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## Keywords

Indigenous Peoples, Religious Freedom, Human Rights Law, Indian Law, International Law: History

# *AWAS TINGNI V. NICARAGUA* RECONSIDERED: GROUNDING INDIGENOUS PEOPLES' LAND RIGHTS IN RELIGIOUS FREEDOM

*Bryan Neihart**

## I. INTRODUCTION

The Inter-American Court on Human Rights ("IACHR") decided the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* ("*Awas Tingni*") over twelve years ago.[1] Since then, the decision has been the subject of many notes and articles focusing primarily on the decision's impact on the collective land and property rights of indigenous peoples.[2] Indeed, the *Awas Tingni* decision has been celebrated as a "landmark decision."[3] It prompted the IACHR to form a distinct body of jurisprudence for indigenous peoples, elaborated a canon of legal

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1. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 79 (Aug. 31, 2001).

2. *See, e.g.*, 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, 33 (2001) ("A discrete body of international human rights law up-holding the collective rights of indigenous peoples has emerged and is rapidly developing."); Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of* Awas Tingni v. Nicaragua, 24 ARIZ. J. INT'L & COMP. L. 609, 613-18 (2007) (analyzing *Awas Tingni* and its significance for the development of communal property rights for indigenous peoples); Jennifer A. Amiott, Note & Comment, *Environment, Equality, and Indigenous Peoples' Land Rights in the Inter-American Human Rights System:* Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 32 ENVTL. L. 873, 876 (2002) ("This case also illustrates the convergence of environmental, sustainable development, and human rights issues in indigenous land rights cases."); David E. Cahn, Note, *Homeless for Generations: Land Rights for the Chocoe Indians From Mogue, Panama*, 28 FORDHAM INT'L L.J. 232, 288 (2004) (discussing the significance of *Awas Tingni* for collective land ownership rights of another indigenous group); Anne Debevoise Ostby, Note & Comment, *Will Foreign Investors Regulate Indigenous Peoples' Right to Self-Determination?*, 21 WIS. INT'L L.J. 223, 235-36 (2003) (arguing that the validation of collective ownership rights in *Awas Tingni* is important for indigenous self-determination and sovereignty rights in international trade); Lindsey L. Wiersma, Note, *Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims*, 54 DUKE L.J. 1061 (2005).

3. Luis Rodríguez-Pinero, *The Inter-American System and the U.N. Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement*, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 457, 460 (Stephen Allen & Alexandra Xanthaki eds., 2011).

interpretation uniquely for indigenous peoples, and was the first legally binding decision by a regional court to recognize collective land rights.[4]

However, despite the *Awas Tingni* decision and the more recent adoption of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), a celebrated declaration recognizing the collective rights of indigenous peoples,[5] indigenous peoples continue to lose access to and possession of their land, territory, and resources due to state expansion. For instance, within the last year, Mayan leaders governing thirty-eight villages in Belize were excluded from discussions between government officials and a U.S.-based oil company for oil concessions on traditional Mayan lands;[6] San communities in Namibia have had difficulty gathering food for themselves because commercial cattle farmers erected illegal fences on their lands while the government ignores the problem;[7] and the Nez Perce Tribe of northern Idaho protested the transportation of oil equipment on the grounds that it damages historic and cultural resources and violates treaties.[8]

These recent examples illustrate that while the *Awas Tingni* decision and international instruments like UNDRIP articulate the right of collective land ownership for indigenous peoples, actual protection remains aspirational.

This note offers a new understanding of the *Awas Tingni* decision. Other notes have focused exclusively on the majority opinion in the *Awas Tingni* decision and its influence on conceptualizing collective ownership as a property right.[9] By contrast, this note centers on the concurring opinion by Judges Trindade, Gómez, and Burelli and offers a freedom-of-religion-based defense of collective land ownership. The concurring judges agreed with the court's decision on the merits but jointly filed a separate opinion highlighting how the Awas Tingni Community's land, territory, and resources must be understood as a part of their spiritual existence because the Community believed that certain landscape features were divine and performed their religious rituals on their land.

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4. *Id.* at 458-61.

5. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, Annex (Sept. 13, 2007) ("[I]ndigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.").

6. *Campaign Update—Belize: Oil Company Attempts Bribery, Corruption of Traditional Leaders*, CULTURAL SURVIVAL (Feb. 14, 2013), http://www.culturalsurvival.org/news/campaign-update-belize-oil-company-attempts-bribery-corruption-traditional-leaders.

7. Delme Cupido, *Land Grabs Threaten San in Namibia*, OPEN SOC'Y INITIATIVE FOR S. AFR. (June 7, 2013), http://www.osisa.org/indigenous-peoples/namibia/land-grabs-threaten-san-namibia.

8. *Nez Perce Committee Members Arrested During Protest*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 6, 2013), http://indiancountrytodaymedianetwork.com/2013/08/06/breaking-nez-perce-committee-members-arrested-during-protest-150764.

9. Most commentary has focused on collective ownership rights as a property right, rather than one based on religious freedom. *See* Wiersma, *supra* note 2, at 1078-79 (arguing for a more expansive protection of indigenous peoples' land by treating the land as cultural property). *But see* Rhett B. Larson, *Holy Water and Human Rights: Indigenous Peoples' Religious-Rights Claims to Water Resources*, 2 ARIZ. J. ENVTL. L. & POL'Y 81, 86-95 (2011) (examining indigenous peoples' religious-rights-based claims to water).

Based on the concurring opinion, this note argues that collective ownership rights for many indigenous peoples should also be grounded in the right to religious freedom. This approach strengthens collective ownership claims because religious freedom has been recognized as a basic human right since the Reformation while the right to collective land ownership has only been recognized recently.[10] Because of its history, religious freedom is codified throughout the world in many international instruments, regional documents, and domestic laws. Defending collective property rights in terms of religious freedom is also effective because even countries without collective rights most likely do have strong jurisprudence protecting religious liberty.[11]

Part II describes the Awas Tingni Community's spiritual relationship with their land, briefly discusses the background of the *Awas Tingni* decision, and reviews the court majority's decision while emphasizing the concurring opinion. Part III addresses some of the most prominent critiques of collective rights generally and responds to these criticisms through cases involving religious minorities to illustrate the broader point that concepts of religious freedom are a helpful lens through which to view indigenous peoples' claims to collective land ownership. Part IV proposes that international law, and many regional and domestic courts and governments, already acknowledges a special connection between indigenous peoples' land and their spirituality making a freedom-of-religion-based defense of collective property rights particularly useful.[12]

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10. MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 75-76 (2nd ed. 2008) ("[T]he rise of Protestantism reshaped prospects for religious freedom and helped ultimately to launch the broader Enlightenment struggle for human rights.").

11. *See* Clive Baldwin & Cynthia Morel, *Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation*, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 121, 131-32 (Stephen Allen & Alexandra Xanthaki eds., 2011).

