & COMP. L. 183, 185–86 (2004).

113. MORAN, *supra* note 107, at 56–57.

114. S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L. 13, 13 (2004).

115. See *supra* note 83 and accompanying text.

116. Anaya & Williams, *supra* note 3, at 53.

than all of humanity, are the beneficial recipients of the protection given to cultural property. Indigenous lands are the property of the indigenous peoples who occupy them not just because those indigenous people are there,<sup>117</sup> but because that land has been important in shaping the group and is important to the group's past, present, and future identity.

### C. *The Awas Tingni: A Case Study*

The *Awas Tingni* case is a real-world case study in the usefulness of applying cultural property concepts to indigenous land claims. This Section will examine that case, first by looking at how it would be resolved under traditional property law, then through the lenses of the Property and Culture Schools.

The Awas Tingni is an indigenous community on the Atlantic coast of Nicaragua.<sup>118</sup> Nicaragua's formal legal regime for recognizing indigenous lands is one of the most progressive in the Americas.<sup>119</sup> Despite this, every time that the leaders of the Awas Tingni group attempted to secure title to their lands, the government rejected their application on several grounds.<sup>120</sup> One of the reasons the Awas Tingni were not able to title their land was because the government was not satisfied with the group's ability to prove that it had been on that land as an independent entity at the time of colonization, a requirement for titling land to an indigenous group under Nicaraguan law.<sup>121</sup> The government also objected to the size of the hunting grounds claimed (it was a fifteen-day walk across their hunting grounds)<sup>122</sup> and to the fact that their hunting grounds overlapped with lands claimed by other indigenous groups.<sup>123</sup>

Nicaragua argued that all untitled land was the property of the state.<sup>124</sup> The Nicaraguan government had a policy of leaving "corridors" of state-owned land between areas titled to indigenous

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117. *Awas Tingni Case*, *supra* note 50, para. 151.

118. *Id.* para. 103(a).

119. S. James Anaya, *The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua*, 9 ST. THOMAS L. REV. 157, 158 (1996).

120. *Awas Tingni Case*, *supra* note 50, para. 105.

121. *See id.* (describing the government's argument that the group's possession was not ancestral).

122. *Final Written Arguments of the Inter-American Commission*, *supra* note 25, at 331.

123. *Awas Tingni Case*, *supra* note 50, para. 141.

124. *Reply to Awas Tingni Complaint*, *supra* note 26, at 121–22.

groups for future infrastructure projects; the land the Awas Tingni claimed fell into such a corridor.<sup>125</sup> Relying on this policy and the untitled status of the land, the government issued a logging concession that included a portion of the area the Awas Tingni claimed as their traditional land.<sup>126</sup>

After exhausting domestic legal remedies,<sup>127</sup> the Awas Tingni brought their case to the Inter-American Court for Human Rights (IACHR), part of the Organization of American States. The Awas Tingni filed their claim under Article 21 of the American Convention on Human Rights (American Convention), which contains a general provision for the protection of private property.<sup>128</sup> Members of the Awas Tingni community argued that the Nicaraguan government, in granting the logging concession, had deprived the community of its property.<sup>129</sup> Nicaragua argued that because the Awas Tingni had not secured title to the land and because the land was part of a “corridor” the government had set aside between lands claimed by other indigenous groups, the land belonged to the state. Therefore, the Awas Tingni’s private property rights had not been violated.<sup>130</sup>

When analyzed under the traditional Western property regime, the result likely favors Nicaragua. Although the definition of property under international law is independent of any domestic definitions, in a case in which an established domestic system allocating ownership of land already exists, that domestic law can be applied by the tribunal.<sup>131</sup> The Awas Tingni did not have title to their land, thus they were not the legal owners under Nicaraguan law. Because the state of Nicaragua owned the land under domestic law, a tribunal applying traditional property principles would have affirmed the logging concession.

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125. *Id.* at 102.

126. Awas Tingni Case, *supra* note 50, para. 103.

127. *Complaint of the Inter-American Commission on Human Rights, Submitted to the Inter-American Court of Human Rights in the Case of the Awas Tingni Mayagna (Sumo) Indigenous Community Against the Republic of Nicaragua*, 19 ARIZ. J. INT’L & COMP. L. 17, 34–35 (2002)[hereinafter *Awas Tingni Complaint*].

128. American Convention, *supra* note 50, art 21.

129. *Awas Tingni Complaint*, *supra* note 127, at 23

130. *Reply to Awas Tingni Complaint*, *supra* note 26, at 121–122.

131. The *Awas Tingni* case was the first time an international tribunal upheld a group’s collective land and natural resource rights after the domestic government failed to do so. S. James Anaya & Claudio Grosman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT’L & COMP. L. 1, 2 (2002).

Applying the Property School of cultural property, the logging concession would be invalidated and the Awas Tingni would receive continued access to the land. The Property School would protect the Awas Tingni's land not for the benefit of the Awas Tingni, but for the benefit conferred upon the rest of humanity by allowing the Awas Tingni to continue living on their land. These benefits include the opportunity to see how the Awas Tingni organize themselves, how they survive in their environment, and how they understand the world. This may or may not result in granting the Awas Tingni legal ownership of the land. For example, instead of granting the Awas Tingni title, the government could continue to own the land, but with restrictions placed on its ability to dispose of the land or the resources on it.<sup>132</sup> In a sense, the government would be holding the land in trust for all humanity to ensure the survival of the Awas Tingni. The government, then, might have the power to regulate what the Awas Tingni could do with the land in the future. Should the Awas Tingni decide to assimilate into the dominant culture, the government could have the power to regulate how they use the land, effectively preventing the assimilation.<sup>133</sup>

The Awas Tingni, however, sought ownership of the land and the autonomy that comes with such ownership. Their access to the land is secured by the Property School, but not their autonomy over it. Under the Property School, the Awas Tingni end up with but a partial victory, and for reasons that might ultimately do more harm than good.

