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## Homeless for Generations: Land Rights for the Chocoe Indians from Mogue, Panama

David E. Cahn\*

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# Homeless for Generations: Land Rights for the Chocoe Indians from Mogue, Panama

David E. Cahn

## **Abstract**

Vaporiso knew that the lack of land ownership in his tribe was a great part of the Chocoes' suffering, and he felt that violence was the only way to rectify the problem. Agenda 21 requires member State governments to strengthen national dispute-resolution arrangements in relation to the settlement of land and resource-management concerns. Convention No. 169, which became legally binding on member States in 1991, provides indigenous people with the right to decide how they wish to develop the lands they occupy and use, and set their own priorities for those lands. Convention No. 169 also provides protection from people or governments seeking to take advantage of indigenous people due to their lack of understanding of the laws. ILO Convention No. 169, a legally-binding convention which focuses on indigenous land rights concerns, continues as a very important legally binding tool that could help the Mogue Community achieve ownership over their lands. Hopefully, Panama will follow its neighbors and soon ratify Convention No. 169 creating legally-binding obligations on Panama which the Mogue Community could use to achieve land ownership.

## NOTE

### HOMELESS FOR GENERATIONS: LAND RIGHTS FOR THE CHOCOE INDIANS FROM MOGUE, PANAMA

*David E. Cahn\**

#### INTRODUCTION

"If [I] tell [you] what [has] been going on [I will] be killed."<sup>1</sup> Such a quote illustrates the desperation with which the Chocoe Indians of the Darien Jungle in Panama<sup>2</sup> from the Mogue Village live.<sup>3</sup> This fear comes after the brutal murder of one Chocoe Indian who was found with his tongue cut out because he threatened to expose a suspected Chocoe guerrilla movement by members of his tribe from a neighboring village.<sup>4</sup>

Ansenio Vaporiso, the Chief of Chiefs for the Chocoe Indians in the late 1990s,<sup>5</sup> became so frustrated after generations of

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\* J.D. Candidate, 2005, Fordham University School of Law; B.S., 1999, University of Maine. I would like to thank Anna for her endless amount of love, faith, support, encouragement, and guidance. I would also like to thank my parents and brothers for all of their encouragement and faith in me. I would like to extend a special thank you to Judge John F. Keenan for his interest in my budding career and for being an exceptional mentor to me. I also greatly appreciate all the Editors and Staff of Vol. XXVIII (most notably Shaun Reader, Dr. Josephine Liu, and Wynne P. Kelly) for all of their hard work. Lastly, I would like to thank Jim Brunton for sharing his dream and without whose help this Note would not have been possible. This Note is dedicated to the Chocoe Indians of Mogue.

1. James A. Brunton, Jr., Address at the University of Colorado Profiles in American Enterprise (Sept. 10, 2001) [hereinafter Brunton Colorado Address] (talking about what Chocoe Indians told him regarding murdered member of tribe).

2. See The Pajaro Jai Foundation: Conservation Through Innovation, available at <http://www.pajarojai.org> (last visited Nov. 7, 2004) [hereinafter PJF: Conservation Through Innovation] (explaining that Embara and Wonan peoples make up Chocoe Indians); see also Interview with Alberto Rito, Mogue Tribal Council (2001-2003), in La Palma, Panama (Jan. 2004) [hereinafter Rito Interview] (stating Chocoe peoples consist of natives from Embara and Wonan tribes).

3. See THE PAJARO JAI FOUNDATION, CHOCOE STRUGGLE FOR LAND RIGHTS (2003) [hereinafter CHOCOE STRUGGLE FOR LAND RIGHTS] (discussing living situation of Chocoe Indians of Mogue). See generally PJF: Conservation Through Innovation, *supra* note 2 (explaining conditions of Mogue Chocoe Indians).

4. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (discussing murder of Mogue Chocoe Indian); see also Interview with Rufino Gomez, Maestro de Trabajo, Pajaro Jai Foundation, in La Palma, Panama (Jan. 2004) [hereinafter Gomez Interview] (telling story about murdered Chocoe Indian from Mogue's neighboring village).

5. See Interview with James A. Brunton, Jr., Founder, *The Pajaro Jai Foundation*, in

enduring the tribe's second class status and poor treatment, that he formed a guerrilla movement out of desperation.<sup>6</sup> Vaporiso knew that the lack of land ownership in his tribe was a great part of the Chocoes' suffering, and he felt that violence was the only way to rectify the problem.<sup>7</sup> To this day, no one is certain how far Vaporiso went towards fulfilling his goal.<sup>8</sup> Vaporiso was arrested for the aforementioned murder, along with several accomplices, and held in jail for about two years.<sup>9</sup>

After a large group of Chocoe protested, however, the authorities released Vaporiso without a trial.<sup>10</sup> While the murder remains unsolved,<sup>11</sup> the Chocoe Indians from Mogue believe

Belfast, Maine (Nov. 2003) [hereinafter Brunton Interview] (stating Vaporiso was Chief of Chiefs of Chocoe Indians from 1993 to 1998); *see also* CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining that in mid-1990s Chief of Chiefs of Chocoe Indians was Vaporiso).

6. *See* Brunton Interview, *supra* note 5 (discussing poor treatment of Chocoe Indians); *see also* DAVID HOWARTH, PANAMA: FOUR HUNDRED YEARS OF DREAMS AND CRUELTY, 14-53 (1966) (describing brutality of Spanish explorers towards Natives from Darien, including: rape, stealing, and enslavement and murder of estimated 2,000,000 Darien Natives which resulted in lack of historical record of their existence for over 100 years); HOWARTH, *supra* at 19 (stating Chocoe Indians would hang themselves in order to relieve themselves from misery Spanish explorers imposed upon them); CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (describing that Conquistadors would hang Chocoe Indians in groups of twelve to commemorate Last Supper and would cut Chocoe men's hands off and send them back into jungle in order to strike fear into other indigenous peoples).

7. *See* Brunton Interview, *supra* note 5 (stating Vaporiso felt land ownership was key to achieving better quality of life, and violence was only way to achieve it); *see also* CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining Vaporiso considered guerrilla movement to fight back as only way to achieve land ownership which led to Chocoe Indian's suffering).

8. *See* CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (noting plan could have gone as far as actually receiving guns and using drug money to finance acquisitions); *see also* Interview with Leonardo Teocama, Chief of Chiefs of the Chocoe Indians (1998-2002), in Mogue Village, Panama (June 2004) [hereinafter Leonardo Teocama Interview] (explaining no Mogue Community members know how close Vaporiso came to completing his guerrilla movement); Rito Interview, *supra* note 2 (explaining Mogue Community did not know how close Vaporiso came to completing his goal).

9. *See* Gomez Interview, *supra* note 4 (noting Vaporiso spent about twenty-four months in jail for Indian's murder); *see also* CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining Arsenio Vaporiso's release from jail after incarceration for two years for murder of Chocoe Indian without ever having any trial proceedings take place).

10. *See* Gomez Interview, *supra* note 4 (discussing Chocoe Indian protest which led to Vaporiso's release from prison without trial); *see also* CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining how Chocoe Indian protests got Arsenio Vaporiso released from jail after two years without trial).

11. *See* CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (stating Panamanian authorities never convicted anyone for murder of Chocoe Indian from village neighbor-

they know Vaporiso murdered the Indian in order to ensure the secrecy of his guerrilla movement.<sup>12</sup> Vaporiso's guerrilla plan, however, never came to fruition.<sup>13</sup>

The Mogue Village's land ownership concerns and poor treatment have become no less desperate.<sup>14</sup> Members of the Mogue Community have lived in the Mogue Village for generations without ever having legal title to the land.<sup>15</sup> While the Mogue's land struggles continue, however, the Mogue Community has furthered its efforts to achieve land ownership through more diplomatic means, rather than violence.<sup>16</sup>

This Note discusses land rights issues involving the Chocoe Indians from the Village of Mogue.<sup>17</sup> Part I of this Note will de-

ing Mogue); *see also* Brunton Interview, *supra* note 5 (explaining that Chocoe Indians from Mogue think they know reason for murder of their neighboring village member even though officials never solved murder).

12. *See* Gomez Interview, *supra* note 4 (stating Mogue Community believes they know reason for murder despite no convictions for Indian's murder); *see also* CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining that Mogue Community knows what provoked Indian's murder).

13. *See* Interview with Aladino Teocama, Chocoe Religious Leader, in Mogue Village (June 2004) [hereinafter Aladino Teocama Interview] (explaining no Chocoe Indians ever started guerrilla army); *see also* Brunton Interview, *supra* note 5 (discussing how Vaporiso's guerrilla plan was never completed); Gomez Interview, *supra* note 4 (describing failure of Vaporiso's guerrilla plan); Leonardo Teocama Interview, *supra* note 8 (stating Chocoe have no guerrilla movement); Rito Interview, *supra* note 2 (stating Vaporiso never completed his plan).

14. *See* Brunton Interview, *supra* note 5 (discussing current living situation of Chocoe Indians from Mogue); *see also* PJF: Conservation Through Innovation, *supra* note 2 (explaining Mogue Community's current conditions).

15. *See* CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (noting Chocoe Indians of Mogue settled in Mogue permanently towards end of 1800s); *see also* Rito Interview, *supra* note 2 (describing how long Chocoe Indians of Mogue have lived in Mogue); Interview with Viodelka Alvarado, General Support, Pajaro Jai Foundation, La Palma, Panama (June 2004) [hereinafter Alvarado Interview] (stating Chocoe Indians settled in Mogue generations ago).

16. *See* Gomez Interview, *supra* note 4 (discussing how Mogue Community tried to achieve land ownership); *see also* Leonardo Teocama Interview, *supra* note 8 (explaining how Chocoe Indians of Mogue attempt land ownership); Brunton Interview, *supra* note 5 (stating Mogue Community now tries to gain ownership over their traditional lands through diplomatic methods).

17. *See* PANAMANIAN LAW 22 (1983) (stating Panama recognizes land benefits to various Chocoe villages, not including Mogue Community); *see also* *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Panama*, U.N. Committee on the Elimination of Racial Discrimination, 15th Sess. ¶ 4, U.N. Doc. CERD/C/304/Add.32 (1997) [hereinafter *CERD Committee Observations*] (noting not all indigenous Panamanians live in *comarcas*); Rito Interview, *supra* note 2 (explaining name of organization of fifty Chocoe villages in Darien Jungle, including Mogue Community, outside *comarca* is *Tierras Colectivas Indigenas*); Alvarado Interview, *supra* note 15 (stating

scribe the plight of the Mogue Community with respect to land rights. Part I will also briefly outline the provisions of the Panamanian Constitution which are relevant to Panamanian indigenous group's land rights. Lastly, Part I will look at the various international human rights laws dealing with the land rights of indigenous people. Part II will identify the merits of attempting to achieve land ownership using the laws identified in Part I. Finally, Part III of this Note will explain why the Inter-American Commission on Human Rights ("IACHR") and the Inter-American Court of Human Rights ("Inter-American Court") are the best arenas for the Mogue Community's efforts to achieve land ownership. Part III also focuses on the recent Inter-American Court's decision of *The Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua*.<sup>18</sup>

## I. LAYING THE FOUNDATION: PANAMANIAN AND INTERNATIONAL LAW REGARDING LAND RIGHTS

### A. *The Chocoe Indians: The People and Their History*

From the 1930s to the 1950s, the Mogue Community peacefully shared the land they inhabited with the owners of a coconut plantation called Patinio.<sup>19</sup> After the 1950s, however, cattle ranching replaced coconut farming as Patinio's primary land use.<sup>20</sup> Patinio's owner used "slash and burn" agriculture as its method for cattle ranching.<sup>21</sup> "Slash and burn" agriculture is a

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*comarca* delineated in PANAMANIAN LAW 22 (1983) does not include Mogue Community).

18. See generally *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 (holding that Nicaragua violated Awas Tingni Community's land rights); Romeo Tiu Lopez, *Mayan Spirituality and Lands in Guatemala*, 21 ARIZ. J. INT'L & COMP. LAW 223 (2004) (explaining Inter-American Court of Human Rights ("Inter-American Court") held Nicaraguan Government violated indigenous Nicaraguan's land rights).

19. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (stating Chocoe Indians of Mogue shared their land with owners of coconut plantation); see also Alvarado, *supra* note 15 (discussing cohabitation of Mogue Community and owners of coconut plantation); Gomez Interview, *supra* note 4 (explaining how Mogue Community peacefully shared land it lived on in 1930s and 1940s with coconut plantation's owners).

20. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (describing business evolution of Patinio); see also Gomez Interview, *supra* note 4 (stating that in 1950s cattle ranchers used Patinio).

21. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (noting "slash and burn" farming remains fundamental threat to Mogue Community); see also Brunton Interview, *supra* note 5 (explaining type of agriculture Patinio's owner used).

method of agriculture which strips the land of all its natural resources and nutrients, making the land unable to be cultivated for a century, while feeding cattle for only a few years.<sup>22</sup>

At that time, Bonga, the Chief of the Mogue Community,<sup>23</sup> began to struggle with Patinio's owner over claims that Patinio's land consisted of all the land "as far as the eye can see," including the land on the Mogue Village lies.<sup>24</sup> Subsequently, Patinio's owner harassed the Mogue Community and tried to limit its use of the natural resources on Patinio.<sup>25</sup> Towards the end of the 1970s, the Panamanian Government seized Patinio due to failure to pay taxes.<sup>26</sup>

Patinio's repossession by the Panamanian Government

22. See Keith Sealing, *Indigenous Peoples, Indigenous Farmers: NAFTA's Threat to Mexican Teosinte Farmers and What Can be Done About It*, 18 AM. U. INT'L L. REV. 1383, 1390 (2003) (noting that "slash and burn" agriculture destroys thin soil); see also Erin B. Newman, *Earth's Vanishing Medicine Cabinet: Rain Forest Destruction and Its Impact on the Pharmaceutical Industry*, 20 AM. J. L. & MED. 479, 488 (1994) (explaining that "slash and burn" agriculture is process where farmers cut down masses of trees and burn them). The resulting ash from "slash and burn" agriculture contains nutrients once possessed by rich tropical trees and organisms, which can only sustain crops and cattle for few years. See Brunton Interview, *supra* note 5 (describing how "slash and burn" method provides proper nutrients for cultivation for limited period of two to three years); see also Newman, *supra* at 488 (reporting that "slash and burn" method provides initial fertility but then leaves soil unsuitable for cultivation after short period). Frequent and heavy rains leach nutrients from the soil leaving the land unusable, so that after only a few years of farming, the land becomes useless and must be abandoned, resulting in deforestation. See Brunton Interview, *supra* note 5 (noting once "slash and burn" method of agriculture is used on land it destroys nutrients and takes land approximately one hundred years to recover its fertility).

23. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (noting Torrijos, then President of Panama, knew Bonga and recognized him as Chief of Mogue Community); see also Brunton Interview, *supra* note 5 (recognizing Bonga Chief of Chiefs of Chocoe Indians from 1972 through 1987).

24. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (stating Patinio's owner claimed ownership over land Mogue Community lives on); see also Leonardo Teocama Interview, *supra* note 8 (explaining how Patinio's owner believed he owned Village of Mogue); Rito Interview, *supra* note 2 (explaining beginning of Mogue Community's land struggles); Aladino Teocama Interview, *supra* note 13 (stating what Patinio's owner thought he owned); Gomez Interview, *supra* note 4 (discussing how Patinio's owner believed he owned Village of Mogue as part of Patinio); Brunton Interview, *supra* note 5 (explaining when Mogue Community's property ownership became problematic).

25. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (noting also that Torrijos, who knew Bonga, did little to stop Patinio's owners treatment of Mogue Community); Brunton Interview, *supra* note 5 (explaining how Patinio's owner tried to impose rules and regulations on Mogue Village which Patinio's owner thought he owned).

26. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining how Panamanian government seized Patinio); see also Brunton Interview, *supra* note 5 (discussing government seizure of Patinio in 1970s).

brought no relief for the Mogue Village as pioneers continued to encroach upon it.<sup>27</sup> Among the pioneers were cattle ranchers who continued to use the “slash and burn” agricultural method.<sup>28</sup> Finally in the 1990s, Ancon, a conservation non-profit organization (headed at the time by Juan Carlos Navarro, Mayor of Panama City), bought Patinio.<sup>29</sup>

The Mogue Community hoped Ancon would provide relief from the destruction of land resources that the “slash and burn” agricultural practices had caused.<sup>30</sup> Mayor Navarro encouraged this hope by promising the Mogue Community control over some of the Patinio land.<sup>31</sup> The Mogue Community worked with Ancon for the next ten years trying to negotiate a deal to define its claim and title, if any, to the land,<sup>32</sup> but the two parties never

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27. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining how once Panamanian Government seized Patinio, cattle ranchers, who continued to use “slash and burn” agriculture, began to encroach upon land Mogue Community used); *see also* Alvarado, *supra* note 15 (describing what happened to land owned by Patinio once government seized it).

28. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining that pioneers used “slash and burn” agriculture on land that government now owned which once comprised Patinio); *see also* Leonardo Teocama Interview, *supra* note 8 (discussing what became of Patinio once government seized it); Gomez Interview, *supra* note 4 (stating pioneers used “slash and burn” agriculture on Patinio’s seized government land).