12. Indeed, although *Awas Tingni* was decided in 2001, the Inter-American Commission on Human Rights has recently admitted two cases where indigenous peoples claim that failure to protect their land, territory, and resources has led to an infringement of their spirituality making an analysis of the connection between religious freedom and collective land ownership even more relevant. *See* Maho Indigenous Cmty. v. Suriname, Pet. 1621-09, Inter-Am. Comm'n H.R., Report No. 9/13, ¶ 2 (2013) (petitioners claiming they "maintain[] a spiritual, cultural and physical survival relationship with [their] lands, territories and natural resources" and that the state's concessions to third parties to "exploit the land, territory and natural resources" has harmed the community); Raposa Serra do Sol Indigenous Peoples v. Brazil, Pet. 250-04, Inter-Am. Comm'n H.R., Report No. 125/10, ¶ 46 (2010) (noting petitioners' argument that Brazil's "tolerance of the continuous presence of non-indigenous people on the *Raposa Serrado Sol* territory, who prevent the movement of the indigenous peoples and restrict their access to sacred sites and natural resources used by said peoples to express their beliefs and practice their culture").

## II. BACKGROUND

### *A. Factual Background*

The Awas Tingni Community is an indigenous community of approximately 600 people who live in the Northern Atlantic Autonomous Region of the Atlantic Coast of Nicaragua.[13] The Community claimed ownership based on the fact that it had lived in the territory for over 300 years.[14] Community members make their living by farming, hunting, and fishing and seek to preserve their natural resources by carefully selecting the things they consume.[15] The territory is owned collectively and only Awas Tingni members could use the land's resources.[16] As one member explained:

> The lands are occupied and utilized by the entire Community. . . . If a person does not belong to the Community, that person cannot utilize the land. There is no right to expel anyone from the Community. To deny the use of the land to any member of the Community, the matter has to be discussed and decided by the Community Council. When a person dies, his or her next of kin become the owners of those things that the deceased person owned. But since lands are collective property of the community, there is no way that one member can freely transmit to another his or her rights in connection with the use of the land.[17]

In addition to owning the land collectively, the Awas Tingni Community believes that its members share a spiritual relationship with their territory.[18]

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13. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 79, ¶ 103 (Aug. 31, 2001).

14. *Id.* ¶¶ 83(a), 103.

15. *Id.* ¶ 83(a).

16. *Id.*

17. *Id.*

18. This belief is not uncommon for indigenous peoples. For example, some indigenous peoples believe the earth is a sacred, living, and breathing entity. *See* ÅKE HULTKRANTZ, THE RELIGIONS OF THE AMERICAN INDIANS 46-47, 57-59, 281-85 (Monica Setterwall trans., 1967) (describing how rain, wind, the moon, crops, trees, and stones are considered sacred by various indigenous peoples); Stephanie Fried, *Shoot the Horse to Get the Rider: Religion and Forest Politics in Bentian Borneo*, *in* INDIGENOUS TRADITIONS AND ECOLOGY 71, 71-72 (John A. Grim ed., 2001) (describing how the indigenous peoples of Indonesian Borneo have fought with logging companies to maintain "ecologically oriented cultural practices" over their forests); Laurie Anne Whitt et al., *Belonging to Land: Indigenous Knowledge Systems and the Natural World*, 26 OKLA. CITY U. L. REV. 701, 703-05 (2001); Valerie Taliman, *Sacred Landscapes*, SIERRA, Nov.-Dec. 2002, at 36, 36, 38-39 (noting the sacredness of water to the Diné and the sacred sites of the Hopi and Lakota Sioux on natural terrain). Indigenous peoples' spiritual relationship to land may be based on any number of rituals: a site may be sacred because of "ancient myths or oral traditions"; traditional sites of ceremonial use such as offerings, dances, or spiritual visions; and significant gathering places for fish, wildlife, plants, or other natural resources. Andrew Gulliford, *Sacred Sites and Sacred Mountains*, *in* 3 AMERICAN INDIAN RELIGIOUS TRADITIONS: AN ENCYCLOPEDIA 945, 945-61 (Suzanne J. Crawford & Dennis F. Kelley eds., 2005).

Theodore Macdonald Jr., an anthropologist, explained how the hills located in the territory were part of the Community's religious worldview:

> The "spirits of the mountain" . . . which in Mayagna are called "Asangpas Muigeni", live in them, and it is they who control the animals throughout that region. To make use of those animals, one must have a special relationship with the spirits. Oftentimes . . . [the spiritual leaders] can maintain such a relationship with the spirits. Therefore, the animals' presence and the possibility of hunting them is based on their cosmovision and has much to do with the boundaries, because according to them these masters of the mountain own the animals . . . .[19]

To the Awas Tingni Community, hunting is "a spiritual act, and it has much to do with the territory with [sic] they utilize."[20] Another anthropologist, Rodolfo Stavenhagen Gruenbaum, acknowledged that the Community's land is a "symbolic and religious space, with which the history and current dynamics of those people are linked" and according to the Community "the land is seen as a spiritual place . . . as it is linked to human beings, since it has sacred places . . . ."[21] Based on these beliefs, any amount of relocation, exploitation, or development necessarily inhibits the Awas Tingni Community's ability to worship and perform rituals.

Transnational companies began exploring the Community's claimed lands with the permission of the Nicaraguan government and in December 1993, the Ministry of Environmental and Natural Resources ("MARENA") granted a logging concession to a Dominican owned company Maderas Y Derivados de Nicaragua, S.A. ("MADENSA") for logging on 43,000 acres of the Community's lands.[22] With the help of environmental and human rights activists, by May 1994 the Community negotiated a deal with MARENA and MADENSA whereby the community would benefit economically from the logging and the government would demarcate their traditional lands.[23] As the Community awaited official demarcation of their property, on January 5, 1995, the National Forestry Service approved a plan submitted by Sol Del Caribe, S.A. ("SOLCARSA") to harvest and manage timber in areas traditionally used by Awas Tingni without consulting them.[24] On July 11, 1995, the Awas Tingni submitted a letter to MARENA, requesting that no further steps be taken by SOLCARSA without the Community's approval.[25] Despite this request, on March 13, 1996, MARENA granted

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19. *Mayagna (Sumo) Awas Tingni Cmty.*, Judgment, No. 79, ¶ 83(c). Expert Charles Rice Hale, an indigenous cultures anthropologist also testified: "The sites for subsistence, such as hunting and fishing, and the key sites which have spiritual or cultural value, are a factor defining the traditional territory. There are key sites that are spiritual sites and are located within the area claimed." *Id.* ¶ 83(j).

20. *Id.* ¶ 83(c).

21. *Id.* ¶ 83(d).

22. S. James Anaya & Claudio Grossman, *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, 3 (2002).

23. *Id.* at 3-4.

24. *Mayagna (Sumo) Awas Tingni Cmty.*, Judgment, No. 79, ¶¶ 83(e), 103(j).

25. *Id.* ¶ 103(ñ).