Applying Culture School conceptions of cultural property, the Awas Tingni lands would be recognized as cultural property because of their importance to the group. The community's culture developed in response to the environment, and its sacred places are on that land. Indeed, the group's very way of life and survival as a distinct group would be imperiled if it were forced to leave its traditional lands or if those lands were fundamentally changed, such as by the logging of the forest. Because of its cultural importance to the Awas Tingni, the land must be regarded as their property, accompanied by formal ownership of the land and all the rights that go with it, including the

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132. See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 355 (arguing that preservation is an essential element of cultural property policy).

133. This could be a problem any time indigenous lands are protected for ecological reasons. The resulting difficult balancing of the interests of the indigenous group with environmental concerns is beyond the scope of this Note.

right to determine how the land will be used. This is the exact result that the Awas Tingni sought when they brought their case to the IACHR. Furthermore, the result is reached for the reason the Awas Tingni wanted title to the land: to preserve their way of life for their own benefit.

The IACHR employed arguments reminiscent of the Culture School in holding that the Awas Tingni did have a property right in the land that was protected by the American Convention,<sup>134</sup> although it did not make the cultural property argument in so many words. Although the Awas Tingni did not have official title to the lands they occupied, they were entitled to ownership of the lands due in part to the land's importance to the group's cultural legacy and the land's role in helping the Awas Tingni maintain itself in future generations.<sup>135</sup> The court held that the protection of property in Article 21 of the American Convention<sup>136</sup> includes protection of the communal property of indigenous groups, including lands, waters, and forests traditionally belonging to the group.<sup>137</sup> Such communal property is inalienable and inextinguishable.<sup>138</sup> In a resounding victory for indigenous communities, the IACHR made clear that in most cases mere possession by an indigenous group should be enough for official recognition and registration of the land.<sup>139</sup> Given these considerations, the court determined that the members of the Awas Tingni community had communal property rights to the lands they inhabited. Accordingly, the court ordered Nicaragua to pay damages<sup>140</sup> to the Awas Tingni and to establish a system to demarcate communal lands that protected land and natural resource rights.<sup>141</sup>

For several reasons, the *Awas Tingni* decision was a landmark for indigenous groups. First, the IACHR interpreted Article 21 in a way that "avoid[ed] the discrimination of the past and, rather than excluding indigenous modalities of property, it embrace[d] them,

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134. Awas Tingni Case, *supra* note 50, para. 148.

135. *Id.* para. 148. The IACHR began its decision by acknowledging that "relations to the land are not merely a matter of possession and production but a material and spiritual element which [the Awas Tingni] must fully enjoy, even to preserve their cultural legacy and transmit it to future generations." *Id.*

136. American Convention, *supra* note 50, art. 21.

137. Awas Tingni Case, *supra* note 50, paras. 148–150.

138. *Id.* para. 150.

139. *Id.* para. 151.

140. *Id.* paras. 167–71.

141. *Id.* para. 164.

marking a new path for understanding the rights and status of the world's indigenous peoples."<sup>142</sup> Second, "*Awas Tingni* prove[d] that well-settled legal principles can give way to indigenous people's fight for survival, even when human rights and Western property regimes conflict."<sup>143</sup> The IACHR did not intentionally apply Culture School principles, but its reasoning nonetheless reflected those principles and demonstrated that they can work to both establish property rights and support the goals of the indigenous movement.

This case study illustrates that employing traditional models of property and cultural property models to indigenous land claims can have opposite results. Furthermore, whether cultural property ideas are applied from the Property School perspective or the Culture School perspective also can affect the long-term outcome. In the short term, both schools protected the *Awas Tingni*'s rights to use and control its traditional lands; however, the differences in the goals of the two schools resulted in long-term differences as to who benefited from protection and how. The Culture School produced results that aligned with the goals of indigenous peoples because they were the beneficial recipients of the protection and because the autonomy and control that they sought over indigenous lands was secured.

#### CONCLUSION

The world's indigenous peoples have long struggled to maintain their separate existence. The fight for access to their traditional lands is a central element of that struggle; it is a fight that must be won to ensure their continued economic, social, cultural, and even physical survival. In the last few decades, a growing number of nonindigenous people from around the world have stood alongside indigenous people in this struggle. Although this assistance has made a world of difference for some indigenous groups, the inability of Western legal concepts to deal with the problems of indigenous peoples, both under domestic and international law, has crippled attempts to secure indigenous land rights.

The primary difficulty for indigenous groups has been in establishing property rights in their land that would trigger the property rights protection provisions in international human rights treaties. Applying the concept of cultural property to indigenous

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142. Anaya & Grosman, *supra* note 131, at 15.

143. Riley, *supra* note 54, at 83.

lands can help indigenous groups prove a property interest in their lands and work within these treaties.

When done under the Culture School of cultural property, treating indigenous lands as cultural property also helps focus the discussion on what indigenous peoples are really fighting for—cultural survival. Framing indigenous land claims in Culture School arguments would not only establish a cognizable property interest and trigger property rights protections, but it would also refocus the debate surrounding indigenous land claims on the issue most important to indigenous groups—securing control over their own way of life.