29. See *Si Se Puede, Señor Torrijos*, Caribbean & Central America Report, May 24, 2004 (explaining re-election of Juan Carlos Navarro as mayor of Panama City); *see also* Rafael Candanedo, *Torrijos, Panama’s New President*, UNITED PRESS INT’L, May 14, 2004 (reporting that after elections, Juan Carlos Navarro remained in office as mayor of Panama City); CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (noting Navarro as currently Mayor of Panama City and many people speculate he plans to run for Presidency of Panama in next election).

30. See Leonardo Teocama Interview, *supra* note 8 (explaining how Mogue Community thought Ancon would quash “slash and burn” cattle ranching on its land); *see also* CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (stating how once Ancon owned Patinio, Mogue Community thought Ancon would put stop to “slash and burn” cattle ranching on land).

31. See Leonardo Teocama Interview, *supra* note 8 (describing how during communications with Juan Carlos Navarro, he told Mogue Community it would control some of Patinio land); *see also* CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining Mogue Community’s hopes of controlling land it traditionally used once Ancon purchased Patinio).

32. See Rito Interview, *supra* note 2 (recalling conversations between Ancon’s owners and Mogue Community since 1994); *see also* Leonardo Teocama Interview, *supra* note 8 (discussing ongoing negotiations between Mogue Community and owners of Ancon for around 10 years); CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (noting about 10 years worth of meetings between Mogue Community and Ancon’s owners to give Mogue control over its historically used territory).



reached an agreement.<sup>33</sup>

Further, Ancon told the Mogue Community it could not farm, fish, hunt or otherwise use the land as it had since settling there generations ago.<sup>34</sup> Ancon has had no qualms enforcing this order by extraordinary means, including the alleged beating of a farmer who violated Ancon's rules.<sup>35</sup> Mogue Community members also claim that Ancon personnel have fired shots over the heads of little boys while they fished in dugout canoes to discourage them from fishing on Ancon land.<sup>36</sup>

Ancon has promised the Mogue Community it can have 1,482 of Patinio's 75,000 acres of Patinio land.<sup>37</sup> The Mogue Community claims it needs more than 1,482 acres to sustain itself,<sup>38</sup> it has traditionally used most of Patinio's 75,000 acres worth of resources to satisfy its basic needs.<sup>39</sup> Though the

33. See Rito Interview, *supra* note 2 (explaining stagnation of talks between Ancon's owners and Mogue Community over lands it had used); see also Leonardo Teocama Interview, *supra* note 8 (discussing current situation of negotiations); CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (stating that despite 10 years of negotiations between Ancon and Mogue Community, agreement over control over Mogue lands has not been reached).

34. See Aladino Teocama Interview, *supra* note 13 (explaining rules and regulation Ancon imposed on Mogue Community); see also Brunton Interview, *supra* note 5 (stating that Ancon's owners told Mogue Community it could not farm, fish, hunt or use land as it had since originally settling on it); Gomez, *supra* note 4 (explaining land use restrictions Ancon imposed on Mogue Community); Leonardo Teocama Interview, *supra* note 8 (discussing how Ancon forbade Mogue Community from agriculture, farming, and fishing on land that it used to sustain itself); Rito Interview, *supra* note 2 (explaining how Ancon's owners would not let Mogue Community use its lands in way they had traditionally in order to provide for themselves); Brunton Colorado Address, *supra* note 1 (stating restrictions Ancon imposed on Mogue Community).

35. See Leonardo Teocama Interview, *supra* note 8 (recalling alleged beating of one Mogue Community farmer when he did not follow Ancon's rules and regulations); see also Brunton Colorado Address, *supra* note 1 (discussing beating of Mogue Community member, and leaving him for dead, when he refused to abide by Ancon's rules).

36. See Leonardo Teocama Interview, *supra* note 8 (discussing how when young boys fished in Mogue River despite Ancon's rules and regulation, people fired warning shots over their heads to scare them); see also Brunton Colorado Address, *supra* note 1 (explaining what Ancon thugs did to boys while they fished).

37. See Leonardo Teocama Interview, *supra* note 8 (stating Ancon's owners most recent offer of land to Mogue Community is 1,482 acres); see also CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining Ancon's current offer to allow Mogue Community control over 1,482 acres of its 75,000 acres of land).

38. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining how much of Mogue Community's traditionally used land it needs to provide for itself); see also Leonardo Teocama Interview, *supra* note 8 (discussing Mogue Community's need of Patinio's 75,000 acres in order to sustain itself traditionally).

39. See Leonardo Teocama Interview, *supra* note 8 (explain Mogue Community

Mogue Community's predicament is bad, it is typical of indigenous peoples' plights to reclaim their native lands.<sup>40</sup> This Note will look at local and international law available to remedy the situation.<sup>41</sup>

### B. Panamanian Constitution

The Panamanian Constitution grants land concessions to its indigenous peoples<sup>42</sup> by guaranteeing them collective properties sufficient to achieve economic and social well-being.<sup>43</sup> The law regulates the procedures to be followed for indigenous peoples to obtain lands.<sup>44</sup> The Constitution further prohibits privatization of indigenous land traditionally inhabited by indigenous people, demarcates native lands, and provides means to return private lands to indigenous people.<sup>45</sup> Accordingly, the Panama-

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uses Patinio's resources for activities that enable it to sustain itself, such as farming, fishing, foraging, hunting, and getting wood for boats); *see also* CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (stating how Mogue Community needs 75,000 acres of Patinio in order to sustain itself).

40. *See, e.g.*, Inter-American Commission on Human Rights, Report on the Maya Indigenous Communities of the Toledo District, Belize, ¶¶ 186-87 (2003) (ruling Belize violated Maya Community's right to communal property by granting logging and oil concessions to third parties); Judith Graham, *Indians: [U.S.]\$140 Million Isn't Justice; Still Disdaining a 1972 Cash Settlement from the U.S. Government, the Western Shoshone in the West Argue Among Themselves Whether the Legal Battle for Ancestral Lands is Still Worth It*, CHI. TRIB., Jan. 1, 2004, at Zone CN 12 (explaining Western Shoshone claim to title of two-thirds of Nevada as ancestral lands).

41. *See, e.g.*, PANAMANIAN LAW 22, *supra* note 17 (granting *comarca* to members of Chocoe Indians); U.N. CHARTER, pmbl. (establishing international human rights standards); Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR] (broadening international human rights standards set forth in U.N. CHARTER).

42. *See* PANAMA CONST. OF 1973, art. 123 (stating Panama will ensure its indigenous peoples have land); *see also* University of Minnesota Human Rights Resource Center, *Circle of Rights-Economic, Social & Cultural Rights Activism: A Training Resource*, § 3, Module 6, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/toc.htm> (last visited Nov. 6, 2004) (explaining Panamanian Constitution guarantees its indigenous communities land).

43. *See* PANAMA CONST. OF 1973, art. 123 (stating Panama guarantees its indigenous communities necessary collective property for profit and their economic and social well-being); *see also* Univ. of Minn. Hum. Rts. Resource Center, *supra* note 42, § 3, Module 6 (explaining Panama guarantees indigenous communities needed land to attain their economic and social well-being).

44. *See* PANAMA CONST. OF 1973, art. 123 (stating Panamanian law will regulate followed procedures); *see also* Brunton Interview, *supra* note 5 (explaining Panamanian Constitution states Panamanian law regulates procedures followed for indigenous people to get land).

45. *See* PANAMA CONST. OF 1973, art. 123 (stating that Panamanian law will regulate

nian government passed Panamanian Law 22 of 1983 ("Law 22"), granting territory to certain members of the Chocoe Peoples.<sup>46</sup> Law 22 demarcated a *comarca*<sup>47</sup> (an administrative district inhabited by Indians, much like a U.S. reservation) to many Chocoe Villages which granted them a level of autonomy and protection.<sup>48</sup> While Panamanian law has not yet protected the Mogue Community, there is international law available to potentially help them achieve land rights.<sup>49</sup>

### C. International Human Rights Tools

There are two major international organizations which can help the Mogue Community achieve land rights.<sup>50</sup> The first is the United Nations ("U.N.")<sup>51</sup> The second is the Organization

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and demarcate boundaries within which appropriation of land is prohibited); *see also* Brunton Interview, *supra* note 5 (explaining Panamanian Constitution provides that Panamanian law regulates and establishes *comarcas*).

46. *See* ROGER PLANT & SOREN HVALKOF, *LAND TITLING AND INDIGENOUS PEOPLES* 36 (2001) (mentioning that PANAMANIAN LAW 22 established *comarca*, recognized territory, for Chocoe Indians in Darien province). *See generally* PANAMANIAN LAW 22, *supra* note 17 (delineating lands for Chocoe Indians, not including Mogue Community).

47. *See* Dean E. Cycon, *When Worlds Collide: Law, Development and Indigenous People*, 25 NEW ENG.L. REV. 761, 773 (1991) (explaining *comarca* is administrative district in Panama inhabited by Indian tribes and communities); *see also* Paul J. Magnarella, *Sixth Annual Tribal Sovereignty Symposium: The Evolving Right of Self-Determination of Indigenous Peoples*, 14 ST. THOMAS L. REV. 425, 442 (2001) (noting *comarca* as autonomy of indigenous ancestral territory in Panama); Telephone Interview with Andrew Huff, Staff Attorney, Indian Law Resource Center (Sept. 8, 2004) (defining *comarca* as Indian Reservation in Panama).

48. *See* PANAMANIAN LAW 22, *supra* note 17 (demarcating territory for Chocoe Indians); *see also* PLANT & HVALKOF, *supra* note 46 (stating PANAMANIAN LAW 22 established *comarca* recognizing territory for certain Chocoe Indian villages in Panama).

49. *See, e.g.*, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382, 1384 (entered into force Sept. 5, 1991) [hereinafter Convention No. 169]; Statute of the Inter-American Court of Human Rights, Oct. 31, 1979, OAS GA Res., 9th Sess. (1979), *reprinted in* 19 I.L.M. 634 (1980) (entered into force Jan. 1, 1980).

50. *See* United Nations, *More Information/Human Rights*, available at <http://www.un.org/rights/morerights.htm> (last visited Nov. 7, 2004) (explaining almost every U.N. body and specialized agency deals with protection of human rights to some extent); Organization of American States, *About the OAS: The OAS and the Inter-American System*, available at <http://www.oas.org/main/main.asp?sLang=E&sLink=. / . / documents/ eng/aboutoas.asp> (last visited Nov. 22, 2004) [hereinafter *About the OAS: The OAS and the Inter-American System*] (mentioning Organization of American States ("OAS") brings together American Nations to advance common interests and strengthen cooperation).

51. *See More Information/Human Rights*, *supra* note 50 (explaining U.N. protects human rights through human rights law and human rights actions); *see also* Office of the High Commissioner for Human Rights, *International Human Rights Instruments*, avail-

of American States ("OAS").<sup>52</sup>

## 1. The United Nations

U.N. bodies, conventions, declarations, resolutions, and other tools exist that the Mogue Community can utilize in its attempt to achieve land ownership.<sup>53</sup> The early U.N. conven-

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able at <http://www.unhchr.ch/html/intinst.htm> (last visited Nov. 7, 2004) (listing all U.N. international human rights instruments).

52. See *About the OAS: The OAS and the Inter-American System*, *supra* note 50 (stating OAS human rights system provides recourse to people throughout Americas who have suffered human rights violations by their States and who have not found justice in their own Nations); see also Laurie Sargent, *The Indigenous Peoples of Bolivia's Amazon Basin Region and ILO Convention No. 169: Real Rights or Rhetoric?*, 29 U. MIAMI INTER-AM. L. REV. 451, 520-22 (1998) (explaining various recourses to human rights violations OAS provides).

53. See U.N. CHARTER (establishing international human rights standards); see also UDHR, *supra* note 41 (extending international human rights standards established in U.N. CHARTER); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), opened for signature Dec. 21 1965, 660 U.N.T.S. 195, art. 1, entered into force Jan. 4, 1969 [hereinafter ICERD] (requires member States of International Convention on the Elimination on all Forms of Racial Discrimination ("ICERD") to condemn all forms of racial discrimination); International Decade of the World's Indigenous People, G.A. Res. 48/163, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/Res/48/163 (1993); United Nations Draft Declaration on the Rights of Indigenous Peoples, U.N. ESCOR, Comm. on Hum. Rts., 11th Sess., Annex I, U.N. Doc. E/CN.4/Sub.2 (1993) [hereinafter Draft Declaration] (establishing moral force, though not legally binding on Nations, to indigenous rights); *Study of the Problem of Discrimination Against Indigenous Populations*, E.S.C. Res. 1982/34, U.N. ESCOR, 35th Sess. 28th plen. mtg., U.N. Doc. A/Res/1982/34 (1982) (noting establishment of Working Group on Indigenous Populations ("WGIP")); UNITED NATIONS, YEARBOOK ON HUMAN RIGHTS FOR 1947 417-426 (1949) (establishing Commission on Human Rights ("CHR") and Sub-Commission on Promotion and Protection of Human Rights ("Sub-Commission")); *Sub-Commission on the Promotion and Protection of Human Rights*, available at <http://www.unhchr.ch/html/menu2/2/sc.htm> (last visited Nov. 22, 2004) [hereinafter *Sub-Commission*] (explaining Sub-Commission); United Nations, Working Group on Indigenous Populations, available at <http://www.ohchr.org/english/issues/indigenous/groups/groups-01.htm> (last visited Nov. 22, 2004) (discussing function of WGIP); Office of the High commissioner for Human Rights, *Commission on Human Rights*, available at <http://www.unhchr.ch/html/menu2/2/chr.htm> (last visited Nov. 22, 2004) [hereinafter Commission on Human Rights] (explaining CHR adopts about 100 resolutions annually and examines, monitors, and reports on human rights situations in specific Nations or on major phenomena of human rights violations worldwide); *Establishment of a Permanent Forum on Indigenous Issues*, U.N. GAOR, Hum. Rts. Comm., 56th Sess., U.N. Doc. E/CN.4/RES/2000/87; Report of the United Nations Conference on Environment and Development, Chapter 26: Recognizing and Strengthening the Role of Indigenous People and Their Communities, U.N. Doc. A/Conf.151/26/Rev.1 (1993) [hereinafter Agenda 21] (laying foundation of international environmental standards that call for protection of indigenous lands); Convention No. 169, *supra* note 49 (establishing international law regarding indigenous rights, including land rights).

tions and treaties established human rights instruments which focused on the individual.<sup>54</sup> They originally included the Charter of the United Nations (“U.N. Charter”),<sup>55</sup> the Universal Declaration of Human Rights (“UDHR”),<sup>56</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”).<sup>57</sup>

The next wave of U.N. commissions included the protection of groups, in addition to individuals.<sup>58</sup> They also actively protected human rights by establishing organizations designed to adopt human rights resolutions and report human rights violations.<sup>59</sup> These include the Commission on Human Rights (“CHR”)<sup>60</sup> and the Sub-Commission on the Promotion and Pro-

54. See UDHR, *supra* note 41 (clarifying that UDHR applies to individuals not groups); see also Gillian Triggs, *Australia’s Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (CTH)*, in *INTERNATIONAL LAW AND INDIGENOUS PEOPLES* 381, 385 (S. James Anaya ed., 2003) (explaining how U.N. CHARTER and UDHR only protect individuals).

55. See U.N. CHARTER, art. 1 (stating importance of respect for equal rights and self-determination of peoples and declaring fundamental freedoms for all without distinction to race); see also Sheldon A. McDonald, *Caribbean Perspective: The Caribbean Court of Justice: Enhancing the Law of International Organizations*, 27 *FORDHAM INT’L L.J.* 930, 936-37 (2004) (mentioning that U.N. CHARTER attempts to solve international problems of cultural, humanitarian, or social character, and to promote and encourage respect for fundamental freedoms and human rights for all without racial distinction).

56. See UDHR, *supra* note 41, art. 41 (declaring that everyone has right to own property alone as well as in association with others and prohibits arbitrarily depriving anyone of his property); see also Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 *GEO. INT’L ENVTL. L. REV.* 309, 324 (1998) (stating that UDHR Article 17 gives everyone right to own property and right not to be arbitrarily deprived of that property).

57. See ICERD, *supra* note 53, art. 5 (stating that everyone has right to own property alone as well as in association with others without discrimination); see also Robin H. Gise, *Rethinking McClesky v. Kemp: How U.S. Ratification of the International Convention of the Elimination of All Forms of Racial Discrimination Provides a Remedy for Claims of Racial Disparity*, 22 *FORDHAM INT’L L.J.* 2270, 2271 (1999) (mentioning CERD prohibits any distinction based on race that has effect or purpose of impairing fundamental freedoms and human rights).

58. See Commission on Human Rights, *supra* note 53 (establishing group human rights); see also Sub-Commission, *supra* note 53 (mentioning Sub-Commission assists CHR in its human rights protection, including protection of group rights).

59. See Commission on Human Rights, *supra* note 53 (stating CHR examines, monitors, publicly reports human rights violations, and adopts resolutions to protect human rights); see also Sub-Commission, *supra* note 53 (explaining that Sub-Commission assists CHR in its human rights work, and has organizations, such as WGIP, which report to Sub-Commission in effort to protect human rights).