SOLCARSA a 30-year logging concession to 62,000 hectares in the North Atlantic Autonomous Region inhabited by the Awas Tingni Community, apparently under the assumption that the disputed land was entirely government owned.[26]

On October 2, 1995, the Awas Tingni filed a petition with the Inter-American Commission on Human Rights ("Commission") to intervene to relieve the threats to its land and resource tenure alleging violations of the right to property, the right to cultural integrity, and other rights guaranteed by the American Convention on Human Rights ("Convention").[27] On September 11, 1995, and again on November 7, 1997, the Community filed an action for amparo (emergency relief) with the Nicaraguan judicial system, but these requests were denied.[28] The Commission decided to take the case in May 1998.[29] On June 4, 1998, the Commission filed a complaint with the IACHR claiming that Nicaragua violated Article 25 (right to judicial protection), Article 21 (right to property), and Article 1 (obligation to respect rights, including freedom of conscience and religion) of the Convention.[30]

### *B. Majority Opinion*

The IACHR began by assessing the Commission's claim that Nicaragua violated Article 25 of the Convention which guarantees the right "to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws . . . or by this Convention . . . ."[31] The court divided its Article 25 analysis into two parts: first, whether Nicaragua had a sufficient procedure for demarcating and titling indigenous land and second, "whether the amparo remedies submitted by members of the Community were decided in accordance with Article 25."[32] The court found that Nicaragua did not have an effective procedure to demarcate and title indigenous communal lands based on a lack of legislation and resources dedicated to the task and that the Nicaraguan courts violated Article 25 by not responding to the Community's requests for emergency relief within a reasonable amount of time.[33] The

26. *Id.* ¶ 103(k); S. James Anaya, *The Mayagna Indigenous Community of Awas Tingni and Its Effort to Gain Recognition of Traditional Lands: The Community's Case Before the Human Rights Institutions of the Organization of American States*, *in* LINKING HUMAN RIGHTS AND THE ENVIRONMENT 185, 187 (Romina Picolotti & Jorge Daniel Taillant eds., 2003). The Nicaraguan government had a practice of assuming that land without a private title gave the government the rights over that unclaimed land. Theodore Macdonald & S. James Anaya, *Demarcating Indigenous Territories in Nicaragua:* The Case of Awas Tingni, CULTURAL SURVIVAL Q., Fall 1995, at 69, 69.

27. *Mayagna (Sumo) Awas Tingni Cmty.*, Judgment, No. 79, ¶¶ 1, 6; Anaya & Grossman, *supra* note 22, at 5.

28. *Mayagna (Sumo) Awas Tingni Cmty.*, Judgment, No. 79, ¶¶ 23, 103(p), 103(r).

29. *Id.* ¶ 28.

30. *Id.* ¶ 2; Anaya & Grossman, *supra* note 22, at 2-3.

31. *Mayagna (Sumo) Awas Tingni Cmty.*, Judgment, No. 79, ¶ 106; Organization of American States, American Convention on Human Rights art. 25(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

32. *Mayagna (Sumo) Awas Tingni Cmty.*, Judgment, No. 79, ¶ 115.

33. *Id.* ¶¶ 124-27, 137.

Community's first request was ultimately decided almost a year and a half after it was originally filed and the second request took more than eleven months to process.[34]

Next, the IACHR considered the application of Article 21 of the Convention to the Awas Tingni Community's collective land ownership. Article 21 guarantees "the right to the use and enjoyment of his property" and prohibits the deprivation of property without just compensation for reasons of the public good or in accordance with the law.[35] After noting that Article 21 protected "the use and enjoyment of . . . property" rather than "private property," the court concluded that the article covered the communal property rights of indigenous peoples.[36] This is so even if domestic law does not recognize such a right of property.[37] Additionally, interpreting the term "property" in human rights treaties should be done so as to "adapt to the evolution of the times and . . . current living conditions,"[38] and indigenous peoples' customary law, including the understanding that possession may suffice as official recognition of that property.[39] Significantly, the court emphasized that "[f]or indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy . . . ."[40] "[L]and must be recognized and understood as the fundamental basis of [indigenous peoples'] cultures, their spiritual life, their integrity, and their economic survival."[41]

For the violation of Articles 21 and 25, the IACHR ordered Nicaragua to demarcate and title the Awas Tingni Community's property, and, in recognition of the Community's collective land ownership, instructed Nicaragua to do so "in accordance with their customary law, values, customs and mores" and awarded damages and litigation costs.[42]

### C. *Concurring Opinion*

Three judges filed a joint separate opinion voting in favor of the judgment but adding a reflection "about one of [the case's] central aspects, namely, the *intertemporal dimension* of the communal form of property prevailing among the members of the indigenous communities."[43] Their opinion quoted a member of the Awas Tingni who explained the importance of one of the Community's sacred hills:

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34. *Id.* ¶¶ 131-33.

35. American Convention on Human Rights, *supra* note 31, arts. 21(1)-(2).

36. *Mayagna (Sumo) Awas Tingni Cmty.*, Judgment, No. 79, ¶¶ 145, 148.

37. *Id.* ¶ 146 ("The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law.").

38. *Id.*

39. *Id.* ¶ 151.

40. *Id.* ¶ 149.

41. *Id.*

42. *Id.* ¶¶ 164, 167, 169.

43. *Id.* ¶ 1 (joint separate opinion of Trindade, J., Gómez, J., & Burelli, J.).

> Cerro Urus Asang is a sacred hill since our ancestors because therein we have buried our grandparents and therefore we call it sacred.
> . . .
> Our grandparents lived in this hill . . . . The utensils of war of our ancestors, our grandparents, were the arrows. There they are stored. (. . .) We maintain our history, since our grandparents. That is why we have [it] as Sacred Hill. (. . .) Asangpas Muigeni is spirit of the hill, is of equal form to a human [being], but is a spirit [who] always lives under the hills.[44]

The concurring judges found that indigenous peoples' right to collective property ownership should be viewed in light of the spiritual connection the Community has with the land; not only the landmarks themselves, like the hill that is considered sacred, but also with the territory dedicated to rituals such as burials and hunting.[45] The Community believes that human beings are integrated with nature and the world and that there is a duty to preserve the communal lands for future generations.[46] This communal conception "has a cosmovision of its own, and an important intertemporal dimension, in bringing to the fore the bonds of human solidarity that link those who are alive with their dead and with the ones who are still to come."[47]

The remainder of this note will attempt to analyze how the concurring opinion's emphasis on linking the Community's religious beliefs with their efforts to protect their land, territory, and natural resources could be implemented in theory and practice.

## III. RECONCILING GROUP RIGHTS WITH INDIVIDUAL RIGHTS

Individuals have been the focus of international norms on human rights since the inception of the concept of human rights.[48] One of the challenges faced by indigenous peoples, then, is how to claim group rights in the context of individual protections. There are two primary conceptual challenges to recognizing collective rights of indigenous peoples. The first is why the collective should be considered new rights-holders, over and above the individual rights-holders in the group. The second is how to address rights held by a group in the context of the traditional prominence of individual rights in human rights discourse. Professor Jack Donnelly poses five relevant questions that he believes need to be addressed in

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44. *Id.* ¶¶ 3-4 (footnote omitted).
45. *Id.* ¶ 5.
46. *Id.* ¶¶ 9-10.
47. *Id.* ¶ 15.
48. *But see* NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 8-14 (2d ed. 2003) (noting the abandonment of protections for national minorities after the failure of the League of Nations protection scheme, especially the Nazi's manipulation of the scheme to justify aggression against Poland and Czechoslovakia); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 57 (1995) [hereinafter KYMLICKA, MULTICULTURAL CITIZENSHIP].

order to overcome a "strong prima facie skepticism towards claims for the recognition of group human rights."[49]

### *A. Identifying Groups Holding Human Rights*

First, Donnelly asks "[h]ow do we identify the groups that ought to hold human rights?"[50] As he correctly notes, not all groups should hold rights and it is necessary to select certain groups that do, and others that do not, hold rights.[51]

Although there is no agreed upon definition of the term "indigenous peoples," scholars and international bodies have attempted to set the parameters for the groups of people who are considered indigenous peoples.[52] These factors include: occupation of ancestral land, original habitation of land, a distinct culture, especially vis-à-vis the dominant state, and involuntary displacement from ancestral and historical land.[53] Based on these factors, indigenous peoples are frequently viewed as distinct from national, ethnic, religious, or linguistic minority groups.[54] Simply by definition, identifying indigenous peoples as a group that ought to hold human rights does not by itself risk extending human rights to all groups.