60. See Commission on Human Rights, *supra* note 53 (stating CHR examines, monitors, and publicly reports human rights violations); see also Grainne de Burca, *On Enlargement of the European Union: Beyond the Charter: How Enlargement has Enlarged the*

tection of Human Rights ("Sub-Commission").<sup>61</sup> In the 1980s, the United Nations began to focus on bodies and resolutions which exclusively addressed indigenous concerns, including the Working Group on Indigenous Populations ("WGIP");<sup>62</sup> the Draft United Nations Declaration on the Rights of Indigenous Peoples ("Draft Declaration");<sup>63</sup> the Report of the United Nations Conference on Environment and Development, Chapter 26, Recognizing and Strengthening the Role of Indigenous People and Their Communities ("Agenda 21");<sup>64</sup> and the International Labor Organization ("ILO") Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries ("Convention No. 169").<sup>65</sup>

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*Human Rights Policy of the European Union*, 27 *FORDHAM INT'L L.J.* 679, 709 (2004) (explaining CHR as charter-based monitoring body triggered either by complaints made by individuals or groups, or on basis of resolutions adopted at CHR's annual session where problem situations in particular States are identified).

61. See *Sub-Commission*, *supra* note 53 (mentioning Sub-Commission assists CHR in its human rights work by examining, monitoring, and publicly reporting human rights violations); see also de Burca, *supra* note 60 (explaining that Sub-Commission, similarly to CHR, protects human rights by responding to complaints made by individuals or groups, or on basis of resolutions adopted at CHR's annual session).

62. See United Nations, Indigenous Peoples: Working Group on Indigenous Population, available at <http://www.unhchr.ch/indigenous/groups-01.htm> (last visited Nov. 15, 2004) (noting that WGIP deals exclusively with indigenous issues); see also Rick Sarre, *Seeking Justice: Critical Perspectives of Native People: The Imprisonment of Indigenous Australians: Dilemmas and Challenges for Policymakers*, 4 *GEO. PUBLIC POL'Y REV.* 165, 167 n.5 (1999) (explaining WGIP consists of five Sub-Commission members and reports to CHR).

63. See *Draft Declaration*, *supra* note 53, Part VI (giving indigenous peoples right to maintain and strengthen their relationship to lands, territories, waters, coastal seas, and other recourses they had traditionally used); see also David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can it Fit?*, 25 *AM. INDIAN L. REV.* 93, 108 n.72 (2001) (explaining Draft Declaration focuses on indigenous issues by ensuring that indigenous peoples that are deprived of their fundamental freedoms and human rights or dispossessed of lands and resources).

64. See *Agenda 21*, *supra* note 53, ch. 26, ¶ 3 (stating that governments should strengthen indigenous legal instruments and recognize lands of indigenous people and that their communities should be protected from environmentally unsound activities or activities indigenous people concerned consider culturally or socially inappropriate); see also Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 *AM. U. INT'L L. REV.* 527, 579 n.196 (2002) (recognizing Report of the United Nations Conference on Environment and Development - Chapter 26: Recognizing and Strengthening the Role of Indigenous People and Their Communities ("Agenda 21") is devoted entirely to indigenous people, including protection of indigenous lands).

65. See *Convention No. 169*, *supra* note 49, art. 7 (stating indigenous peoples concerned shall have right to decide their own priorities for development over their lands);

a. The Early Tools: The Charter of the United Nations, the Universal Declaration of Human Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination

The early U.N. bodies and resolutions established international human rights standards, but focused primarily on individuals' rights.<sup>66</sup> It began in 1945 with the adoption of the U.N. Charter, which mandated the promotion of equal rights and self-determination of peoples, respect for human rights and fundamental freedoms for all, without regard to language, race, religion, or sex.<sup>67</sup> UDHR elaborated the human rights declared in the U.N. Charter.<sup>68</sup> Although UDHR's founding Nations originally developed it as a mere statement of guiding principles, UDHR has emerged as an authoritative interpretation of international human rights standards.<sup>69</sup> With respect to land owner-

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*see also* Maria McFarland Sanchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic Social, and Cultural Rights in Bolivia*, 27 *FORDHAM INT'L L.J.* 1663, 1675-76 (2004) (explaining Convention No. 169 is legally binding international instrument regarding indigenous peoples).

66. *See* UDHR, *supra* note 41 (clarifying that UDHR applies to individuals not groups); *see also* Triggs, *supra* note 54, at 385 (explaining how early U.N. human rights tools only protect individuals).

67. *See* U.N. CHARTER, art. 1(2) & (3) (stating Nations wish to develop friendly relations based on respect for equal rights and self-determination, and to take appropriate measures to strengthen universal peace and that Nations wish to achieve international cooperation in solving international problems of cultural, economic, humanitarian, or social character, in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to language, race, religion, or sex); *see also* Craig Scott, *Towards the Institutional Integration of the Core Human Rights Treaties*, in *GIVING MEANING TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 7, 10 (Isfahann Merali & Valerie Oosterveld eds., 2001) (noting U.N. CHARTER and UDHR as force behind U.N. human rights protections).

68. *See* UDHR, *supra* note 41 (expanding human rights developed in U.N. CHARTER); *see also* Sarah Pritchard, *The Significance of International Law, in INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS* 2, 14 (Sarah Pritchard ed., 1998) (noting UDHR expands human rights declared in U.N. CHARTER); Chisanga Puta-Chekwe & Nora Flood, *From Division to Integration: Economic, Social, and Cultural Rights as Basic Human Rights*, in *GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS* 39, 46 (Isfahann Merali & Valerie Oosterveld eds., 2001) (mentioning that UDHR elaborates on human rights commitment originally declared in U.N. CHARTER).

69. *See* Triggs, *supra* note 54, at 385 (explaining UDHR's original intention was to guide but it has become human rights measuring stick); *see also* Puta-Chekwe & Flood, *supra* note 68, at 46 (noting UDHR elaborates commitment to human rights first declared in U.N. CHARTER); Garth Nettheim, *The U.N. Charter-Based Human Rights System: An Overview*, in *INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS* 32, 33 (Sarah Pritchard ed., 1998) (stating that scholars agree that by 1968, UDHR constituted

ship specifically, UDHR states that everyone has the right to own property and prohibits arbitrary deprivation of anyone's property.<sup>70</sup>

ICERD, another U.N. instrument, has provisions that address indigenous peoples.<sup>71</sup> ICERD defines racial discrimination as any exclusion, preference, or restriction based on color, descent, or race.<sup>72</sup> Further, ICERD mandates parties to the Convention must condemn racial discrimination and must not engage in any act or practice of racial discrimination against any person or group of persons.<sup>73</sup> ICERD follows UDHR's principle of non-discrimination and applies the rights to own property and also provides the right to inherit property.<sup>74</sup>

integral part of customary international law); Scott, *supra* note 67, at 10-11 (diagramming and explaining "six-treaty system" which includes UDHR).

70. See UDHR, *supra* note 41, art. 17(1) & (2) (stating everyone has right to own property and prohibits arbitrary deprivation of property); see also CHRIS CONRAD ET AL., HUMAN RIGHTS AND THE U.S. DRUG WAR: A TREATISE TO COMMEMORATE THE 50TH ANNIVERSARY OF THE SIGNING OF THE U.N. UNIVERSAL DECLARATION OF HUMAN RIGHTS 57 (2001) (noting everyone has right to own property and no arbitrary deprivation of that property should occur); *Subject Guide to the Universal Declaration of Human Rights*, available at <http://www.silcom.com/~barnowl/humanrights.htm> (last visited Nov. 15, 2004) (stating UDHR mandates everyone has right to own property alone or with others).

71. See ICERD, *supra* note 53, pmbl. (prohibiting racial distinction that harms human rights and fundamental freedoms); see also Gise, *supra* note 57, at 2271 (explaining ICERD prohibits any distinction based on race that impairs human rights and fundamental freedoms).

72. See ICERD, *supra* note 53, art. 1(1) (defining racial discrimination as meaning any distinction, exclusion, restriction or preference based on color, descent, ethnic origin, or race, which affects or impairs human rights and fundamental freedoms in cultural, economic political, social, or any other field or public life); see also Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L. L. 283, 286 (1985) (noting ICERD's definition of racial discrimination); Gise, *supra* note 57, at 2271 (explaining ICERD prohibits any distinction based on race that has effect or purpose of impairing human rights and fundamental freedoms).

73. See ICERD, *supra* note 53, art. 2 (mandating State parties condemn racial discrimination and pursue all appropriate means, and without delay, policy of eliminating racial discrimination and promoting understanding among all races, and States will not to engage in any act or practice of racial discrimination against persons or groups of persons); see also Berta Esperanza Hernandez-Truyol & Shelbi D. Day, *Property, Wealth, Inequality and Human Rights: A Formula for Reform*, 34 IND. L. REV. 1213, 1229 (2001) (explaining ICERD mandates Nations adopt all necessary measures for speedy elimination of racial discrimination in all its forms and manifestations).

74. See ICERD, *supra* note 53, art. 5 (stating right to own property alone or in association with others, without discrimination, and right to inherit); see also MacKay, *supra* note 64, at 594 (mentioning ICERD obliges State-parties to guarantee, recognize,



b. Group Protection: The Commission on Human Rights and the Sub-Commission on Human Rights

CHR comprises the largest, most important, and most active human rights forum in the United Nations.<sup>75</sup> It meets annually when members and observers formally speak on various human rights issues.<sup>76</sup> CHR consists of fifty-three member Nations represented by government officials.<sup>77</sup> Most U.N. member Nations that are not members of CHR attend the session as observers.<sup>78</sup> In recent years, CHR has devoted increasing amounts of time

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and respect, without discrimination, right to own property alone and with others and right to inherit property).

75. See UNITED NATIONS, LEAFLET NO. 3: U.N. CHARTER BASED BODIES AND INDIGENOUS PEOPLE 7 [hereinafter LEAFLET 3] (stating CHR adopts around 100 decisions and resolutions each year); see also Press Release, United Nations, U.N. Commission on Human Rights Meets for 60th Session: Remarks of Bertrand Ramcharan Acting High Commissioner for Human Rights (Jan. 19, 2004) (reporting how CHR continues to be one of most important U.N. organs established under U.N. CHARTER); Human Rights Watch, *Libya Confirms Why it is Wrong for U.N. Rights Chair* (2002), available at <http://www.hrw.org/press/2002/08/libya082002> (last visited Oct. 28, 2004) (explaining CHR is chief U.N. human rights body).

76. See United Nations Public Inquiry Unit, Human Rights and the United Nations, available at <http://www.un.org/geninfo/faq/humanrights/hr2.htm> (last visited Oct. 14, 2004) (explaining objectives of annual session); see also A United Nations Priority: Human Rights in Action, available at <http://www.un.org/rights/HRToday/action.htm> (last visited Nov. 3, 2004) (discussing how CHR provides forum to voice human rights concerns); German Foreign Policy - Human Rights: The 60th Session of the United Nations Commission on Human Rights - Light and Shade, available at [http://www.auswaertiges-amt.de/en/aussenpolitik/menschenrechte/beauftragte/mrk60\\_html](http://www.auswaertiges-amt.de/en/aussenpolitik/menschenrechte/beauftragte/mrk60_html) (last visited Nov. 6, 2004) (giving examples of various speeches at 60th Session of CHR such as Bertrand Ramcharan, acting U.N. High Commissioner for Human Rights, to informal meeting of CHR).

77. See The United Nations and Human Rights, available at <http://www.un.org/rights/dpi1774e.htm> (stating number of members of CHR is 53); see also Human Rights and the United Nations: History, available at <http://www.un.org/cyberschoolbus/humanrights/about/history.asp> (last visited Oct. 15, 2004) (asserting CHR originally had 18 members and currently has 53 members); United Nations Public Inquiry Unit, *supra* note 76 (acknowledging 53 as number of members presently comprising CHR).

78. See The Austrian Foreign Ministry, Human Rights in the UN, available at [http://www.bmaa.gv.at/view.php3?f\\_id=73&LNG=en](http://www.bmaa.gv.at/view.php3?f_id=73&LNG=en) (last visited Nov. 5 2004) (explaining that non-CHR member countries, international organizations, and non-governmental organizations ("NGOs") participate in session as observers); see also Press Release, Embassy of the United States: Caracas, Venezuela Public Affairs Office, *World's Problems Cannot Justify Terrorism, U.S. Envoy Says* (Mar. 20, 2002), available at <http://embajadausa.org.ve/www1760.html> (stating member countries, as well as observers, attending upcoming CHR session); Web Monitoring & Documentation: 60th Session of the UN Commission on Human Rights (CHR), available at <http://www.unchr.info/calendar/0324.htm> (last visited Oct. 12, 2004) (listing members and observers who attended 60th Session of CHR such as China, Russia, and United States); 56th Session of the Commission on Human Rights, available at <http://www.unhchr.ch/>

and attention to indigenous issues.<sup>79</sup>

Similar to other U.N. bodies, CHR may engage in additional projects outside of its annual meeting.<sup>80</sup> In fact, one of the most important elements of CHR's work remains investigating and reporting on human rights problems.<sup>81</sup> CHR uses a *special rapporteur*, or individual expert, to conduct reports and investigations.<sup>82</sup>

CHR has a Sub-Commission which performs various functions in order to assist CHR with investigating human rights violations.<sup>83</sup> The Sub-Commission's agenda covers most human

html/menu2/2/56chr/order11.htm (last visited Nov. 4, 2004) (noting observers who took part in CHR's 56th Session).

79. See *Human Rights and Indigenous Issues*, Commission on Human Rights Resolution 2001/57, U.N. Commission on Human Rights, 58th Sess., 76th mtg., U.N. Doc. E/CN.4/2001/57 (2001) [hereinafter *Human Rights and Indigenous Issues*] (explaining that various issues concerning indigenous peoples that CHR is involved with include promoting and protecting indigenous people's human rights); see also LEAFLET 3, *supra* note 75, at 7 (noting that in 1996 CHR established special agenda on "Indigenous Issues" for first time); *Indigenous Issues: Report of the Special Rapporteur*, 1 FOR THE RECORD 2002: THE U.N. HUMAN RIGHTS SYSTEM (2002), available at <http://www.hri.ca/fortherecord2002/voll/indigenouchr.htm> (last visited Nov. 1, 2004) (noting various indigenous issues CHR is concerned with in 2002 including report of Draft Declaration, *special rapporteur*, and "International Decade of the World's Indigenous People"); *Indigenous Issues: Report of the Special Rapporteur*, 1 FOR THE RECORD 2003: THE U.N. HUMAN RIGHTS SYSTEM (2003), available at <http://www.hri.ca/fortherecord2003/voll/indigenouchr.htm> (last visited Nov. 2, 2004) (noting various indigenous issues recommended to CHR by *special rapporteur* in 2003).

80. See LEAFLET 3, *supra* note 75, at 9 (stating that CHR conducts work other than its annual meeting); see also Hurst Hannum, *Indigenous Rights, in INTERNATIONAL HUMAN RIGHTS IN THE 21ST CENTURY: PROTECTING THE RIGHTS OF GROUPS* 72 (Gene M. Lyons & James Mayall eds., 2003) (noting ways various other U.N. bodies work when not in their annual meeting). See generally Nettheim, *supra* note 69 (describing ways various U.N. bodies work beyond their annual meetings).

81. See LEAFLET 3, *supra* note 75, at 9 (discussing functions of CHR); see also Nettheim, *supra* note 69, at 34-35 (recognizing CHR has developed into body which can respond to human rights violations and pursue wide range of measures to hand human rights, including, investigate allegations of human rights violations and make studies).

82. See LEAFLET 3, *supra* note 75, at 9 (stating *special rapporteur* is common name for individual experts that investigate and report on human rights problems including indigenous human rights violations); see also *Human Rights and Indigenous Issues*, *supra* note 79, ¶ 1 (stating CHR's mandate includes existence of *special rapporteur* regarding indigenous issues and positions); United Nations, *Indigenous People: Information Note on the Mandate of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, available at <http://www.unhchr.ch/indigenous/rapporteur.htm> (last visited Nov. 16, 2004) (stating mandate of CHR to use *special rapporteurs*).

83. See LEAFLET 3, *supra* note 75, at 6 (explaining Sub-Commission's reports to CHR); see also Commission on Human Rights, *supra* note 53 (explaining Sub-Commission assists CHR in fulfilling its duties).

rights issues of international concern, including the human rights of indigenous peoples.<sup>84</sup> The Sub-Commission considers, and takes action on, recommendations from WGIP.<sup>85</sup> The Sub-Commission also recommends new studies to CHR, its parent body, including studies concerning indigenous issues.<sup>86</sup>

## b. Focus on Indigenous Peoples

### i. Working Group on Indigenous Populations

Over the past thirty years, the United Nations has focused greater attention on the rights of indigenous peoples and developed bodies and resolutions to specifically address indigenous issues.<sup>87</sup> In 1982, the U.N. Economic and Social Council ("ECOSOC") established WGIP, which is supervised by the Sub-Commission.<sup>88</sup> WGIP, arguably the most important body for in-

84. See Sarah Pritchard, *Working Group on Indigenous Populations: Mandate, Standard Setting Activities and Future Perspectives*, in *INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS*, 40, 41-42 (Sarah Pritchard ed., 1998) [hereinafter *Working Group Mandate*] (noting Sub-Commission is involved with indigenous issues); see also Hannum, *supra* note 80, at 82-84 (noting various ways Sub-Commission is involved in issues concerning indigenous peoples). See generally UNITED NATIONS, *LEAFLET: SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS INFORMATION 3-4* (2002) [hereinafter *SUB-COMMISSION LEAFLET*] (explaining Sub-Commission works on indigenous peoples' human rights concerns).

85. See *LEAFLET 3*, *supra* note 75, at 6 (explaining some of Sub-Commission's duties include recommending studies about indigenous concerns to CHR); see also *SUB-COMMISSION LEAFLET*, *supra* note 84, at 3-4 (stating Sub-Commission uses its working groups to make recommendations and conduct research on specific human rights problems, including those concerning indigenous peoples); *Working Group Mandate*, *supra* note 84, at 44 (stating WGIP presents its reports to Sub-Commission).