It is even more unlikely that a religious-based right to collective property ownership will be extended to other groups. There are several tests to evaluate the legitimacy of claims based on religious practice or belief that could be extended to evaluating land claims.[55] For example, the substantial burden test allows the government to substantially burden a person's exercise of religion only when the burden "is in furtherance of a compelling governmental interest" and "is the least

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49. JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 49 (3d ed. 2013) (Professor Donnelly actually presents seven questions in regards to group human rights, however, only five are relevant for this note).

50. *Id.*

51. *Id.* (identifying "states, multinational corporations, gangs, and barbershop quartets" as examples of groups that should not be rights-holders).

52. *See, e.g.*, PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 37-40 (2002).

53. *See* International Labour Organization [ILO], Convention Concerning Indigenous and Tribal Peoples in Independent Countries No. 169 art. 1, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO Convention No. 169]; JOSÉ R. MARTÍNEZ COBO, 5 STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS: CONCLUSIONS, PROPOSALS AND RECOMMENDATIONS, at 1-2, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1987); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3 (2d ed. 2004); THORNBERRY, *supra* note 52, at 37-40.

54. *See, e.g.*, United Nations, Econ. & Soc. Council, Sub-Comm'n on the Promotion and Prot. of Human Rights, Prevention of Discrimination Against and the Protection of Minorities: Working Paper on the Relationship Between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples, ¶ 8, U.N. Doc. E/CN.4/Sub.2/2000/10 (July 19, 2000) (explaining that one of the differences between international instruments governing minority group and those governing indigenous peoples is that instruments for indigenous peoples seek to give them "a high degree of autonomous development" while minority instruments seek to ensure "a space for pluralism").

55. *See, e.g.*, Larson, *supra* note 9, at 101-08 (arguing that the "substantial burden" framework, the "economic analysis" framework, and the "customary law" framework could be used to evaluate indigenous religious-based claims to water).

restrictive means of furthering" that interest.[56] Another approach is the customary law approach where courts evaluate whether a custom has developed based on the elements of ancientness, reasonableness, certainty, and observation.[57]

Scholars have also developed at least three theories justifying the extension of group rights to indigenous peoples while withholding such rights from other groups.[58] The theories usually focus on the right to self-determination, which carry all rights of sovereignty, including the right to own land.[59] The first theory is based on indigenous peoples' historical sovereignty that was taken from them by colonization.[60] Self-determination merely restores indigenous peoples' inherent sovereignty.[61] Another theory is "that indigenous peoples need self-determination to preserve their pre-modern way of life."[62] Finally, Professor James Anaya argues that indigenous peoples are entitled to self-determination, and, consequently, to collective land ownership, as a remedy to redress the wrongs of colonization.[63] Under this theory, indigenous peoples need special remedies because they have been abused more systematically than other groups.[64] While these justifications are based on a history of systematic suffering, and could consequently be applied to many groups, indigenous peoples need protection through group rights to the extent that they cannot protect their interests through individual rights.

### *B. Exercising Group Rights*

Donnelly's second question asks "[w]ho exercises group rights?"[65] In other words, who in the group acts as the group's "right-holder[]"?[66]

This question can be easily set aside because Donnelly admits it is less applicable to indigenous peoples because they are normally "small, concentrated, and homogenous groups with a strong tradition of collective action."[67] Instead, the

56. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a) to (b) (2006).

57. Larson, *supra* note 9, at 106-07. *See* Alexkor Ltd. v. Richtersveld Cmty. & Others 2004 (5) SA 460 (CC) at 25 para. 51 (S. Afr.) (noting that under the South African Constitution, courts must apply customary law where applicable). For example, the Awas Tingni Community claimed ownership based on its 300-year presence on the disputed territory. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 79, ¶¶ 83, 103 (Aug. 31, 2001).

58. *See, e.g.*, ANAYA, *supra* note 53, at 107; WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP 125-26 (2001) [hereinafter KYMLICKA, POLITICS IN THE VERNACULAR].

59. KYMLICKA, POLITICS IN THE VERNACULAR, *supra* note 58, at 125-26.

60. *Id.*

61. *Id.*

62. *Id.* at 126.

63. ANAYA, *supra* note 53, at 106-10.

64. *Id.*

65. DONNELLY, *supra* note 49, at 50.

66. *Id.*

67. *Id.*

problem of who exercises the right of the group is more applicable for "large, heterogeneous, or widely dispersed" groups.[68]

### C. *Necessity and Success of Group Rights*

Donnelly's third and forth questions are related. He asks "[a]re the purported group rights necessary?" and "[w]hy should we expect group rights to succeed where individual rights have failed?"[69] The two questions are related because if individual rights succeeded then group rights would not be necessary, and if group rights would fail where individual rights have also failed, then group rights would be useless.

Philosopher Will Kymlicka, one of the world's foremost scholars on issues of multiculturalism, has developed a typology of the different types of minority rights that ethnic and national groups can plausibly demand.[70] The first is "self-government rights," which often demand political and territorial autonomy "so as to ensure the full and free development of their cultures and the best interests of their people."[71] Second, a defined group may demand "polyethnic rights."[72] These rights usually involve public funding for cultural practices or "exemptions from laws and regulations that disadvantage them."[73] The most common form of the latter is exemptions from laws for religious reasons.[74] One key difference between polyethnic rights and self-government rights is that polyethnic rights are intended to help minority groups maintain their cultural identity while participating in the economic and political institutions of the dominant society.[75] Finally, "special representation rights," is the right to a guaranteed seat in representative forms of government.[76]

The group-differentiated right argued for in this note falls in between self-government rights and polyethnic rights. The demands of the particular indigenous group, and the extent to which they want to be separate from the dominant society, will determine whether the group rights more closely resemble self-government, polyethnic, or a mixture of the two. For example, if an indigenous group wants total political autonomy, and part of that autonomy includes owning the land collectively, then it is asking for self-government rights.[77] However, if an indigenous group merely wants to be exempt from property laws that only recognize title vesting in an individual, then it is asking for polyethnic rights.[78]

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68. *Id.*
69. *Id.* at 51.
70. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 48, at 26-33.
71. *Id.* at 27.
72. *Id.* at 30-31.
73. *Id.* at 31.
74. *Id.*
75. *Id.*
76. *Id.* at 31-33.
77. *Id.* at 30.
78. *Id.*