86. See *LEAFLET 3*, *supra* note 75, at 2-3 (stating Sub-Commission recommended report on indigenous related studies on cultural, intellectual property, land rights, and treaties); see also *SUB-COMMISSION LEAFLET*, *supra* note 84, at 3 (stating Sub-Commission makes recommendations to CHR).

87. See G.A. Res. 48/163, *supra* note 53 (declaring 1994-2004 "International Decade of the World's Indigenous People" and every August 9th during decade as "International Day of the World's Indigenous People"); see also UNITED NATIONS, *LEAFLET NO. 4: HUMAN RIGHTS TREATY BODIES AND INDIGENOUS PEOPLES 4* (2001) [hereinafter *LEAFLET 4*] (stating United Nations has focused on indigenous rights over past 30 years); Draft Declaration, *supra* note 53 (reflecting increased attention indigenous peoples' conditions have received from international community).

88. See *Sub-Commission*, *supra* note 53 (noting that in 1999, ECOSOC changed name to Sub-Commission on Promotion and Protection of Human Rights from Sub-Commission on Prevention of Discrimination and Protection of Minorities); see also International Service For Human Rights, *Charter-Based Bodies: Sub Commission on the Promotion and Protection of Human Rights*, available at [http://www.ishr.ch/About%20UN/Charter-based%20bodies/Sub.2/sub\\_2.htm](http://www.ishr.ch/About%20UN/Charter-based%20bodies/Sub.2/sub_2.htm) (last visited Nov. 7, 2004) (noting WGIP is one of various working groups governed by Sub-Commission); UNITED NATIONS, *FACT SHEET*

indigenous peoples,<sup>89</sup> reviews developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples and gives special attention to the evolution of international standards concerning indigenous rights.<sup>90</sup>

The U.N. attention towards indigenous peoples became so great that the United Nations, at the behest of WGIP, named 1993 as the "International Year for the World's Indigenous People."<sup>91</sup> The next year, WGIP commenced the U.N. "International Decade of the World's Indigenous People," which will end in December 2004.<sup>92</sup> The main objective of the decade is to

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NO. 9 (REV. 1): THE RIGHTS OF INDIGENOUS PEOPLES (2000) (noting 1982 is when ECOSOC initiated WGIP). See generally Study of the Problem of Discrimination Against Indigenous Populations, ESC Res. 1982/34, U.N. ESCOR, 38th Sess. 28th plen. mtg., U.N. Doc. A/Res/1982/34 (1982) (stating that WGIP was founded in 1982).

89. See UNITED NATIONS, LEAFLET NO. 2: INDIGENOUS PEOPLES, THE U.N. AND HUMAN RIGHTS 4 (2001) (distinguishing WGIP as most important U.N. body for indigenous peoples); see also Hannum, *supra* note 80, at 81-82 (stating WGIP as single most significant forum in United Nations that considers indigenous issues).

90. See *United Nations Working Group on Indigenous Populations: Mandate*, available at <http://www.unhchr.ch/indigenous/mandate.htm> (last visited Nov. 5, 2004) (explaining WGIP's mandate of monitoring evolving international standards and reviewing developments regarding indigenous peoples' human rights); see also *Report of the Working Group on Indigenous Populations on its First Session*, U.N. ESCOR, 35th Sess., U.N. Doc. E/CN.4/Sub.2/1982/33 (1982) (showing type of work in which WGIP partakes to review developments regarding promotion and protection of indigenous peoples' human rights); *Report of the Working Group on Indigenous Populations on its Second Session*, U.N. ESCOR, 36th Sess., U.N. Doc. E/CN.4/Sub.2/1983/22 (1983) (listing various findings of WGIP); *Report of the Working Group on Indigenous Populations on its Third Session*, U.N. ESCOR, 37th Sess., UN Doc E/CN.4/Sub.2/1984/20 (1984) (providing findings WGIP has made regarding indigenous peoples).

91. See *International Year of the World's Indigenous People*, G.A. Res. 45/164, U.N. GAOR, 45th Sess., 89th plen. mtg., U.N. Doc. A/Res/45/164 (1990) (stating 1993 as "International Year of the World's Indigenous People"); see also *International Year of the World's Indigenous People, 1993*, G.A. Res. 47/75, U.N. GAOR, 47th Sess., 85th plen. mtg., U.N. Doc. A/RES/47/75 (1992) (explaining "International Year of the World's Indigenous People" is 1993); Charles Scheiner, *Voluntary Fund for the 1993 International Year for the World's Indigenous People*, NATIVE-L (1992), available at <http://www.nativenet.uthscsa.edu/archive/nl/9211/0126.html> (last visited Nov. 15, 2004) (reporting United Nations declared 1993 as "International Year of the World's Indigenous People").

92. See G.A. Res. 48/163, *supra* note 53 (stating that "International Decade of the World's Indigenous People" commenced in December 1994 and continues through December 2004 and that during decade United Nations recognizes protecting human rights and fundamental freedoms of indigenous peoples as responsibility of all U.N. member States); see also *First Meeting of Permanent Forum High Point of UN Decade* (May 12, 2002), available at <http://www.un.org/rights/indigenous/background1.htm> (last visited Nov. 6, 2004) (explaining "International Decade of the World's Indigenous People" spans from December 1994 through December 2004); Patricia Chuse, *International*

strengthen international cooperation to solve problems faced by indigenous people.<sup>93</sup>

ii. The Draft United Nations Declaration on the Rights of Indigenous Peoples (“Draft Declaration”)

If adopted, the Draft Declaration will represent a major new instrument for indigenous peoples’ fight for human rights.<sup>94</sup> Although the United Nations has not completed the Draft Declaration, discussions still continue.<sup>95</sup> December 2004 marks the end of the “International Decade of the World’s Indigenous People,” and has been declared the target date for adopting the Draft Declaration.<sup>96</sup>

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*Decade of the World’s Indigenous People*, NATIVE-L (1994), available at <http://nativenet.uthscsa.edu/archive/nl/9412/0106.html>. (discussing “International Decade of the World’s Indigenous Peoples”); UNITED NATIONS, LEAFLET NO. 7: THE INTERNATIONAL DECADE OF THE WORLD’S INDIGENOUS PEOPLE 4 (2001) [hereinafter LEAFLET 7] (describing what “International Decade of the World’s Indigenous People” wants to accomplish between 1994 and 2004).

93. See LEAFLET 7, *supra* note 92, at 1 (noting that in addition to main objective, other issues of interest to WGIP that are important to Chochoe’s land claims include cultural heritage of indigenous peoples, working paper on land rights, and Permanent Forum on Indigenous Issues (“Permanent Forum”) within U.N. system); see also G.A. Res. 48/163, *supra* note 53 (stating main objective of “International Decade of the World’s Indigenous People” is resolving indigenous peoples’ concerns); *Programme of Activities for the International Decade for the World’s Indigenous People*, G.A. Res. 50/157, U.N. GAOR, 50th Sess., U.N. Doc. A/Res/50/157 (1996) (explaining goals of “International Decade of the World’s Indigenous People” include garnering international cooperation in order to solve problems encountered by indigenous people).

94. See generally *Technical Review of the Draft Declaration on the Rights of Indigenous Peoples* U.N. ESCOR, 46th Sess., E/CN.4/Sub.2/1994/2/Add.1 (1994) (expressing importance of Draft Declaration on Rights of Indigenous Peoples’ (“Draft Declaration”) completion); *Draft United Nations Declaration on the Rights of Indigenous Peoples*, E.S.C. Res. 1994/45, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/56 (1994) [hereinafter Draft Declaration II] (recognizing decision to adopt and submit Draft Declaration to CHR agreed upon by members of WGIP).

95. See UNITED NATIONS, NGLS ROUNDUP: 2ND SESSION OF THE UN PERMANENT FORUM ON INDIGENOUS ISSUES 4 (2003) (stating certain organizations and governments are not interested in cooperating on completing Draft Declaration and instead impede completion of process); see also UNITED NATIONS, INDIGENOUS PEOPLES: FIRST MEETING OF PERMANENT FORUM HIGH POINT OF UN DECADE, available at <http://www.un.org/rights/indigenous/background1.htm> (last visited Nov. 16, 2004) (stating Draft Declaration should be completed and adopted by end of “International Decade of the World’s Indigenous People”).

96. See Press Release, United Nations, Third Committee Delegates Say completion of Draft on Indigenous Rights is Critical by 2004, as Discussion Of Indigenous People Concludes (Sept. 21, 2002), available at <http://www.un.org/News/Press/docs/2002/gashc3704.doc.htm> [hereinafter Third Committee Delegates] (expressing that it is critical to complete Draft Declaration by end of “International Decade of the World’s Indig-

The preamble to the Draft Declaration addresses the problems indigenous peoples have faced involving land rights.<sup>97</sup> The preamble discusses the concern for indigenous peoples' right to development and the colonization and deprivation of their lands and resources.<sup>98</sup> In addition, the preamble recognizes the urgent need to respect and promote rights and unique characteristics of indigenous peoples, especially land rights.<sup>99</sup> Finally, the preamble asserts that control over developments affecting indigenous peoples and their lands will enable indigenous peoples to maintain and strengthen their cultures, and will promote fulfillment of their aspirations.<sup>100</sup>

Part VI of the Draft Declaration deals almost exclusively

enous Peoples" in 2004); *see also* UNITED NATIONS, LEAFLET NO. 5: THE DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 3 [hereinafter LEAFLET 5] (stating international community would like to complete Draft Declaration by December 2004).

97. *See Annex I: Draft United Nations Declaration on the Rights of Indigenous Peoples (The Daes Declaration)*, in JUSTICE PENDING: INDIGENOUS PEOPLES AND OTHER GOOD CAUSES 281, 285-86 (Gudmundur Alfredsson and Maria Stavropoulou, eds., 2002) [hereinafter JUSTICE PENDING] (discussing preamble to Draft Declaration); Erica-Irene A. Daes, *Discrimination Against Indigenous Populations: A Working Paper*, E.S.C. Res. 1982/22, U.N. ESCOR, 40th Sess., E/CN.4/Sub.2/1987/22, annex II (1987) [hereinafter *Daes Working Paper*] (containing set of draft preamble paragraphs and principles for insertion into Draft Declaration). *See generally* Draft Declaration, *supra* note 53, arts. 1-18 (stating different human rights violations indigenous peoples have endured).

98. *See* Draft Declaration, *supra* note 53, pmbl. (stating concern regarding indigenous peoples' deprivation of human rights and fundamental freedoms, resulting in their dispossession of lands and resources, thus preventing them from exercising their right to development in accordance with their own needs and interests); *see also* JUSTICE PENDING, *supra* note 97, at 285 (discussing Draft Declaration and past land dispossession and colonization); *Daes Working Paper*, *supra* note 97 (discussing indigenous peoples right to development from past colonization and dispossession).

99. *See* Draft Declaration, *supra* note 53, pmbl. (stating how Nations recognize urgent need to respect and promote rights and characteristics of indigenous peoples, especially their rights to their lands and resources); *see also* JUSTICE PENDING, *supra* note 97, at 285 (discussing importance of respecting indigenous peoples' right to land); *Daes Working Paper*, *supra* note 97 (recognizing importance of need to respect and promote indigenous people's right to own land).

100. *See* Draft Declaration, *supra* note 53, pmbl. (stating Nations are convinced that control by indigenous peoples over developments affecting them and their lands and resources will enable them to maintain and strengthen themselves); *see also* JUSTICE PENDING, *supra* note 97, at 285 (discussing how control over land will strengthen indigenous peoples); Erica-Irene A. Daes, *Equality of Indigenous Peoples Under the Auspices of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493, 501 (1995) [hereinafter *Equality of Indigenous Peoples*] (explaining preamble to Draft Declaration highlights importance of indigenous peoples' control over their land).

with issues concerning indigenous peoples' land rights.<sup>101</sup> Part VI gives indigenous peoples the right to maintain and strengthen their relationship to the lands, territories, waters, coastal seas, and other resources they have traditionally used.<sup>102</sup> This declaration includes full recognition of indigenous peoples' laws, traditions and customs, and suggests that Nations take measures to prevent any interference with or encroachment upon them.<sup>103</sup> Part VI also asserts that indigenous peoples have the right to develop strategies for the development and use of their lands and other resources.<sup>104</sup>

iii. Report of the United Nations Conference on Environment and Development - Chapter 26: Recognizing and Strengthening the Role of Indigenous People and Their Communities

Agenda 21,<sup>105</sup> actually adopted to protect the environ-

101. See Draft Declaration, *supra* note 53, arts. 25-30 (noting land rights concerns regarding indigenous peoples); see also *Equality of Indigenous Peoples*, *supra* note 100, at 496 (noting subject of Part VI of Draft Declaration as territorial security); *Working Group Mandate*, *supra* note 84, at 49 (noting Part VI of Draft Declaration addresses rights connected with indigenous peoples and their land and territories).

102. See Draft Declaration, *supra* note 53, art. 25 (stating indigenous peoples have right to maintain and strengthen their relationship with lands and resources which they have occupied, owned, or used); see also *Equality of Indigenous Peoples*, *supra* note 100, at 509 (showing indigenous people have right to strong relationship with their land); Draft Declaration, *supra* note 53, art. 26 (noting terms "lands and territories" include total environment of air, coastal seas, flora and fauna, lands, sea-ice, and waters); *Working Group Mandate*, *supra* note 84, at 49 (explaining right of indigenous peoples to maintain strong relationship with their lands and waters).

103. See Draft Declaration, *supra* note 53, art. 26 (stating indigenous peoples' right to full recognition of their customs, laws, land-tenure systems, traditions, and institutions for development and management of resources, and right to State protection from any interference or encroachment upon these rights); see also *Equality of Indigenous Peoples*, *supra* note 100, at 509-10 (explaining Draft Declaration mandates full State protection and recognition of indigenous land); *Working Group Mandate*, *supra* note 84, at 49 (stating Draft Declaration recognizes importance of indigenous peoples' traditional use of land).

104. See Draft Declaration, *supra* note 53, art. 30 (stating indigenous peoples have right to determine priorities and strategies for development or use of their lands and resources); see also *Equality of Indigenous Peoples*, *supra* note 100, at 509 (noting Draft Declaration mandates States give indigenous peoples autonomy over decision making regarding their land).

105. see ROMINA PICOLATTI, AGENDA 21 AND HUMAN RIGHTS: THE RIGHT TO PARTICIPATE IN LINKING HUMAN RIGHTS AND THE ENVIRONMENT 50 (Romina Picolatti & Jorge Daniel Taillant eds., 2003) (mentioning Chapter 26 of Agenda 21 deals with indigenous communities); see also Gregory F. Maggio, *Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity* 16 *UCLA J. ENVTL. L. & POL'Y*

ment,<sup>106</sup> also recognized that indigenous peoples have an historical relationship with their lands as most are descendants of the original inhabitants.<sup>107</sup> Agenda 21 calls for indigenous peoples to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.<sup>108</sup>

In accordance with Agenda 21, member State governments should establish a process to empower indigenous peoples through adopting or strengthening appropriate policies and/or legal instruments at the national level.<sup>109</sup> Agenda 21 also recognizes that indigenous peoples' lands should have protection from activities the indigenous peoples consider culturally and socially inappropriate.<sup>110</sup> Agenda 21 requires member State gov-

179, 183 (1998) (mentioning Agenda 21 recognizes that achievement of sustainable development requires participation by indigenous peoples). *See generally* Agenda 21, *supra* note 53 (showing importance of Agenda 21 to indigenous peoples).

106. *See* Agenda 21, *supra* note 53, ¶ 8 (expressing guidelines of how countries can successfully implement integrating developmental and environmental policy, planning and management levels, provide legal framework, effectively use economic instruments as incentive and establish systems for environmental and economic accounting); *see also* United Nations, Agenda 21, *available at* <http://www.un.org/esa/sustdev/documents/agenda21/index>. (last visited Nov. 6, 2004) (explaining that Agenda 21 is comprehensive action plan by organizations of U.N. System in every area in which humans impact environment).

107. *See* Agenda 21, *supra* note 53, ch. 26, ¶ 1 (noting term "lands" includes environment of areas which indigenous peoples traditionally occupy); *see also* United Nations Economic and Social Council: Working Paper on the Concept of "Indigenous Peoples", U.N. GAOR, Hum. Rts. Comm, 14th Sess. ¶ 44, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996) (recognizing Agenda 21 noted inseparability of cultural distinctiveness and territory); UNITED NATIONS, THE GLOBAL PARTNERSHIP FOR ENVIRONMENT AND DEVELOPMENT: A GUIDE TO AGENDA 21 POST RIO EDITION 181, 212 (1993) [hereinafter GUIDE TO AGENDA 21] (noting indigenous people and their communities have historic relationship with their lands and are generally descendants of original inhabitants of those lands and have developed holistic traditional scientific knowledge of their lands, natural resources, and environment).

108. *See* Agenda 21, *supra* note 53, ch. 26, ¶ 1 (stating indigenous people and their communities shall enjoy human rights and fundamental freedoms without discrimination); *see also* AGENDA 21: EARTH'S ACTION PLAN 507 (Nicholas A. Robinson ed., 1993) (explaining that with no discrimination, indigenous people shall have fundamental freedoms).