Under either scenario, collective land ownership rights are necessary for indigenous peoples. Donnelly believes that the exercise of individual rights is sufficient to protect against the intrusion of the state,[79] but Kymlicka argues this is not necessarily true of minority groups: "Some groups are unfairly disadvantaged in the cultural market-place, and political recognition and support [of group-differentiated rights] rectify this disadvantage."[80] This is true when indigenous people may be "outbid or outvoted on resources and policies that are crucial to the survival of their societal cultures."[81]

For example, in *Navajo Nation v. U.S. Forest Service*, a number of Native American tribes challenged the Forest Service's decision to allow a ski resort to use recycled wastewater to create artificial snow and suppress fires on the San Francisco Peaks ("Peaks") in northern Arizona.[82] The tribes gather "plants, water, and other minerals from the Peaks" to perform healing and religious ceremonies.[83] They believe the Peaks are a living entity whose spirituality is desecrated by the wastewater, causing disasters around the world.[84] Despite the spiritual significance of the Peaks, the Ninth Circuit held that the use of recycled wastewater did not substantially burden the tribes' religious exercise because it did not force them to choose between their religion and a public benefit or coerce them to act contrary to their religion.[85] While the use of wastewater diminished the tribes' "subjective, emotional religious experience," "offen[ded their] religious sensibilities," and "decrease[d] the spiritual fulfillment they get from practicing their religion on the mountain," none of these factors were sufficient to find a substantial burden on the tribes' religious practices.[86]

This case highlights two key parts of Kymlicka's argument for the necessity of group-differentiated rights. First, government decisions, even those as seemingly innocuous as ski resorts, have the capacity to seriously harm indigenous peoples.[87] Second, indigenous peoples are at a disadvantage to protect themselves

79. DONNELLY, *supra* note 49, at 51 (while Professor Donnelly does have "prima facie skepticism toward . . . most group rights claims," he states that "Indigenous peoples probably present an exception").

80. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 48, at 109.

81. *Id.*

82. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1062-63 (9th Cir. 2008).

83. *Id.* at 1064.

84. *Id.*

85. *Id.* at 1070.

86. *Id.* This was not the first time the Indian tribes lost on a free exercise claim involving the Twin Peaks. In 1982, the Navajo and Hopi tribes alleged a free exercise violation when the Forest Service authorized a ski resort to construct parking, ski slopes, lodge facilities, and ski lifts on the mountain. Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983). The court held, even after recognizing that the tribes viewed the Peaks as a living deity often visited by important spirits, that the developments were not a free exercise violation because the tribes continued to have access to the Peaks and therefore could arguably still perform their religious ceremonies. *Id.* at 738, 744-45.

87. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 48, at 109 (noting that political decisions made by the majority can undermine minority cultures).

against these harms without specific group differentiated rights.[88] The group-differentiated rights, therefore, "ensure that members of the minority have the same opportunity to live and work in their own culture as members of the majority."[89]

Recognizing collective land ownership is also necessary for indigenous peoples because certain things, like socialization processes and kinship structures, can only be held by groups.[90] This is true of land ownership for many indigenous peoples. As described above, certain indigenous peoples do not believe that land can be owned individually.[91] Indigenous peoples' relationship to the land is often embedded in the historical continuity of the relationship with the land, the present lives of peoples on the land, and the future transmission of the lands to the next generations.[92] As Professor Jérémie Gilbert has written "land is not seen as a simple commodity but a space of socio-economic, spiritual and cultural anchorage. . . . Accordingly, the protection of Indigenous peoples' land rights fits more into the category of cultural rights rather than the right to property . . . ."[93] Therefore, because land is essential to indigenous peoples' culture, and many indigenous groups do not recognize private land ownership, it is impossible for those groups to protect their land through individual private property rights without making a fundamental change to their culture.[94] However, if the value inherent in a group is recognized, indigenous claims to land ownership has value in its protection of the culture itself, in addition to the protection of its individuals.[95]

Unfortunately, there is no way to guarantee the success of group rights where individual rights have failed. Indigenous peoples have been historically deprived of their land based on property law that explicitly rejected their collective claims of ownership. The common justification for dispossessing indigenous peoples was that land inhabited by indigenous peoples was unoccupied because it was not

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88. *Id.*

89. *Id.*

90. Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1038 (1983).

91. *See, e.g.*, Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 79, ¶ 83(a) (Aug. 31, 2001).

92. Jérémie Gilbert & Cathal Doyle, *A New Dawn over the Land: Shedding Light on Collective Ownership and Consent*, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 289, 294 (Stephen Allen & Alexandra Xanthaki eds., 2011).

93. Jérémie Gilbert, *Custodians of the Land: Indigenous Peoples, Human Rights and Cultural Integrity*, *in* CULTURAL DIVERSITY, HERITAGE AND HUMAN RIGHTS: INTERSECTIONS IN THEORY AND PRACTICE 31, 34-35 (Michele Langfield, William Logan & Máiréad Nic Craith eds., 2010).

94. *Id.* Of course, this argument would not apply to those indigenous peoples who hold land individually, but cultural differences between indigenous peoples groups is part of what makes groups indigenous. *See, e.g.*, ILO Convention No. 169, *supra* note 53, art. 1(b) (defining indigenous peoples as "peoples . . . who . . . retain some or all of their own social, economic, cultural and political institutions").

95. For example, the concept of cultural property necessarily involves recognizing the value of a culture itself, not only for the present, but also for future generations. Wiersma, *supra* note 2, at 1074-83 (asking if we should "allow the owner of a Rembrandt to use it as a dartboard?").

agriculturally developed nor inhabited by nation states.[96] While there is no guarantee that indigenous peoples' land will ultimately be better protected by recognizing collective ownership, their recent success internationally, provides hope.[97]

### *D. Recognizing Group Rights*

Finally, Donnelly asks whether "group *rights* [are] the best way to protect or realize the interests, values, or desires of a group?"[98] Specifically, he believes "we must ask whether recognizing a new group *human* right—which by definition would hold against all states for all groups of the designated type—is either necessary or desirable."[99] Those who agree with Donnelly's skepticism of group rights make a key distinction between a conceptual question and a substantive question.[100] For philosopher Michael Hartney, the conceptual question is divided between moral and legal rights and questions whether rights "can ever inhere in collectivities."[101] The substantive question asks "whether the protection of communities requires that they be endowed with rights."[102]

The moral conceptual question demands whether group rights are so "central to the well-being of individuals" that there is a sufficient moral reason to generate group rights.[103] Siegfried Wiessner, an international expert on indigenous peoples, has recognized that indigenous peoples derive their value from being members of their indigenous groups and that being a group member is essential to the pursuit of self-realization.[104] This membership is heightened for indigenous peoples as they are "characterized by the desire and practice of sharing virtually all aspects of life together."[105] Cultural integrity, including the preservation of sacred, ancestral

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96. *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287 (Peter Laslett ed., Cambridge Univ. Press, Student ed. 1988) (1690) ("The Fruit, or Venison, which nourishes the wild *Indian*, who knows no Inclosure, and is still a Tenant in common, must be his, and so his, *i.e.* a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life.").

97. Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 86-87 (Aug. 24, 2010); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 174-75 (Nov. 28, 2007); Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 120-21, 124, 141 (June 17, 2005); Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 131, 133 (June 15, 2005) (all recognizing collective property rights).

98. DONNELLY, *supra* note 49, at 51.

99. *Id.*

100. Michael Hartney, *Some Confusions Concerning Collective Rights*, 4 CAN. J. L. & JURIS. 293, 301 (1991).

101. *Id.*

102. *Id.*

103. *Id.* at 304.

104. Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L. 121, 124 (2011).

105. *See id.* at 125-26; *see also* W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 ST. THOMAS L. REV. 25, 35 (1996) ("[I]t is the integrity of the inner worlds of peoples—their

land, is necessary for the continued fulfillment indigenous people share with their group.

The legal conceptual question asks whether there are authoritative pronouncements that confer legal rights on groups.[106] In response to the legal conceptual question, it is evident that courts, even those that are not normally associated with recognizing group rights, have acknowledged that groups can claim legal rights.[107] For example, in *Sindicatul "Păstorul cel bun" v. Romania*, the Grand Chamber of the European Court of Human Rights held that the religious autonomy rights of the Romanian Orthodox Church trumped the rights of dissident priests to unionize.[108] The court commented that "[r]espect for the autonomy of religious communities . . . implies . . . that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements" emerging from within their ranks.[109] Thus, there is a basis for collective legal rights because several jurisdictions have recognized this right.

Finally, the substantive question: do indigenous peoples require rights? Professor Wiessner argues that indigenous peoples deserve group rights because their claims are often directed at the state. Indigenous peoples' claims "are essentially claims to be treated in a certain way by the governments of the nation-states wherein they find themselves. Such claims are, in their structure, identical to the human rights claims of individual human beings."[110] While Western thought focuses on the relationship between the individual and the state, and the rights held by the individual are rights against the state, indigenous peoples conceive themselves as "social beings" who "naturally think of their rights as part of a group."[111] Therefore, enforcing an individual property right that is held and

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rectitude systems or their sense of spirituality—that is their distinctive humanity. Without an opportunity to determine, sustain and develop that integrity, their humanity—and ours—is denied.").

106. Hartney, *supra* note 100, at 301 ("The utterance of a legal authority . . . that a right is being conferred is conclusive evidence that a legal right has been conferred.").

107. *See* Wisconsin v. Yoder, 406 U.S. 205, 216, 222 (1972); Hofer v. Hofer, [1970] S.C.R. 958, 967-69, 974-75 (Can.) (both cases examining Amish communities).

108. Sindicatul "Păstorul cel bun" v. Romania, App. No. 2330/09, ¶¶ 159-173 (Eur. Ct. H.R. July 9, 2013), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122763; *see also* Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 132 S. Ct. 694, 706 (2012) (recognizing rights of churches to be exempt from employment discrimination laws as applied to ministers).

109. *Sindicatul "Păstorul cel bun,"* App. No. 2330/09, ¶ 165; *see also Hosanna-Tabor Evangelical Lutheran Church*, 132 S. Ct. at 706 (exempting churches from employment discrimination laws for their ministers because the exemption is necessary to "protect[] a religious group's right to shape its own faith and mission through its appointments"); Kichwa People of Sarayaku v. Ecuador, Case 12.465, Inter-Am. Comm'n H.R., ¶ 238 (Appl. Inter-Am. Ct. H.R. Apr. 26, 2013), https://www.cidh.oas.org/demandas/12.465%20Sarayaku%20Ecuador%2026abr2010%20ENG.pdf (using group rights to enforce individual rights violations).

110. Siegfried Wiessner, *Re-Enchanting the World: Indigenous Peoples' Rights as Essential Parts of a Holistic Human Rights Regime*, 15 UCLA J. INT'L L. & FOREIGN AFF. 239, 266 (2010) [hereinafter Wiessner, *Re-Enchanting the World*].

111. Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739, 742 (1990).

exercised by a group is definitionally impossible, requiring the group to hold group rights.

These counterarguments to Donnelly's skepticism of group rights are still being developed. The point, however, is to illustrate that there are a number of existent frameworks that can be applied to deal with many of the principle criticisms of group rights generally.

## IV. PROTECTING INDIGENOUS COLLECTIVE LAND OWNERSHIP THROUGH RELIGIOUS FREEDOM

Though the debate on how to reconcile group rights and individual human rights continues, it is more clear that religious freedom jurisprudence, as defined by international law and regional and domestic courts, can serve as an additional layer of protection for indigenous land ownership. Property possession is a necessary correlate to the exercise of religious freedom.[112] For many religious organizations, owning property is the simplest way of gathering as a religious body for collective worship, an essential part of their faith.[113] As we have seen, property ownership for indigenous peoples is often an even more pressing need.[114] Whereas some faiths worship the divine in a building, indigenous peoples often worship the land as divine.[115] This section analyzes how U.N. Declarations, international treaties, U.N. Special Rapporteurs, regional commissions and courts, and some domestic laws have interpreted the guarantee of religious freedom to include protection of indigenous land, territory, and resources.

### *A. U.N. Declarations and International Treaties*

Given the spiritual relationship indigenous peoples have with their land, it is no surprise that international law implicitly and explicitly covers indigenous land use. Implicitly, many international instruments protect the right to manifest and practice religion or belief. Article 18 of the Universal Declaration of Human Rights ("UDHR") protects "the right to freedom of thought, conscience and religion" which includes the ability to practice religion and worship in community.[116] The Office of the High Commissioner on Human Rights notes that

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112. *See* United Nations, Human Rights Comm., General Comment No. 22 (48) (art. 18), ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993) [hereinafter General Comment No. 22].

113. *See, e.g.*, 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) ("The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct to the core First Amendment right to assemble for religious purposes.").

114. *See generally supra* Part II(A).

115. *Id.*

116. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 18, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); *see also* International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, pmbl., arts. 1(1), 6,

the freedom to manifest religion or belief encompasses a broad range of activities such as "ritual and ceremonial acts giving direct expression to belief . . . including the building of places of worship [and] the use of ritual formulae and objects."[117]

While international law has not precisely defined the word "religion," the interpretation of freedom of religion should be broad and extends beyond "traditional religions . . . with institutional characteristics or practices analogous to those of traditional religions."[118] The right to worship, a necessary correlate to religious freedom, includes the performance of rituals and ceremonies and "building of places of worship [and] the use of ritual formulae and objects."[119] Thus, although indigenous peoples are not explicitly mentioned in the text of any of these instruments, each one covers individual indigenous people.