109. *See* Agenda 21, *supra* note 53, ch. 26, ¶ 3(a) (stating governments should aim to empower indigenous people and their communities through measures including adoption or strengthening of appropriate policies and/or legal instruments, recognition protection of lands of indigenous peoples from activities that are environmentally unsound or that indigenous people concerned consider inappropriate); *see also* MacKay, *supra* note 64 (explaining Agenda 21 states governments should empower indigenous peoples through various measures).

110. *See* Multi-Stakeholder Dialogue Segment of the Second Session of the Commission of the Commission of Sustainable Development Acting as the Preparatory Committee for the World Sum-



ernments to strengthen national dispute-resolution arrangements in relation to the settlement of land and resource-management concerns.<sup>111</sup> Yet, Agenda 21 recognizes that some indigenous peoples may require greater control over their lands and self-management of the natural resources in their territories in accordance with national legislation.<sup>112</sup> Agenda 21 suggests that Nations ratify and apply existing international conventions relevant to indigenous peoples and also support the adoption of the U.N. Draft Declaration on Indigenous Rights.<sup>113</sup>

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*mit on Sustainable Development* (Dec. 28, 2001) U.N. ESCOR, 2nd Prep. Sess. ¶ 9, U.N. Doc. E/CN.17/2002/PC.2/6/Add.3 (2002) (mentioning Agenda 21 calls for protection of indigenous peoples' land from activities that are environmentally unsound or indigenous people involved consider culturally and socially inappropriate); *see also* GUIDE TO AGENDA 21, *supra* note 107, at 181-182 (noting governments should protect indigenous peoples' lands from activities that are either environmentally unsound or that they consider inappropriate); *Actions of the United Nations Environment Programme to Implement the Plan of Implementation of the World Summit on Sustainable Development*, U.N. GAOR, 57th Sess. ¶ 24 UNEP/GC.22/5 (2002) (acknowledging one of Agenda 21's objectives as recognizing lands and protecting indigenous people and their communities from activities that indigenous people concerned consider inappropriate and environmentally unsound).

111. *See* Agenda 21, *supra* note 53, ch. 26, ¶ 3(a)(v) (mandating governments empower indigenous people through developing and strengthening national dispute-resolution arrangements regarding settlement of land and resource-management concerns); *see also* *Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples' Permanent Sovereignty over Natural Resources Preliminary Report of the Special Rapporteur, Erica-Irene A. Daes, Submitted in Accordance with Sub-Commission Resolution 2002/15*, U.N. GAOR, Hum. Rts. Comm., 55th Sess., E/CN.4/Sub.2/2003/20 (2003) (explaining how Agenda 21 mandates governments to empower indigenous people); GUIDE TO AGENDA 21, *supra* note 107, at 182 (noting national dispute-resolution arrangements in relation to settlement of land and resource-management concerns with indigenous people should develop and strengthen).

112. *See* Agenda 21, *supra* note 53, ch. 26, ¶ 4 (stating some indigenous people and their communities may require, in accordance with national legislation, more autonomy); *see also* GUIDE TO AGENDA 21, *supra* note 107, at 182 (mentioning strengthening of laws and national policy regarding indigenous people and their communities, including indigenous peoples initiation of proposals for such policies).

113. *See* Agenda 21, *supra* note 53, ch. 26, ¶ 4(a) (stating governments should consider ratifying and applying existing international conventions relevant to indigenous people and their communities, where not yet done, and support Draft Declaration); *see also* AGENDA 21: EARTH'S ACTION PLAN, *supra* note 111, at 509 (stating Agenda 21's support for ratification of international conventions regarding indigenous people including Draft Declaration).

iv. International Labor Organization Convention No. 169  
Concerning Indigenous and Tribal Peoples  
in Independent Countries

Convention No. 169<sup>114</sup> has replaced Indigenous and Tribal Populations Convention, 1957 ("Convention No. 107").<sup>115</sup> Scholars criticized Convention No. 107, the first international standard specifically devoted to indigenous rights, for being patronizing and assimilationist in its approach.<sup>116</sup> Convention No. 169, on the other hand, aimed to resolve the issue of indigenous peoples' right to possess land they traditionally occupied.<sup>117</sup>

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114. See Hannum, *supra* note 80 (stating Convention No. 169 remains most important legally binding international instrument on indigenous rights); see also UNITED NATIONS, LEAFLET NO. 8: THE I.L.O. AND INDIGENOUS AND TRIBAL PEOPLES I [hereinafter LEAFLET 8] (recognizing legal importance of Convention No. 169).

115. See Martin Scheinin, *The Right to Enjoy A Distinct Culture: Indigenous and Competing Uses of Land*, in THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETIVE APPROACH 159, 184 (noting Convention No. 169 replaces Indigenous and Tribal Populations Convention, 1957 ("Convention No. 107") in large part because Convention No. 107 had assimilationist orientation that is no longer acceptable in today's world where multiculturalism and right of minority groups to enjoy their own culture and traditions have become norm); see also Gudmundur Alfredsson & Lee Swepston, *The Rights of Indigenous Peoples and the Contribution by Erica Daes*, in JUSTICE PENDING: INDIGENOUS PEOPLES AND OTHER GOOD CAUSES 69, 72 (Gudmundur Alfredsson & Maria Stavropoulou eds., 2002) (ratifying Convention No. 169 into force meant no further ratification of Convention No. 107); Hannum, *supra* note 80, at 88 (stating Convention No. 169 replaces Convention No. 107); *International Labor Standards: Indigenous and Tribal Peoples*, available at <http://www.ilo.org/public/english/indigenous/standard/index.htm> (last visited Nov. 6, 2004) (recognizing Panama ratified Convention No. 107 on June 4, 1971 and that Convention No. 107 is still in force for those countries that ratified it and have yet to ratify Convention No. 169).

116. See Biko Nagara, *Long Path Towards Recognition*, UN CHRON. ONLINE EDITION (Nov. 11, 2003) available at [http://www.un.org/Pubs/chronicle/2003/webArticles/111103\\_longPath.asp](http://www.un.org/Pubs/chronicle/2003/webArticles/111103_longPath.asp) (explaining Convention No. 107, while groundbreaking for indigenous peoples' rights, needed replacing); see also *Programme of Activities of the International Decade of the World's Indigenous People: Report on Progress Made at the National, Regional and International Levels in Accomplishing the Objectives Contained in Paragraph 13 of General Assembly Resolution 49/214*, U.N. GAOR, 50th Sess. ¶ 36, U.N. Doc. A/50/565 (1995) (stating while Convention No. 107, first document regarding rights of indigenous peoples, has strong protective element, experts consider it outdated); Nagara, *supra*, ¶ 36 (explaining Convention No. 107's novel, yet strictly limiting nature when first introduced).

117. See Catarina Krause, *The Right to Property*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 143, 148 (Asbjorn Eide et al. eds., 1995) (discussing land right component of Convention No. 169); see also Convention No. 169, *supra* note 49 (stating importance Convention No. 169 places on indigenous land rights); *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. GAOR, Hum. Rts. Comm, 58th Sess. at 3, U.N. Doc. E/CN.4/2002/97 (2002) (noting importance of indigenous land rights in Convention No. 169).

Convention No. 169, which became legally binding on member States in 1991, provides indigenous people with the right to decide how they wish to develop the lands they occupy and use, and set their own priorities for those lands.<sup>118</sup> It also ensures that governments take measures to protect and preserve the environment of the lands indigenous people inhabit.<sup>119</sup> Further, Convention No. 169 requires member State governments to respect indigenous peoples and their special relationship with their lands.<sup>120</sup> In particular, Convention No. 169 calls for respect of the collective nature of this special relationship between indigenous peoples and their lands.<sup>121</sup>

Convention No. 169 requires measures to safeguard indigenous peoples' right to use lands not exclusively occupied by them, but which they historically used for sustenance and traditional activities.<sup>122</sup> Convention No. 169 also provides protection

118. See Convention No. 169, *supra* note 49, art. 7(1) (stating indigenous peoples concerned shall have right to decide their own priorities for process of development and lands they occupy or use); see also INTERNATIONAL LABOR ORGANIZATION, ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES 1989 (No. 169): A MANUAL 31 (2003) [hereinafter ILO MANUAL] (stating Convention No. 169 indicates indigenous peoples have rights to lands they have lived on, used, and managed according to their traditional practices); Hannum, *supra* note 80, at 88 (listing various ways Convention No. 169 calls for indigenous peoples to control their own lands).

119. See Convention No. 169, *supra* note 49, art. 7(4) (stating governments shall take measures, in cooperation with peoples concerned, to protect and preserve indigenous lands); see also ILO MANUAL, *supra* note 118, at 34 (stating Convention No. 169 calls for special measures of protection for indigenous peoples land rights); *The People's Movement for Human Rights Education: The Human Right to a Safe and Healthy Environment*, available at <http://www.pdhre.org/rights/environment.html> (last visited Nov. 16, 2004) (stating governments shall take measures to protect and preserve environment of territories indigenous people inhabit).

120. See Convention No. 169, *supra* note 49, art. 13(1) (stating governments shall respect special importance for indigenous cultures and spiritual values and their relationship with lands which they occupy or use, and in particular its collective aspects); see also LEAFLET 8, *supra* note 114 (stating Convention No. 169 requires governments to respect special importance to cultures and spiritual values of indigenous and tribal peoples of their relationship with lands or territories); ILO MANUAL, *supra* note 118, at 34 (stating governments need to respect special relationship between indigenous people and their land).

121. See Convention No. 169, *supra* note 49, art. 13(1) (emphasizing special relationship indigenous communities have with their land); see also ILO MANUAL, *supra* note 118, at 34 (stating governments need to respect relationship between indigenous people and their land); LEAFLET 8, *supra* note 114 (stating Convention No. 169 requires governments to respect special importance between land and cultures and spiritual values of indigenous and tribal peoples).

122. See Convention No. 169, *supra* note 49, art. 14(1) (stating governments must protect indigenous peoples' use of lands they do not own, but have traditionally used

from people or governments seeking to take advantage of indigenous people due to their lack of understanding of the laws.<sup>123</sup> In addition, Convention No. 169 supports appropriate legal penalties for unauthorized intrusion upon, or use of, indigenous peoples' lands.<sup>124</sup>

## 2. The Organization of American States

OAS has a human rights system which provides recourse to people in the Americas who have suffered human rights violations by a member State.<sup>125</sup> Its main resources consist of IACHR<sup>126</sup> and the Inter-American Court.<sup>127</sup> Together, these two institutions apply the regional law on human rights in the

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for their subsistence); *see also* ILO MANUAL, *supra* note 118, at 34 (noting protection of lands); Hannum, *supra* note 80, at 88 (recognizing use of lands indigenous people have traditionally used but do not own).

123. *See* Convention No. 169, *supra* note 49, art. 17(3) (stating no one shall take advantage of indigenous customs or of lack of understanding of laws to secure ownership, possession, or use of land belonging to indigenous peoples); *see also* ILO MANUAL, *supra* note 118, at 34 (recognizing importance of not allowing people to take advantage of indigenous peoples).

124. *See* Convention No. 169, *supra* note 49, art. 18 (stating governments establish adequate legal penalties for unauthorized intrusion upon, or use of, indigenous peoples' lands, and governments shall take measures to prevent such offences); *see also* ILO MANUAL, *supra* note 118, at 34 (recognizing penalties for intrusion upon indigenous land).

125. *See Key OAS Issues*, available at [http://www.oas.org/key\\_issues/eng/GAhumanrights.htm](http://www.oas.org/key_issues/eng/GAhumanrights.htm) (last visited Nov. 1, 2004) (explaining how people in Americas can address human rights violations); *see also About the OAS: The OAS and the Inter-American System*, *supra* note 50 (recognizing Nations of Americas are working more closely together than ever before to advance human rights).

126. *See* Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2394, ch. 15 (mandating creation of IACHR, whose principal function promotes observance and protection of human rights and serves as consultative organ of OAS in these matters); *see also What is the IACHR?*, available at <http://www.cidh.oas.org/what.htm> (last visited Nov. 4, 2004) (mentioning IACHR remains one of two bodies in Inter-American system for promotion and protection of human rights); Congo Online, *Human Rights Bodies*, available at <http://www.congo-online.com/HumanRights/BodyList.asp?Area=Regional> (last visited Nov. 6, 2004) (recognizing IACHR and Inter-American Court together provide recourse to people who have suffered human rights violations).

127. *See What is the IACHR?*, *supra* note 126 (mentioning IACHR and Inter-American Court constitute two bodies in inter-American system for promotion and protection of human rights); *see also* Statute of the Inter-American Court on Human Rights, O.A.S. Res. 448 (IX-0/79), art. 1 (1979) [hereinafter IACHR Statute] (describing Inter-American Court as autonomous judicial institution whose purpose is application and interpretation of American Convention on Human Rights ("American Convention") and Court exercises its functions in accordance with provisions of American Convention and Statute of Inter-American Court); Congo Online, *supra* note 126 (recognizing IACHR and

Americas.<sup>128</sup>

### a. Inter-American Commission on Human Rights

Continually promoting the observance and defense of human rights,<sup>129</sup> IACHR analyzes, investigates, and receives individual petitions which allege human rights violations by member States.<sup>130</sup> IACHR also observes the general human rights situations in member States and publishes special reports regarding the situations when appropriate.<sup>131</sup> In order to analyze human

Inter-American Court together provide recourse to people who have suffered human rights violations).

128. See Charter of the Organization of American States, *supra* note 126 (mandating IACHR will promote observance and protection of human rights in American Nations); see also IACHR Statute, *supra* note 127, art. 2 (stating any Nation to have ratified American Convention is subject to jurisdiction of Inter-American Court); UNITED NATIONS, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 80 (2003) (recognizing Inter-American Commission and Inter-American Court shall have competence with respect to matters relating to fulfillment of commitments made by State parties to American Convention); OFFICE OF PUBLIC COMMUNICATION: UNITED STATES OF AMERICA, BUREAU OF PUBLIC AFFAIRS, TRAVEL, HISTORY, INTERNATIONAL ORGANIZATIONS, TRADE/ECONOMICS, OAS, HUMAN RIGHTS, TERRORISM, NARCOTICS, DEMOCRATIZATION, ENVIRONMENT (1991) [hereinafter OFFICE OF PUBLIC COMMUNICATION] (mentioning IACHR has been called conscience of hemisphere and together with Inter-American Court give OAS active and at times forceful role in promoting and protecting human rights in Americas); *Inter-American Commission on Human Rights* available at [http://www.fact-index.com/i/in/inter\\_american\\_commission\\_on\\_human\\_rights.html](http://www.fact-index.com/i/in/inter_american_commission_on_human_rights.html) (stating IACHR and Inter-American Court are two bodies that comprise inter-American system for promotion and protection of human rights).

129. See Charter of the Organization of American States, *supra* note 126 (mandating IACHR, whose principal function is to promote observance and protection of human rights); see also *Permanent Council on the Organization of American States: Committee on Juridical and Political Affairs*, available at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/consejo/CAJP/Indigenous.asp> (last visited Nov. 6, 2004) [hereinafter *Permanent Council*] (stating IACHR promotes and protects human rights in Americas).

130. See The American Convention on Human Rights, July 18, 1978, arts. 44-45, OEA/Ser. L.V./II.82, 1144 U.N.T.S. 123 (mentioning how IACHR protects human rights); see also International Labour Organization, *Organization of American States (OAS) - Inter-American Commission on Human Rights*, available at [http://www.ilo.org/public/english/employment/gems/eo/oas/c\\_iachr.htm](http://www.ilo.org/public/english/employment/gems/eo/oas/c_iachr.htm) (last visited Nov. 5, 2004) [hereinafter *OAS-IACHR*] (mentioning IACHR specifically investigates individual petitions that allege human rights violations); *Inter-American Commission on Human Rights*, *supra* note 128 (stating that in order to pursue its mandate, IACHR analyzes, investigates, and receives individual petitions alleging violations of specific human rights protected by American Convention).

131. See *Key OAS Issues*, *supra* note 125; see also OFFICE OF PUBLIC COMMUNICATION, *supra* note 128 (noting IACHR also publishes special reports, effective in challenging abuses in Nations including Panama); *Organization of American States (OAS) - Inter-Ameri-*

rights situations more deeply or to investigate specific situations, IACHR may carry out on-site visits of member States.<sup>132</sup> IACHR can also bring cases before the Inter-American Court.<sup>133</sup>

#### b. The Proposed American Declaration on the Rights of Indigenous Populations

IACHR's Proposed American Declaration on the Rights of Indigenous Populations ("American Declaration") acknowledges that the rights of indigenous peoples constitute a fundamental issue in the future of the Americas.<sup>134</sup> It recognizes the necessity of various traditional systems for use and control of land by indigenous peoples for their development and well-being.<sup>135</sup> In

*can Commission on Human Rights, supra* note 130 (monitoring general human rights situation in OAS's member States and, when necessary, prepares and publishes country-specific human rights reports are functions of IACHR); *What is the IACHR?*, *supra* note 126 (stating IACHR observes human rights violations and publishes special reports regarding situations in member Nations).

132. *See Key OAS Issues, supra* note 125 (explaining importance of on-site visits as tool which IACHR uses to analyze and investigate human rights violations); *see also What is the IACHR?*, *supra* note 126 (stating IACHR has ability to carry out on-site visits to Nations and to engage in more in-depth analysis of general situations and/or to investigate specific situations); Press Release, Inter-American Commission on Human Rights, IACHR Calls Upon the United States to Postpone Execution of Juvenile Offender Alexander Williams (Feb. 19, 2002), *available at* <http://www.cidh.oas.org/Comunicados/English/2002/Press7.02.htm> (stating IACHR had called upon United States to postpone execution of Alexander Williams in U.S. State of Georgia, in order to allow IACHR to investigate human rights complaint filed on his behalf).