Explicitly, Article 27 of the International Covenant on Civil and Political Rights ("ICCPR") guarantees that ethnic, religious, and linguistic minorities be able to enjoy their culture.[120] In a general comment, the Office of the High Commissioner for Human Rights explained culture includes using land resources "especially in the case of indigenous peoples."[121] Article 15 of the International Covenant on Economic, Social and Cultural Rights protects the right of everyone to participate in "cultural life,"[122] which includes "religion or belief systems."[123] States must "respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources . . . ."[124]

Perhaps most significantly, UNDRIP discusses the interaction between religious freedom and indigenous peoples. Article 1 of UNDRIP incorporates the right to religious freedom.[125] UNDRIP specifically protects indigenous peoples' spiritual relationship to their land as a group. Article 12 states "[i]ndigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and

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U.N. Doc. A/RES/36/55 (Nov. 25, 1981) (recognizing religion as "one of the fundamental elements in [the] conception of life" and protecting the right "to establish and maintain places for these purposes" and to "make, acquire and use . . . materials related to the rites or customs of a religion").

117. General Comment No. 22, *supra* note 112, ¶ 4.

118. *Id.* ¶ 2.

119. *Id.* ¶ 4.

120. ICCPR, *supra* note 116, art. 27.

121. United Nations, Human Rights Comm., General Comment No. 23 (50) (art. 27), ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (April 26, 1994).

122. International Covenant on Economic, Social and Cultural Rights art. 15(1)(a), Dec. 16, 1966, 993 U.N.T.S. 3.

123. United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant of Economic, Social and Cultural Rights), ¶ 13, U.N. Doc. E/C.12/GC/21 (Nov. 21, 2009).

124. *Id.* ¶ 49(d).

125. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 5, art. 1 ("Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.").

have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects" and encourages the repatriation of "ceremonial objects and human remains."[126] Finally, Article 25 acknowledges "the right to maintain and strengthen th[e] distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas."[127] In total, nineteen of UNDRIP's forty-six articles relate to indigenous peoples' land rights emphasizing the "huge importance of the question for the survival of indigenous peoples."[128]

### *B. U.N. Special Rapporteurs*

U.N. Special Rapporteurs have recently sought to safeguard indigenous land through international religious freedom laws and have recognized the inherently religious dimension of land for indigenous peoples and the necessity of preserving indigenous land for the exercise of their religion. After visiting Argentina, the Special Rapporteur on freedom of religion or belief, Abdelfattah Amor, acknowledged "[t]he principal problem regarding freedom of religion and freedom to manifest one's religion or belief relates to the question of land."[129]

In 2011, James Anaya, the U.N. Special Rapporteur on Indigenous Peoples, issued a report to the Human Rights Council on the plight of ten different indigenous peoples.[130] In his report, Anaya was highly critical of the 2008 decision by the Ninth Circuit in *Navajo Nation* v. *U.S. Forest Service*.[131] Anaya's report recommended that the United States consult with the tribes affected by the ski resort and ensure that their government act in accordance with "international standards that protect the right of Native American to practice and maintain their religious traditions."[132] Anaya surveyed the beliefs of the Hopi and the Navajo and concluded that the ski operation violated the right of the Native Americans to maintain and practice their religion.[133] Anaya urged the government to consider

126. *Id.* art. 12.

127. *Id.* art. 25.

128. Julian Burger, *The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation*, *in* REFLECTIONS ON THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 41, 51 (Stephen Allen & Alexandra Xanthaki eds., 2011).

129. Special Rapporteur on Freedom of Religion or Belief, *Civil and Political Rights, Including the Question of: Religious Intolerance*, ¶ 112, Comm. on Human Rights, U.N. Doc. E/CN.4/2002/73/Add.1 (Jan. 16, 2002) (by Abdelfattah Amor).

130. Special Rapporteur on the Rights of Indigenous Peoples, *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples*, Human Rights Council, U.N. Doc. A/HRC/18/35/Add.1 (August 25, 2011) (by James Anaya) [hereinafter *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples*].

131. *Id.* at 43-52; *see also supra* notes 82-86 and accompanying text.

132. *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples*, *supra* note 130, at 52.

133. *See id.* at 44-46, 49-50. Neither did the ski operation pass one of the permissible limitations on the right to religious freedom when a limitation is "necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others." *Id.* at 50. Anaya expressed doubt that a "private recreational ski facility is in furtherance of one of the specific public purposes" and suggested

that any restrictions on indigenous peoples' exercise of religion "is subject to the *most exacting scrutiny* under these international instruments" and doubted whether the ski resort could pass such scrutiny.[134]

### *C. Regional Commissions*

Regional commissions have also identified the important link between indigenous land ownership and the exercise of religion. The Commission has emphasized the inextricable link between indigenous peoples' exercise of religion and their relationship to ancestral lands. The Commission reported:

> Indigenous and tribal peoples' territories and natural resources are a constitutive element of their worldview and religiousness, given that for them, the notions of family and of religion are intimately connected to the places where ancestral burial grounds, places of religious significance and importance, and kinship patterns have developed from their occupation and use of their physical territories.[135]

Given this relationship, states are obligated to respect indigenous territory, land, and resources "to allow for the exercise of their spiritual life."[136]

In 2003, the African Commission on Human and Peoples' Rights ("ACHPR") addressed the claims of the Endorois, a community of approximately 60,000 people in the Lake Bogoria area of Kenya, who were dispossessed of their ancestral lands after the Kenyan government created a game reserve.[137] The Endorois claimed that the restricted access to their ancestral lands violated their religious freedom guaranteed under the African Charter.[138] Specifically, the Endorois believe that a lake on the reservation is "of fundamental religious significance" as a site where they perform traditional ceremonies to appease their ancestors, bury their ancestors, and pray and perform other religious rituals.[139] The ACHPR concluded that Kenya unlawfully interfered with the Endorois' right to religious freedom by forcibly removing them from their lands and ordered that the Endorois have unrestricted access to the lake on their ancestral land.[140] The

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that the ski resort did not consider "the nature and severity of the limitation on religion, in relation to the identified valid purpose and the manner in which the purpose is being pursued." *Id.* at 51.

134. *Id.* at 49 (emphasis added). In the United States, classifications based on religion are subject to the most exacting scrutiny just like classifications of race and speech. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 886 n.3 (1990) (this is an example of the application of the substantial burden test). *See also supra* Part III(A).

135. Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources, Inter-Am. Comm'n H.R., ¶ 150, OEA/Ser.L/V/II., Doc. 56/09 (2009) (footnotes omitted).

136. *Id.* ¶ 151.

137. Centre for Minority Rights Dev. (Kenya) and Minority Rights Group Int'l on behalf of the Endorois Cmty. v. Kenya, Afr. Comm'n on Human & Peoples' Rights, Comm. No. 276/2003, ¶¶ 1, 3, 5, (2006) [hereinafter Endorois Communication].

138. *Id.* ¶¶ 1-2; Organization of African Unity, African Charter on Human and Peoples' Rights art. 8, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 1520 U.N.T.S 217.

139. Endorois Communication, *supra* note 137, ¶ 79.

140. *Id.* at 80.

ACHPR emphasized that removing the Endorois from their land "rendered it virtually impossible for the community to maintain religious practices central to their culture and religion."[141]

*D. Regional Courts*

The IACHR has continued to connect indigenous peoples' religious practices to their ancestral land.[142] In *Yakye Axa Indigenous Community v. Paraguay*, the Yakye Axa Community, an indigenous community whose economy is primarily based on hunting, fishing, and especially gathering, were resettled from their traditional territory to inferior land that had no animals to hunt, proved poor for domestic animals, and lacked water.[143] The Yakye Axa Community could not conduct their cultural practices freely because they had been removed from their traditional settlement.[144] The IACHR found that Paraguay violated the indigenous peoples' right to property by failing to protect the community's traditional lands.[145] The court acknowledged that the Yakye Axa community's traditional lands were a "part of their worldview, their religiosity, and therefore, of their cultural identity" and that Article 21 must be interpreted as a mechanism to protect this aspect of the community.[146]

141. *Id.* ¶ 173.

142. *See, e.g.*, Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 118 (Mar. 29, 2006) ("[T]he Court has considered that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention."); Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 131, 133 (June 15, 2005) (citing Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 79, ¶¶ 149, 151 (Aug. 31, 2001)) (finding a violation of Moiwana community members' property right by failing to investigate the massacre and noting indigenous peoples' "communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in [the] material and spiritual elements that must be fully integrated and enjoyed by the community").

143. Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 50.3, 50.15 (June 17, 2005).

144. *Id.* ¶ 50.15.

145. *Id.* ¶ 135, 156.

146. *Id.* ¶¶ 135, 137; *see also* Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 95 (Nov. 28, 2007) ("Article 21 of the American Convention [supports] . . . the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the[ir] territory . . . .").

### *E. Domestic Laws*

Some domestic laws or practices also provide an opportunity for indigenous peoples to protect their land, territory, and resources by appealing to religious freedom.[147]

For example, the Northern Territory Aboriginal Sacred Sites Act of Australia requires that a person who proposes to work on land held by an aboriginal tribe must apply to the Aboriginal Areas Protection Authority ("Authority") in order to receive permission to work on that land.[148] Only after the Authority has concluded that the work will not result in "substantive risk of damage to or interference with a sacred site on or in the vicinity of the land" or after the Aboriginals who have responsibility for the site have come to agreement with the person or company proposing to do the work can the work continue.[149] Failing to abide by these requests can result in penalties; entering a sacred site, working on a sacred site without permission, and desecration of a sacred site all carry fines and the possibility of imprisonment.[150]

Another statute, although one that is less likely to be useful for indigenous peoples in the short term,[151] is the United States' Religious Land Use and Institutionalized Persons Act ("RLUIPA").[152] RLUIPA "assert[s] the obvious connections between religious exercise and land use"[153] and prohibits governments from implementing "a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution" absent a compelling government interest.[154] RLUIPA case law has held unconstitutional the exercise of eminent domain when it prevents the group from "engaging in conduct or having a religious experience which the faith mandates,"[155] when it fails to issue permits to build temples,[156] and when it fails to accommodate religious practices, such as prayer.[157] In each of these examples, religious organizations and individuals were able to protect their land use rights

147. *See, e.g.*, ANAYA, *supra* note 53, at 139-40 (noting how governments in Australia, New Zealand, and Canada have all stopped different development projects on indigenous land based on their recognition of the spiritual importance the land had for the indigenous groups).

148. *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) para 19B (Austl.).

149. *Id.* para 22(1)(a)-(b).

150. *Id.* pt IV.

151. *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1062-63 (decided under RLUIPA's predecessor Religious Freedom Restoration Act).

152. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2006).

153. Angela C. Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good*, 2 ALB. GOV'T L. REV. 485, 498 (2009).

154. 42 U.S.C. § 2000cc(a)(1).

155. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1227 (C.D. Cal. 2002), *cited with approval in* Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995).

156. Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 326 F. Supp. 2d 1140, 1140-41 (E.D. Cal. 2003).

157. DiLaura v. Twp. of Ann Arbor, 112 F. App'x 445, 446 (6th Cir. 2004); Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 175-180 (D. Conn. 2001).

through the enforcement of their religious exercise rights.[158] The difficulty in applying these cases to indigenous peoples is that courts misunderstand indigenous peoples' spirituality, particularly their spiritual relationship with their land.[159] While it appears that courts comprehend the significance of church buildings, sacrifice, and prayer, they often fail to grasp the sacredness of land for indigenous peoples.

Finally, several countries now require registration and demarcation of indigenous peoples' lands that belonged to their ancestors.[160] This process has occurred in a variety of ways, including a peace treaty in Guatemala, constitutional and statutory changes in Brazil, common-law modifications in Australia, Taiwan, and Malaysia, and legal judgments in Botswana, South Africa, and Colombia.[161] New Zealand has even signed a treaty with members of Whanganui Iwi that settled their claims to the Whanganui River.[162] The agreement recognizes the status of the river as "an integrated, living whole" in accordance with Whanganui Iwi belief, affords the river protection as a legal entity "reflecting the view of the River as a living whole," and appoints two people to act on the river's behalf and protect "its status and health and wellbeing."[163]

This brief overview highlights how international law already acknowledges a special relationship between indigenous peoples' land and their spirituality, facilitating a freedom-of-religion-based defense of their property rights. And even in countries that do not recognize collective land ownership, religious freedom jurisprudence can be used to protect the land of indigenous peoples.

## V. CONCLUSION

Land, territory, and resource rights of indigenous peoples have vastly improved since the beginning of European world exploration.[164] Today international law serves as a protector of indigenous peoples rather than a tool of conquering nations. This is most prominent in the IACHR's jurisprudence, mostly

158. *See, e.g.*, *DiLaura*, 112 F. App'x at 446 (affirming judgment based on RLUIPA).

159. *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1097 (9th Cir. 2008) (Fletcher, J., dissenting) ("I do not think that the majority would accept that the burden on a Christian's exercise of religion would be insubstantial if the government permitted only treated sewage effluent for use as baptismal water, based on an argument that no physical harm would result and any adverse effect would merely be on the Christians' 'subjective spiritual experience.'").

160. Wiessner, *Re-Enchanting the World*, *supra* note 110, at 283-84.

161. *Id.*

162. Christopher Finlayson, *Whanganui River Agreement Signed*, BEEHIVE.GOV.NZ (Aug. 30, 2012), http://www.beehive.govt.nz/release/whanganui-river-agreement-signed.

163. *Id.*

164. *See, e.g.*, E. DE VATTEL, 3 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 85 (Charles G. Fenwick trans., Carnegie Inst. of Wash., 1916) (1758) ("[Indigenous peoples'] uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.").

notably the *Awas Tingni* decision, and in the passage of UNDRIP. The assumption of the spiritual importance indigenous peoples share with their ancestral land is often embedded in the effort to safeguard indigenous land, territory, and resources. Thus, religious liberty-based arguments have been successful in regional courts, with U.N. Special Rapporteurs, and are consistently mentioned throughout UNDRIP. Similarly, domestic courts, statutes, and treaties have also acknowledged the link between indigenous religion and land. This note explored a religious-freedom based approach to effectuate and supplement indigenous peoples' claims to their land, territory, and resources.

However, success at the U.N., in regional courts and commissions, and even in domestic courts and legislation, marks the beginning, not the end, of the struggle for indigenous peoples to gain real protection in countries where they have long been ignored. As the examples that began this note illustrate, indigenous peoples continue to experience existential harm at the behest of state governments. The next step is to convert legal victories into actual change on the ground and security in the everyday lives of the men, women, and children of indigenous people groups.

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