133. *See* SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* 185 (1997) (explaining how either IACHR or respondent State may submit case to Inter-American Court's contentious jurisdiction if friendly settlement is unachievable); *see also* JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 7 (2003) (describing when IACHR initially began to bring contentious cases before Inter-American Court); *HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM: HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM* 164-65 (1985) (explaining how IACHR brings cases before Inter-American Court).

134. *See Permanent Council of the Organization of the American States Committee on Juridical and Political Affairs, Working Document Comparing the Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the IACHR in March 1997) and the Proposals Made by States and Indigenous Representatives at OAS Meetings in 1999*, OEA/Ser.K/XVI/GT/DADIN/doc.9/01 (2001) [hereinafter *American Declaration*] (recognizing indigenous peoples' rights constitute fundamental and profoundly significant issue in Americas' future). *See generally* Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd Session, 95th Regular Session), OEA/Ser/L/V/.II.95 Doc. 6 (1997) [hereinafter *Proposed American Declaration*] (stating importance of indigenous treatment by American Nations in future).

135. *See* Proposed American Declaration, *supra* note 134, pmb. ¶ 5 (recognizing that in many indigenous cultures, traditional collective systems for control and use of

addition, it specifically addresses the importance of preserving traditional collective forms of land ownership for indigenous peoples,<sup>136</sup> and mandates that Nations demarcate lands indigenous peoples use.<sup>137</sup>

Also, the American Declaration asserts that indigenous peoples have the right to legal recognition, control and enjoyment of their lands and property.<sup>138</sup> It recognizes the property and ownership rights that indigenous peoples have with respect to the lands and resources that they have occupied.<sup>139</sup> Further-

land and territory are necessary condition for their survival, social organization, development and their individual and collective well-being); see also Michael Holley, *Recognizing the Rights of Indigenous People to their Traditional Lands: A Case Study of an Internally-Displaced Community in Guatemala*, 15 *BERKELEY J. INT'L L.* 119, 142 (1997) (stating that consideration of traditional collective systems for control and use of land are necessary for indigenous peoples' survival).

136. See *American Declaration*, *supra* note 134 (recognizing form of indigenous peoples' control and ownership of their lands are distinctive and varied and does not necessarily coincide with systems protected by domestic laws of countries in which they live); see also *Permanent Council of the Organization of American States, Proposed American Declaration on the Rights of Indigenous Populations (Considered at the Meetings Held on Nov. 8-12, 1999; Incorporating the Observations and Proposals of the Representatives of the Indigenous Populations)*, OEA/Ser.K/XVI GT/DADIN/doc.1/99 rev. 2 (2002) (stating further importance of preserving indigenous cultures, which may include traditional collective forms of land ownership); *Permanent Council of the Organization of American States, Information Bulletin No. 2*, OEA/Ser.K/XVI GT/DADIN/doc.110/02, at 3 (2002) (understanding concept of collective ownership in Proposed American Declaration on Rights of Indigenous Peoples ("American Declaration") presented as framework and mechanism to keep alive indigenous peoples' internal relationships, its human and cultural survival, exercise of self-government and systems of authority, and implementation of its life plans).

137. See *American Declaration*, *supra* note 134, art. 18(8) (stating States should give maximum priority to demarcation and recognition of indigenous peoples' lands); see also *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*, reprinted in 19 *ARIZ. J. INT'L & COMP. LAW* 17, 58 (2002) [hereinafter *Awas Tingni Complaint*] (explaining American Declaration mandates demarcation of indigenous lands).

138. See *American Declaration*, *supra* note 134, art. 18(1) (stating indigenous peoples should have right to legal recognition of their lands); see also *Awas Tingni Complaint*, *supra* note 137, at 47 (explaining right to legal recognition of indigenous land).

139. See *American Declaration*, *supra* note 134, art. 18(2) (stating indigenous peoples have right to recognition of their property and ownership rights with respect to lands they have historically occupied); see also Indian Law Resource Center, *A Report by the Indian Law Resource Center on the Third Special Session of the OAS Working Group on the Proposed American Declaration on the Rights of Indigenous Peoples* (Mar. 11-15, 2002), available at [http://www.indianlaw.org/body\\_ilrc\\_rpt\\_on\\_oas\\_wg.htm](http://www.indianlaw.org/body_ilrc_rpt_on_oas_wg.htm) (mentioning emerging consensus among participants of Third Special Session that indigenous peoples have rights to ownership and possession of lands they have traditionally owned and occupied).

more, the American Declaration entitles indigenous peoples to the use of property or lands to which they have had access for their traditional activities and livelihood.<sup>140</sup> The American Declaration gives indigenous peoples the right to restitution for lands they owned and traditionally occupied.<sup>141</sup> Additionally, it calls for member States to take all possible measures to avert, prevent, and punish any intrusion on, or use of, indigenous lands by unauthorized persons trying to possess indigenous lands.<sup>142</sup>

### c. Inter-American Court of Human Rights

In concert with IACHR, the Inter-American Court also addresses human rights violations.<sup>143</sup> The Inter-American Court

140. See *American Declaration*, *supra* note 134, art. 18(2) (stating indigenous people should have use of those lands which they have historically had access to for their traditional activities and livelihood); see also *Report by the Indian Law Resource Center on the Third Special Session of the OAS Working Group on the Proposed American Declaration on the Rights of Indigenous Peoples*, *supra* note 139 (mentioning experts believe indigenous peoples have rights to ownership of lands they have traditionally owned and occupied).

141. See *American Declaration*, *supra* note 134, art. 18(2) (stating that when restitution is not possible, indigenous peoples have right to compensation on basis not less favorable than standard of international law); see also *Preliminary Report of the Special Rapporteur, Erica-Irene A. Daes, Submitted in Accordance with Sub-Commission Resolution 2002/15, U.N. ESCOR, 53rd Sess., U.N. Doc. E/CN.4/Sub.2/2003/20* (2003) (explaining Nations must prevent unauthorized intrusion, taking, or use of indigenous lands).

142. See *American Declaration*, *supra* note 134, art. 18(8) (asserting States should take all measures, including use of law enforcement mechanisms, to avert, prevent and punish, if applicable, any intrusion or use of indigenous lands by unauthorized people to take possession or make use of lands); see also Osvaldo Kreimer, *Seven Principles of Indigenous Rights - A Closer Look at the Proposed American Declaration on the Rights of Indigenous Peoples*, 5 DEMOCRACY 2, 6 (1997) (noting Proposed Declaration demands special guarantees to prevent and punish intruders and unauthorized use of indigenous peoples' properties); The Aboriginal Mapping Network, *Legal Memorandum Regarding Principle 3 of the Forest Stewardship Council's Principles and Criteria 23*, available at <http://www.nativemaps.org/news/Docs/Principle%203%20Legal%20Memorandum.doc> (last visited Nov. 15, 2004) (recognizing American Declaration includes member States' right to help avert intrusion upon or use of indigenous peoples' lands by unauthorized persons).

143. See Charter of the Organization of American States, *supra* note 126 (establishing Inter-American Court); see also World Policy Institute, *American Convention on Human Rights: Who Has Ratified*, available at <http://www.worldpolicy.org/globalrights/treaties/maps-achr.html> (last visited Nov. 6, 2004) (noting Panama has ratified American Convention, and remains subject to IACHR's compulsory jurisdiction); ORGANIZATION OF AMERICAN STATES, B-32: American Convention on Human Rights "Pact of San Jose, Costa Rica" (1979) (mentioning Panamanian Government recognized jurisdiction of Inter-American Court as binding on all matters relating to application or interpretation of American Convention); Right to Education, *International Obligations and Access to Remedies: Panama*, available at [http://www.right-to-education.org/content/rights\\_and\\_](http://www.right-to-education.org/content/rights_and_)



has contentious jurisdiction over member States' human rights violations.<sup>144</sup> The majority of the Inter-American Court's cases have dealt with disappearances or extra-judicial executions, but it recently decided its first indigenous land rights case: *The Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua*.<sup>145</sup>

#### d. American Convention on Human Rights

The American Convention on Human Rights ("American Convention") is an important treaty regarding human rights in the Americas.<sup>146</sup> It applies to all people regardless of color, race, language, social origin, or any other social condition.<sup>147</sup> The American Convention ensures protection of these rights and

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remedies/panama.html (last visited Nov. 6, 2004) (noting Panama ratified American Convention on June 28, 1978); 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* 185-86 (Romina Picolotti & Jorge Daniel Taillant eds., 2003) (recognizing Inter-American Court has authority to issue decisions that legally bind OAS member Nations).

144. See Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 *AM. J. INT'L L.* 231, 235 (1982) (noting that Inter-American Court's contentious jurisdiction is adjudicatory and thus allows it to hear and decide cases brought against State parties alleging human rights violations); see also PASQUALUCCI, *supra* note 133, at 11 (referencing Inter-American Court's contentious jurisdiction); DAVIDSON, *supra* note 133, at 205 (stating Inter-American Court's main objective regarding contentious jurisdiction is to rule on whether State violated victim's rights in American Convention and to secure redress for victims of those violated rights); Irum Taqi, *Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights' Approach*, 24 *FORDHAM INT'L L.J.* 940, 956 n.99 (2001) (commenting that Inter-American Court's contentious jurisdiction allows it to decide cases brought against State parties, provided that State party has expressly recognized Court's jurisdiction).

145. See generally *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79, [2001] (holding that Nicaragua violated Awas Tingni's land rights). See PASQUALUCCI, *supra* note 133, at 11 (describing types of cases with which Inter-American Court has predominantly dealt).

146. See *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 (showing how Inter-American Court relied on American Convention in its ruling). See generally American Convention on Human Rights, *supra* note 130 (expressing human rights throughout Americas).

147. See American Convention on Human Rights, *supra* note 130, art. 1(1) (stating State parties to American Convention agree to respect rights and freedoms recognized within it and to ensure to all persons those rights and freedoms); see also Elizabeth M. Misiaveg, *Important Steps and Instructive Models in the Fight to Eliminate Violence Against Women*, 52 *WASH. & LEE L. REV.* 1109, 1128 (1995) (explaining Article 1(1) of American Convention mandates State parties to respect and ensure rights and freedoms recognized in American Convention).

freedoms by having member States adopt laws to protect them.<sup>148</sup>

Article 21 of the American Convention deals solely with the right to property.<sup>149</sup> While not dealing specifically with indigenous land rights, it states everyone has the right to the use and enjoyment of his/her property.<sup>150</sup> It also forbids anyone from being deprived of his/her property.<sup>151</sup> Lastly, Article 21 prohibits any exploitation of people.<sup>152</sup>

Article 25 of the American Convention asserts the right to judicial protection for violated human rights.<sup>153</sup> It entitles everyone to recourse by a court or tribunal for human rights concerns recognized by the Nation's Constitution or the American Convention.<sup>154</sup> Member Nations of the American Convention must

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148. See American Convention on Human Rights, *supra* note 130, art. 2 (asserting State parties to American Declaration adopt legislation or other measures as necessary to give effect to those rights); see also Capt. Benjamin P. Dean, *An International Human Rights Approach to Violations of NATO Sofa Minimum Fair Trial Standards*, 106 MIL. L. REV. 219, 245 n.141 (1984) (noting Article 2 of American Convention states that member States adopt laws to give effect to human rights outlined in Article 1(1)).

149. See American Convention on Human Rights, *supra* note 130, art. 21 (dealing with right to property); see also Sanchez-Moreno & Higgins, *supra* note 65, at 1789, n.572 (noting Article 21 of American Convention provides right to property).

150. See American Convention on Human Rights, *supra* note 130, art. 21(1) (stating every person has right to use and enjoy his property); see also Patrick Macklem, *Indigenous Rights and Multinational Corporations at International Law*, 24 HASTINGS INT'L & COMP. L. REV. 475, 478 (2001) (explaining Article 21(1) of American Convention affirms indigenous property rights).

151. See American Convention on Human Rights, *supra* note 130, art. 21(2) (stating prohibition of deprivation of anyone's property, except for listed reasons); Jennifer A. Amiot, *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, 888 n.79 (2002) (explaining Article 21(2) of American Convention forbids exploitation).

152. See American Convention on Human Rights, *supra* note 130, art. 21(3) (stating prohibition of usury and any other forms of exploitation of people); see also Jonathan P. Vuotto, *Awas Tingni v. Nicaragua: International Precedent for Indigenous Land Rights?*, 22 B.U. INT'L L.J. 219, 231-32 (2004) (explaining American Convention prohibits usury or exploitation).

153. See American Convention on Human Rights, *supra* note 130, art. 25 (stating Article 25 of American Declaration deals with right to judicial protection); see also Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities From Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651, 661 (2003) (explaining Article 25 discusses judicial remedies); Douglass Cassel, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROB. 197, 212 (1996) (reporting Article 25 provides right to judicial protection).

154. See American Convention on Human Rights, *supra* note 130, art. 25(1) (stating everyone has right to recourse through court or tribunal for protection from acts

ensure the enforcement of remedies when granted.<sup>155</sup>

Diplomatic tools exist to help move the Mogue Community forward to achieving land rights.<sup>156</sup> The Panamanian Constitution has provisions which seem to support the Mogue Community's control over its land.<sup>157</sup> The international community affirms this notion by emphasizing indigenous land rights.<sup>158</sup> Part

that violate his human rights recognized by constitution or laws of State concerned); *see also* Sanchez-Moreno & Higgins, *supra* note 65, at 1739 (noting Article 25 of American Convention requires Nations to create courts or tribunals to which individuals can have recourse for protection of their human rights).

155. *See* American Convention on Human Rights, *supra* note 130, art. 25(2)(c) (stating Parties ensure that competent authorities enforce granted remedies); *see also* Francisco Forrest Martin, *The International Human Rights & Ethical Aspects of the Forum Non Conveniens Doctrine*, 35 U. MIAMI INTER-AM. L. REV. 101, 115-16 (2004) (explaining governments must ensure enforcement of granted remedies to human rights violations).

156. *See* PANAMA CONST. OF 1973, art. 123 (granting indigenous peoples land rights). *See generally* U.N. CHARTER (establishing international human rights standards); UDHR, *supra* note 41 (extending international human rights standards established in U.N. CHARTER); ICERD, *supra* note 53 (extending human rights to groups of people); G.A. Res. 48/163, *supra* note 53 (establishing "International Decade of the World's Indigenous People"); Draft Declaration, *supra* note 53 (marking international commitment to indigenous rights); *Study of the Problem of Discrimination Against Indigenous Populations*, *supra* note 53 (noting establishment of WGIP); YEARBOOK ON HUMAN RIGHTS FOR 1947, *supra* note 53 (founding Sub-Commission and CHR) Working Group on Indigenous Populations, *supra* note 53; Agenda 21, *supra* note 53 (recognizing importance of indigenous peoples' control over their land); Convention No. 169, *supra* note 49 (founding international binding human rights standards for indigenous people); Charter of the Organization of American States, *supra* note 126; The American Convention on Human Rights, *supra* note 130 (realizing human rights in Americas); *Proposed American Declaration*, *supra* note 134 (asserting Nations commitment to indigenous rights in Americas).

157. *See* PANAMA CONST. OF 1973, art. 123 (granting indigenous land rights); *see also* Brunton Interview, *supra* note 5 (discussing Article 123 of PANAMA CONST.).

158. *See generally* U.N. CHARTER (establishing human rights standards internationally); UDHR, *supra* note 41 (extending human rights standards established in U.N. CHARTER); ICERD, *supra* note 53 (extending international rights to groups); G.A. Res. 48/163, *supra* note 53 (founding "International Decade of the World's Indigenous People"); Draft Declaration, *supra* note 53 (establishing international human rights for indigenous people); *Study of the Problem of Discrimination Against Indigenous Populations*, *supra* note 53 (noting establishment of WGIP); *Sub-Commission*, *supra* note 53 (explaining role of Sub-Commission); Working Group on Indigenous Populations, *supra* note 53 (expressing importance of WGIP); Commission on Human Rights, *supra* note 53 (explaining CHR adopts about 100 resolutions annually); Agenda 21, *supra* note 53 (recognizing importance of indigenous peoples' control of their land); Convention No. 169, *supra* note 49 (establishing legally-binding international standards regarding indigenous people); Charter of the Organization of American States, *supra* note 126 (establishing IACHR and Inter-American Court); The American Convention on Human Rights, *supra* note 130; *Proposed American Declaration*, *supra* note 134 (granting indigenous rights in Americas).

II discusses the merits and legal effect of each tool.

## II. FRAMING THE RIGHT TO LAND OWNERSHIP: THE USE OF LOCAL AND INTERNATIONAL LAWS

The United Nations has made advances regarding indigenous rights and has given attention to indigenous problems.<sup>159</sup> The ratification of the Draft Declaration would give the indigenous peoples increased diplomatic means of improving their conditions.<sup>160</sup> The OAS American Declaration, like the U.N. Draft Declaration, would provide moral force to the indigenous peoples' struggle for rights in the Americas, even though neither are legally binding instruments.<sup>161</sup> Further, the Inter-American Court's recent decision in *The Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua*, provides a potential legal foundation for the indigenous peoples' movement to achieve land rights.<sup>162</sup>

### A. The Panamanian Laws

Law 22 demarcated many Chocoe villages as part of a *comarca*.<sup>163</sup> The Mogue Community, however, did not benefit from Law 22 because it failed to include the Mogue Commu-

159. See G.A. Res. 48/163, *supra* note 53 (establishing "International Decade of the World's Indigenous People"); see also Indigenous Peoples: Working Group on Indigenous Population, *supra* note 60 (explaining WGIP is recently developed U.N. forum which deals exclusively with indigenous issues); *Establishment of a Permanent Forum on Indigenous Issues*, *supra* note 53 (explaining that Permanent Forum on Indigenous Issues, established in 2000, deals solely with issues concerning indigenous peoples).

160. See Third Committee Delegates, *supra* note 96 (expressing it is critical to complete Draft Declaration in 2004); see also LEAFLET 5, *supra* note 96, at 3 (stating that preferred date to complete Draft Declaration is by December 2004).

161. See Government of Canada Comments on the Draft Inter-American Declaration on the Rights of Indigenous Peoples (explaining non-binding nature of Draft Declaration); see also LEAFLET 5, *supra* note 96, at 1 (explaining moral force behind Draft Declaration even though it does not legally bind Nations).

162. See *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79 [2001] (holding Nicaragua violated Awas Tingni's land rights and must demarcate Awas Tingni lands); see also S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. LAW 13, 42 (2004) (explaining Inter-American Court ruled in favor of Awas Tingni's violated land rights even though land is not held under deed of title and not otherwise specifically recognized by Nation).

163. See generally *CERD Committee Observations*, *supra* note 17 (noting indigenous Panamanians live in *comercas*); PANAMANIAN LAW 22, *supra* note 17 (stating Panama recognizes land benefits to various Chocoe villages).

nity's land in the *comarca*, thereby not protecting the Mogue Community's land rights under the law.<sup>164</sup> Despite being excluded from Law 22, however, many different Chocoe villages, including the Mogue Community, formed the *Tierras Collectivas Indigenas* in order to achieve land protection.<sup>165</sup> The *Tierras Collectivas Indigenas* consists of approximately fifty Chocoe villages not included in the *comarca*.<sup>166</sup> They seek to unite to achieve land ownership via inclusion in the *comarca*.<sup>167</sup> Although these villages may be stronger as a group, they still have little recourse under Panamanian Law, yet they may find a remedy under international law.<sup>168</sup>

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164. See CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining while PANAMANIAN LAW 22 recognizes land for some Chocoe Peoples, Mogue Community is not included in that group); see also Rito Interview, *supra* note 2 (noting Mogue Community is member of *Tierras Collectivas Indigenas* which represents those Chocoe Indian villages not given autonomy due to exclusion from *comarca*); PLANT & HVALKOF, *supra* note 46, at 36 (stating no jurisprudence covers indigenous people living outside *comarcas*); Arecio Valiente, *Panama: Do Indigenous People Have the Right to Decide about Their Own Natural Resources in Indigenous & Tribal Peoples Centre*, available at <http://www.itpcentre.org> (mentioning Embara District of Panama which grants semi-autonomy to certain Chocoe villages); Rich Winkel, *Panama: Indigenous Actions for Land Repressed*, NATIVE-L (July 1993) (noting arrest, tear gassing, and murder of indigenous people who organized demanding Panamanian government complete demarcation of indigenous); see also Atencio Lopez, *Panama: Mining Concessions and Indigenous Peoples in Panama*, available at <http://www.itpcentre.org> (noting indigenous peoples in Panama are in danger of losing indigenous districts that have not yet been legalized due to obsolete Mining Code of 1963); PANAMA CONST. OF 1973, art. 243 (stating municipalities can tax extraction of wood and other materials).

165. See Rito Interview, *supra* note 2 (mentioning *Tierras Collectivas Indigenas* represents those Chocoe Indian villages not included in *comarca*); see also CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining Mogue Community is member of *Tierras Collectivas Indigenas* which includes collection of about 50 Chocoe villages excluded from PANAMANIAN LAW 22).

166. See Rito Interview, *supra* note 2 (mentioning that *Tierras Collectivas Indigenas* represents about 50 Chocoe Indian villages not included in *comarca* demarcated by PANAMANIAN LAW 22); see also CHOCOE STRUGGLE FOR LAND RIGHTS, *supra* note 3 (explaining *Tierras Collectivas Indigenas* is collection of about 50 Chocoe villages excluded from PANAMANIAN LAW 22).

167. See Brunton Interview, *supra* note 5 (noting villages excluded by PANAMANIAN LAW 22 continue to lobby for inclusion in *comarca*); see also Rito Interview, *supra* note 2 (explaining *Tierras Collectivas Indigenas* as attempt by Chocoe Indian villages not included in *comarca* demarcated by PANAMANIAN LAW 22 to create strong lobby in order to include their villages in *comarca*).

168. See *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79, [2001] (holding Nicaraguan Government violated indigenous land rights and must demarcate indigenous lands); see also Draft Declaration, *supra* note 53 (explaining potential indigenous land rights international commu-

## B. *United Nations*

### 1. The Charter of the United Nations and the Universal Declaration of Human Rights

While the U.N. Charter and UDHR are extremely important human rights tools, the early years of the United Nations emphasized decolonization and individual human rights rather, than collective rights.<sup>169</sup> More recently, the United Nations has widened its interests to groups and non-State entities.<sup>170</sup> Of particular relevance to indigenous peoples and their fight for land rights, UDHR affirms the right to own property and prohibits the arbitrary deprivation of anyone's property.<sup>171</sup> The founding members of the United Nations, however, never meant UDHR to become a legally binding instrument, and did not draft it to protect group rights.<sup>172</sup>

### 2. The International Convention on the Elimination of All Forms of Racial Discrimination

ICERD has complaint mechanisms that enable an individual to voice his or her dissatisfaction regarding the violation of his or her rights.<sup>173</sup> ICERD has recognized Panama's enactment of

nity will grant indigenous peoples); Proposed American Declaration, *supra* note 134 (noting American Countries' importance on indigenous land rights).

169. See generally U.N. CHARTER (applying its provisions to individuals only). See UDHR, *supra* note 41 (showing UDHR applies to individuals not groups); see also Triggs, *supra* note 54, at 385 (explaining how early U.N. human rights tools only protect individuals).

170. See Michael Dodson, *Linking International Standards with Contemporary Concerns of Aboriginal and Torres Strait Islander Peoples*, in *INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS* 18 (Sarah Pritchard ed., 1998) (explaining how more recent U.N. human rights instruments include groups and individuals); see also Agenda 21, *supra* note 53 (noting group human rights protection of document); Draft Declaration, *supra* note 53 (recognizing protection of human rights to group of people in addition to individuals).

171. See UDHR, *supra* note 41 (clarifying that UDHR applies to individuals not groups); see also Triggs, *supra* note 54, at 385 (explaining how early U.N. human rights tools only protect individuals).

172. See INTERNATIONAL FRANCISCAN CONGRESS, *INSTRUMENTS OF PEACE LED BY THE SPIRIT 175* (2003) (stating UDHR does not legally bind Nations); see also Letter from Douglas Graham, Minister of Justice, New Zealand (May 13, 1998), available at <http://www.embassy.org.nz/encycl/decllet.htm> (explaining that New Zealand never ratified UDHR because it is not legally binding); UNITED NATIONS, *FIFTIETH ANNIVERSARY OF THE UNIVERSAL DECLARATION ON HUMAN RIGHTS* (1998) (stating International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights take UDHR step further by making provisions legally binding).

173. See STEFANO SENSI, SECOND SESSION OF THE AD HOC COMMITTEE ON A COMPRE-

laws establishing indigenous *comarcas* as encouraging, yet expressed concern that some groups living in Panama, in particular indigenous people, do not fully benefit from the rights in ICERD.<sup>174</sup> Despite this concern and due to a lack of complaints against Panama, the report from 1997 is the last one regarding Panamanian human rights violations.<sup>175</sup>

### 3. The Commission on Human Rights

CHR's meetings are not as easily accessible as the Sub-Commission's or WGIP's.<sup>176</sup> Nevertheless, CHR remains a forum where high Panamanian officials could hear from Mogue Community representatives or the Pajaro Jai Foundation,<sup>177</sup> a non-governmental organization ("NGO") which works with the Mogue Community to achieve a greater standard of living—including obtaining land rights.<sup>178</sup> This meeting has the potential

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HENSIVE AND INTEGRAL INTERNATIONAL CONVENTION ON PROTECTION AND PROMOTION OF THE RIGHTS OF PERSONS WITH DISABILITIES (2003) (stating ICERD remains one of four core human rights treaties to establish procedures which allow individuals to submit complaints to treaty-monitoring bodies); see also LEAFLET 4, *supra* note 87, at 2-3 (describing complaint mechanisms).

174. See CERD Committee Observations, *supra* note 17 (expressing concern that not all indigenous Panamanians live in *comarcas*); see also *Panama: Treaties and Reports to Treaty Bodies*, 4 FOR THE RECORD 1997: THE HUMAN RIGHTS SYSTEM (1997), available at <http://www.hri.ca/fortherecord1997> (last visited Nov. 1, 2004) (mentioning expressed concerns about indigenous land rights situation in Panama).

175. See United Nations, Documents on Panama, available at <http://www.unhcr.ch/TBS/doc.nsf/FramePage/Country%20Panama?OpenDocument&Start=1&Count=1000&ExpandView> (last visited Nov. 6, 2004) (noting last CERD report regarding Panama occurred in 1997); see also *Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination Panama*, ¶ 8, U.N. Doc., CERD/C/304/Add. 32 (1997) (stating no complaints filed against Panama despite reports that Panama has not fully respected rights covered by ICERD).

176. See SUB-COMMISSION LEAFLET, *supra* note 84 (stating various ways non-government entities can become involved with Sub-Commission); see also LEAFLET 3, *supra* note 75, at 7-8 (noting CHR's agenda remains very much determined by governments); *Working Group Mandate*, *supra* note 84, at 50 (noting participation in U.N. bodies other than WGIP remains limited to indigenous individuals and organizations).

177. See PJF: Conservation through Innovation, *supra* note 2 (explaining that Pajaro Jai Foundation is NGO that works primarily with Mogue Community to increase its standard of living, including its land rights problems); see also Alan Bisbort, *Finding a Connection, Though a World Away*, N.Y. TIMES, Dec. 16, 2001, Conn. Ed., at 19 (stating Pajaro Jai Foundation works with Chochoe Indians in Mogue to help human economic problems); Susan Young, *Wisdom on the Waterfront: Lobstermen, a Researcher and an Idealist Come Together at the Lobster Institute*, BANGOR DAILY NEWS, Oct. 18, 1997, at A1 (explaining Pajaro Jai Foundation aims to help Mogue Community become self-sufficient).

178. See PJF: Conservation through Innovation, *supra* note 2 (explaining Pajaro Jai Foundation attempts to work with Panamanian Government to improve Mogue Com-

to develop a dialogue between the Mogue Community and Panamanian Government and may ultimately lead to the eventual goal of Mogue Community's land ownership.<sup>179</sup> CHR remains the most important human rights forum in the United Nations, thus a speech made there has a greater impact on the international community than anywhere else in the U.N. system due to the number of attendants and the high-level government officials attending the session.<sup>180</sup>

An increasing number of indigenous peoples have taken their human rights concerns to CHR in order to lobby for, and influence, resolutions on indigenous issues.<sup>181</sup> The Mogue Community can send a representative to participate in informal discussions with other indigenous peoples and NGOs working with indigenous issues; they can also speak with government representatives about preparations underway in WGIP on the Draft Declaration.<sup>182</sup> A Mogue Community member attending CHR could also give the Mogue Community the opportunity to get

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community's situation); *see also* Brunton Interview, *supra* note 5 (noting one of Pajaro Jai Foundation's functions is negotiating with Panamanian Government on behalf of Mogue Community).

179. *See* PJF: Conservation through Innovation, *supra* note 2 (explaining how Pajaro Jai Foundation attempts improve Mogue Community's situation through negotiations with Panamanian Government which could lead to land ownership); *see also* Brunton Interview, *supra* note 5 (stating one of Pajaro Jai Foundation's goals is development dialogue, which could start at CHR, between Panamanian Government and Mogue Community to diplomatically resolve land rights issue).

180. *See* Nettheim, *supra* note 69, at 35 (explaining that including 53 member Nations to CHR, other countries, specialized agencies, and intergovernmental organizations participate in CHR's annual session); *see also* LEAFLET 3, *supra* note 75, at 7 (noting generally over 3,000 people participate in CHR each session, including: foreign ministers, ministers of justice, presidents, and prime ministers); United Nations Commission on Human Rights, *Dominicans for Justice and Peace at the United Nations*, available at <http://un.op.org/background/unhrc.php> [hereinafter *Dominicans for Justice and Peace*] (noting that other countries may participate in CHR sessions as observers as well as representatives of other specialized U.N. agencies and intergovernmental organizations).

181. *See* Letter from Maori Legal Service and Ka Lahui Hawai'i, to The Commission on Human Rights, (Nov. 22, 2000), available at <http://www.converge.org.nz/pma/indself.htm> (mentioning complaints concerning indigenous peoples to CHR); *see also* LEAFLET 3, *supra* note 75, at 8 (noting more indigenous people have begun to participate in CHR); International Working Group for Indigenous Affairs, *Human Rights, Projects, Conferences and Political Works*, available at <http://www.iwgia.org/sw152.asp> (encouraging and supporting continued indigenous involvement in CHR sessions).

182. *See* LEAFLET 3, *supra* note 75, at 8; *see also* *Dominicans for Justice and Peace*, *supra* note 180 (noting NGOs attend and participate in CHR in limited function); *Draft Declaration II*, *supra* note 94 (giving examples of work of various NGOs that have already had input in Draft Declaration).



the support of other human rights groups to build a stronger lobby for the Mogue Community's cause.<sup>183</sup>

#### 4. Sub-Commission on the Promotion and Protection of Human Rights

The Sub-Commission undertakes studies and makes recommendations to CHR concerning the prevention of discrimination of any kind relating to fundamental freedoms, human rights, and the protection of minorities.<sup>184</sup> The Sub-Commission requested that Dr. Erica-Irene A. Daes, a *special rapporteur* of the Sub-Commission, write a working paper on indigenous people and their relationship to land that incorporates comments and information received from governments, indigenous peoples, and others.<sup>185</sup> Among other things, the working paper suggested practical measures to address ongoing problems regarding indigenous peoples' land rights and to provide the *special rapporteur* with the assistance necessary to complete her work.<sup>186</sup>

183. See LEAFLET 3, *supra* note 75, at 8 (explaining how NGOs interact during CHR sessions); see also *Dominicans for Justice and Peace*, *supra* note 180 (giving example of how NGOs participate in CHR's annual meeting); Nettheim, *supra* note 69, at 35 (realizing important consultative status of NGOs in process and during CHR annual meeting).

184. United Nations, *Sub-Commission*, *supra* note 53 (describing function of Sub-Commission); see also William A. Schabae, *Legal Perspectives and Analyses: Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, 25 FORDHAM INT'L L.J. 23, 37 (2001) (explaining Sub-Commission conducts studies); Tayyab Mahmud, *Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT'L L.J. 40, 96 (1995) (discussing Sub-Commission's work to restore human rights and fundamental freedoms).

185. See *Working Paper on Indigenous Peoples' Permanent Sovereignty Over Natural Resources*, C.H.R. Res. 2004/31, U.N. GAOR, Hum. Rts. Comm., 54th Sess., U.N. Doc. E/CN.4/Sub.2/2004/31 (2004) (explaining purpose of her working paper); see also *Study on Indigenous Land Rights*, U.N. ESCOR, 50th Sess., 38th plen. mtg., U.N. Doc. Decision 1997/289 (1997) (appointing Daes as *special rapporteur* to prepare working paper on indigenous peoples and their relationship to land and discussing elements of indigenous peoples' and their relationship to their land); *Prevention of Racial Discrimination, Including Early-Warning Measures and Urgent Action Procedures (Continued)*, U.N. CERD, 53d Sess., 1287th mtg. ¶ 39, U.N. Doc. CERD/C/SR.1287 (1998) (stating appointment "special rapporteur" to prepare working paper on indigenous people and their relationship to land); U.N. High Commissioner for Human Rights, *Working Paper on Indigenous Peoples and Their relationship to Land*, Res. 1999/21 (1999) (explaining how Daes would acquire information for her working paper).

186. See *Study on Indigenous Land Rights*, *supra* note 185 (giving Daes task of suggesting ways to address indigenous land rights problems and to provide "special rapporteur" with facts necessary to allow her to complete her assignment); see also UNITED NATIONS, NGLS ROUNDUP: 1997 SUBSTANTIVE SESSION OF THE ECONOMIC AND SOCIAL COUNCIL 7 (1997) (stating working paper on indigenous people and their relationship

Some of Dr. Daes' proposals include an emphasis on the formal mechanisms for indigenous participation in the World Conference Against Racism, that the U.N. High Commissioner for Human Rights should organize a seminar on indigenous peoples and justice during the preparatory process, and that indigenous peoples should be able to organize parallel activities to the conference, such as panel discussions.<sup>187</sup> Unfortunately, commentators still believe that indigenous peoples have insufficiently utilized *special rapporteurs* for their causes by indigenous peoples not reporting their concerns.<sup>188</sup> By not employing the work of *special rapporteurs*, indigenous people are not getting as much international attention for their human rights concerns.<sup>189</sup>

### 5. Working Group on Indigenous Populations

The most accessible charter-based U.N. body for indigenous peoples remains WGIP.<sup>190</sup> The "Review of Developments," a place where speakers can inform WGIP about recent indigenous

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to land will suggest practical measures to address continuing indigenous land rights problems). See generally United Nations, *Study on Indigenous Land Rights: Sub-Commission Resolution 1998/21*, CERD Res. 1998/21, U.N. CERD, 53 Sess. (1998) (explaining working paper on indigenous people and their relationship to land suggests practical measures addressing ongoing problems concerning indigenous land rights).

187. See Daes *Working Paper*, *supra* note 97 (listing Dr. Daes' recommendations including organization of seminar on indigenous peoples); see also UNITED NATIONS, NGLS ROUNDUP: HUMAN RIGHTS SUB-COMMISSION HOLDS 2000 ANNUAL SESSION 4 (2000) (expressing working paper's Sub-Commission recommendation); Press Release, United Nations, HR/CN/1101, *Round-Up of Session: Subcommission on Promotion and Protection of Human Rights Concludes Fifty-Sixth Session* (Aug. 13, 2004), available at <http://www.un.org/News/Press/docs/2004/hrcn1101.doc.htm> (explaining some recommendations from Dr. Daes' working paper).

188. International Work Group for Indigenous Affairs, *The Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous People*, available at <http://www.iwgia.org/sw348.asp> (explaining indigenous groups need to further utilize *special rapporteur*); see also LEAFLET 3, *supra* note 75, at 9 (encouraging indigenous peoples to expand their use of *special rapporteurs*).

189. See International Work Group for Indigenous Affairs, *supra* note 188 (encouraging indigenous groups and communities to utilize *special rapporteur* on situation of human rights and fundamental freedoms of indigenous people); see also LEAFLET 3, *supra* note 75, at 9 (noting indigenous peoples' lack of use of *special rapporteurs* in past).

190. See LEAFLET 3, *supra* note 75, at 2 (stating WGIP enables indigenous peoples to raise their concerns at United Nations through making speeches, networking, and providing information); see also Hannum, *supra* note 80, at 82 (noting WGIP has become public forum for indigenous peoples, and their representatives, to address specific and general grievances against them and that WGIP allows all interested persons to address and submit information from any source to it); *Working Group Mandate*, *supra* note 84, at 42 (noting how easily accessible WGIP is to indigenous peoples).

issues from around the world, provides an opportunity for Panamanian Indians to draw attention to their land rights issues and for the Panamanian Government to present their responses to ICERD.<sup>191</sup> Recently, however, the “Review of Developments” session started to address a specific theme each year, including: indigenous children and youth; indigenous peoples and their right to development; and indigenous peoples and conflict resolution.<sup>192</sup> Unless the “Review of Developments” chooses indigenous land rights as its theme, it will not help relieve the Mogue Community’s plight.<sup>193</sup>

## 6. The Draft United Nations Declaration on the Rights of Indigenous Peoples

If adopted, the Draft Declaration will be the most comprehensive statement to date of indigenous peoples’ rights.<sup>194</sup> While the Draft Declaration will not bind Nations, and thus will

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191. See *Programme of Activities of the International Decade of the World’s Indigenous People*, U.N. GAOR, 51st Sess. ¶ 1, U.N. Doc. A/51/565 (1996) (stating one of WGIP’s mandates as reviewing developments pertaining to promotion and protection of human rights and fundamental freedoms regarding indigenous peoples); see also United Nations Permanent Forum on Indigenous Issues, *Indigenous Peoples, Indigenous Voices*, available at <http://www.un.org/esa/socdev/pfii/dpi2309.htm> (explaining purpose of WGIP); LEAFLET 3, *supra* note 75, at 2 (describing function of WGIP’s “Review of Developments”).

192. See LEAFLET 3, *supra* note 75, at 2 (explaining WGIP’s “Review of Developments” addresses specific theme each year, e.g., in 2000, theme was indigenous children and youth and in 2001, theme was indigenous peoples and their right to development); see also Office of the U.N. High Commissioner for Human Rights, *Highlights from the Twenty Second Session of the Working Group on Indigenous Populations*, available at <http://www.ohchr.org/english/issues/indigenous/groups/wgip22/highlights.htm> (last visited Oct. 8, 2004) (explaining “Review of Developments” for 2004 was indigenous peoples and conflict resolution).

193. See LEAFLET 3, *supra* note 75, at 2 (mentioning how each year during “Review of Developments,” WGIP has addressed specific theme); see also *Highlights from the Twenty Second Session of the Working Group on Indigenous Populations*, *supra* note 192 (explaining WGIP’s 2004 “Review of Developments” theme is indigenous peoples and conflict resolution).

194. See LEAFLET 5, *supra* note 96, at 1 (explaining importance of Draft Declaration and its all-encompassing nature regarding indigenous human rights); see also Indian Law, *United Nations*, available at [http://www.indianlaw.org/body\\_united\\_nations.htm](http://www.indianlaw.org/body_united_nations.htm) (last visited Nov. 1, 2004) (recognizing Draft Declaration as comprehensive statement of indigenous rights); United Nations Permanent Forum on Indigenous Issues, *Background and History*, available at <http://www.un.org/esa/socdev/pfii/history.htm> (recognizing that if adopted, Draft Declaration will at most comprehensive statement of rights of indigenous peoples ever developed as it establishes collective rights to degree unprecedented in international human rights law).

not impose any legal obligations on governments, it will carry moral force.<sup>195</sup> The adoption of this instrument would further demonstrate the international community's commitment to indigenous peoples' human rights protections.<sup>196</sup>

The Draft Declaration promotes procedures for resolving disputes between indigenous peoples and governments, such as mediation, negotiation, and international or regional human rights complaint and review mechanisms.<sup>197</sup> The Draft Declaration's preamble also encourages Nations to comply with and implement all international instruments as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned.<sup>198</sup>

With this in mind, the Draft Declaration promotes the conservation, protection, and restoration of the total environment and the productive capacity of indigenous lands and resources.<sup>199</sup> In order to achieve these goals, the Draft Declaration

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195. See LEAFLET 5, *supra* note 96, at 1 (explaining moral force behind Draft Declaration since it will not legally bind Nations); see also UNITED NATIONS, MANA TANGATA: DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 1993: BACKGROUND AND DISCUSSION ON KEY ISSUES (1994) [hereinafter MANA TANGATA] (noting text of Draft Declaration has great moral force).

196. See LEAFLET 5, *supra* note 96, at 1; see also MANA TANGATA, *supra* note 195 (describing Draft Declaration as norms reflecting aspirations of indigenous peoples strongly rooted in broad consensus among international community).

197. See LEAFLET 5, *supra* note 96, at 2 (addressing Draft Declaration's dispute resolution procedures); see also Hannum, *supra* note 80, at 89-93 (recognizing symbolic significance of Draft Declaration to rights of indigenous peoples if adopted). *But see Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples: Information Received From Non-Governmental and Indigenous Organizations*, U.N. GAOR, Hum. Rts. Comm., 52nd Sess., U.N. Doc. E/CN.4/1995/WG.15/4 (1995) [hereinafter *Consideration of Draft Declaration*] (expressing concern that Article 36 does not provide indigenous peoples with independent access to proposed dispute resolution mechanisms).

198. See Draft Declaration, *supra* note 53, pmbl. (encouraging Nations to implement and comply with all international instruments related to human rights and indigenous peoples); see also *Consideration of Draft Declaration*, *supra* note 197 (discussing Draft Declaration's call for Nations to comply with existing international instruments); JUSTICE PENDING, *supra* note 97, at 286 (explaining Draft Declaration paragraph 16); *Equality of Indigenous Peoples*, *supra* note 100, at 501 (expressing international community should apply and implement international human rights instruments regarding indigenous people).

199. See Draft Declaration, *supra* note 53, art. 28 (stating indigenous peoples have right to protection of their lands and resources); see also *Consideration of Draft Declaration*, *supra* note 197 (restating Article 28 of Draft Declaration gives indigenous peoples right to protection of environment in which they live); *Working Group Mandate*, *supra* note 84, at 49 (noting that Article 28 of Draft Declaration affirms right of indigenous peoples to protection of environment and productive capacity of their lands).

provides that the Mogue Community can get assistance from the Panamanian Government.<sup>200</sup> This goal includes the Mogue Community's right to require Panama to obtain the Mogue Community's consent prior to approving any project that affects the Mogue Community's lands.<sup>201</sup> Moreover, it would entitle the Mogue Community to receive fair compensation to mitigate any adverse cultural, economic, environmental, spiritual, or social impact from any government acts.<sup>202</sup> The Mogue Community can also get assistance from other Nations to achieve these goals.<sup>203</sup>

According to the Draft Declaration, the Mogue Community would have the right to autonomy or self-government in matters relating to their internal and local affairs.<sup>204</sup> Specifically, this au-

200. See Draft Declaration, *supra* note 53, art. 28 (stating indigenous people are allowed assistance in order to protect themselves from their governments); see also Andrew Huff *Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian Nation of Canada*, 10 *COLO. J. INT'L ENVTL. L. & POL'Y* 161, 193 (1999) (explaining Article 28 of Draft Declaration states indigenous peoples have right from their government in order to protect productive capacity of their lands).

201. See Draft Declaration, *supra* note 53, art. 30 (requiring Nations obtain consent before approving any projects which affect indigenous peoples' lands, territories, and other resources); see also Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 *COLUM. J.L. & SOC. PROBS.* 529, 536 (1997) (recognizing Article 30 of Draft Declaration mandates informed consent of indigenous people before development projects are undertaken on their lands).

202. See Draft Declaration, *supra* note 53, art. 30 (stating indigenous peoples must receive fair and just compensation for any activities and measures taken to mitigate adverse economic, environmental, social, cultural or spiritual impact); see also Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 *AM. J. INT'L L.* 414, 440 (1998) (noting indigenous peoples have right to compensation to lessen adverse impact to their lands).

203. See Draft Declaration, *supra* note 53, art. 28 (stating indigenous people are allowed assistance for protection of their environment through international cooperation); see also Lauren E. Godshall, *Making Space for Indigenous Intellectual Property Rights Under Current International Environmental Law*, 15 *GEO. INT'L ENVTL. L. REV.* 497, 506 n.48 (2003) (noting that under Article 28 of Draft Declaration indigenous peoples have right to conservation, protection and restoration of total environment of lands they traditionally lived on and used); Alexandra Kersey, *The Nunavut Agreement: A Model for Preserving Indigenous Rights*, 11 *ARIZ. J. INT'L & COMP. LAW* 429, 450 (1994) (explaining indigenous people deserve protection by governments to conserve, protect, and restore total environment of their lands and resources in spirit of Article 28 of Draft Declaration); Benjamin J. Richardson, *Environmental Law in Postcolonial Societies: Straddling the Local—Global Institutional Spectrum*, 11 *COLO. J. INT'L ENVTL. L. & POL'Y* 1, 72 (2000) (noting Draft Declaration commands governments to recognize indigenous peoples' right to protection of their environments).

204. See Draft Declaration, *supra* note 53, art. 31 (stating indigenous peoples have right to autonomy or self-government in matters relating to their internal and local

tonomy includes land and resource management, and the authority to grant access to non-members of the Mogue Community.<sup>205</sup> Some countries, however, attempt to interpret this assertion of self-determination declared in the Draft Declaration as a limitation or reduction of the universal right of self-determination stated in other sections of the Draft Declaration.<sup>206</sup> For example, a proposed revision of the Draft Declaration attempts to limit the right of indigenous peoples to internal self-governance within the framework of, and subject to, their country's domestic laws.<sup>207</sup> The Latin American countries reaffirmed their region's commitment to indigenous peoples and stated that they will make every available effort to adopt the Draft Declaration before the target date.<sup>208</sup>

The target date for the Draft Declaration's adoption is approaching.<sup>209</sup> The Mogue Community will soon lose its opportu-

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affairs and means for financing these autonomous functions); *see also* Kersey *supra* note 203, at 453 (explaining indigenous peoples have right to autonomy in internal and local affairs in accord with Article 31 of Draft Declaration).

205. *See* Draft Declaration, *supra* note 53, art. 31 (stating indigenous peoples' self-determination includes land and resource management and entry by non-members of indigenous community); *see also* Kersey *supra* note 203, at 452 (explaining indigenous peoples have right to autonomy and self-determination over their land, resources, and how non-indigenous people can use their land in accord with Article 31 of Draft Declaration).

206. *See* International Indian Treaty Council, *United Nations Commission on Human Rights 8th Ad Hoc Intersessional Working Group on the Draft Declaration for the Rights Of Indigenous Peoples: Statement by the International Indian Treaty Council* (2002), available at [http://www.treatycouncil.org/new\\_page\\_552111.htm](http://www.treatycouncil.org/new_page_552111.htm) [hereinafter *Statement by the IITC*] (explaining some Nations' interpretation of self-determination in Draft Declaration); *see also* Draft Declaration, *supra* note 53, arts. 3, 31 (stating how certain countries try to weaken Draft Declaration and assert indigenous peoples have rights to self-determination and by virtue of that right they freely determine their political status and freely pursue their cultural, economic, and social development).

207. *See* *Statement by the IITC*, *supra* note 206 (explaining how proposed edition to Draft Declaration reduces indigenous peoples self governance within existing laws of their country); *see also* Draft Declaration II, *supra* note 94 (giving examples of proposed edits which would weaken Draft Declaration).

208. *See* *Indigenous Issues: Report of the Working Group Established in Accordance With Commission of Human Rights Resolution 1995/32*, U.N. GAOR, Hum. Rts. Comm., 59th Sess. ¶¶ 9-10, U.N. Doc. E/CN.4/2003/92 (2003) [hereinafter *Indigenous Issues: Report of the Working Group*] (noting Chilean, Guatemalan, and Mexican representatives said their governments could accept Draft Declaration without any revisions and that many proposals put forward weakened Declaration).

209. *See* Third Committee Delegates, *supra* note 96 (noting importance of completing Draft Declaration by end of International Decade of World's Indigenous Peoples in 2004); *see also* LEAFLET 5, *supra* note 96, at 3 (stating deadline international

nity to participate in the crafting' of the Draft Declaration.<sup>210</sup> It is critical that indigenous peoples continue to participate in the writing of the Draft Declaration.<sup>211</sup> Indigenous peoples' participation in the open-ended working group will ensure that the final text of the 'Declaration reflects their aspirations, human rights concerns, and needs.'<sup>212</sup>

### 7. Report of the United Nations Conference on Environment and Development – Chapter 26: Recognizing and Strengthening the Role of Indigenous People and Their Communities

Agenda 21 is another tool important in indigenous land sovereignty, but does not legally bind Nations.<sup>213</sup> Also, indigenous peoples do not have power to take action against governments in Nations that do not recognize indigenous rights within their own legal frameworks.<sup>214</sup> Thus, the indigenous community is still subject to the national laws of the State in which it resides.<sup>215</sup>

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community would like to complete Draft Declaration on Rights of Indigenous People is December 2004).

210. See *Indigenous Issues: Report of the Working Group*, *supra* note 208 (explaining indigenous peoples' opportunity to participate in process of adopting Draft Declaration is almost over); see also LEAFLET 5, *supra* note 96, at 3 (stating December 2004 as tentative date for completion of Draft).

211. See *Indigenous Issues: Report of the Working Group*, *supra* note 208 (explaining importance of indigenous people in process of adopting Draft Declaration); see also *Draft Declaration II*, *supra* note 94 (giving examples of how indigenous groups have made suggestions to Draft Declaration).

212. See *Indigenous Issues: Report of the Working Group*, *supra* note 208 (stating why indigenous participation during final stages of Draft Declaration is important); see also *Draft Declaration II*, *supra* note 94 (giving examples of how indigenous groups suggestions to Draft Declaration tailor it to address their concerns).

213. See United Nations, EXCAP Virtual Conference, available at [http://www.unescap.org/drrpad/vc/orientation/M3\\_ink\\_treaty\\_agenda21.htm](http://www.unescap.org/drrpad/vc/orientation/M3_ink_treaty_agenda21.htm) (last visited Nov. 6, 2004) (explaining how Agenda 21 as agreed upon text adopted by U.N. General Assembly but remains non-legally binding in nature); see also INTERNATIONAL COUNCIL FOR LOCAL ENVIRONMENTAL INITIATIVES, LOCAL AGENDA 21: A EUROPEAN COMPARISON (1999) (noting problem with Agenda 21 is how to make it binding municipal policy).

214. See UNITED FAMILIES INTERNATIONAL, NATIONAL SOVEREIGNTY IN UNITED NATIONS DOCUMENTS 4 (2001) (stating Agenda 21 is binding within that Nation's legal system); see also Jeanette Bailey, *Indigenous People and Agenda 21*, available at [http://tuftsgloballeadership.org/WSSDSite/papers/indigenous\\_jeanette.doc](http://tuftsgloballeadership.org/WSSDSite/papers/indigenous_jeanette.doc) (stating indigenous people can only take action against governments that recognize indigenous rights within that Nation's legal framework).

215. See Agenda 21, *supra* note 53, ch. 26, ¶ 3(b) (stating Agenda 21 encourages Nations to strengthen laws); see also Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 46-47 (1994)

## 8. The International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries

The International Labour Organization Committee of Experts noted that Convention No. 169 is currently the most comprehensive instrument of international law for the legal protection of indigenous peoples' right to preserve their own customs and laws within the Nations they live.<sup>216</sup> Convention No. 169 remains the only international legal instrument currently in force and open for ratification that specifically addresses indigenous peoples' rights.<sup>217</sup> Currently, seventeen Nations have ratified Convention No. 169.<sup>218</sup>

Panama has not yet ratified Convention No. 169.<sup>219</sup> If Panama adopts Convention No. 169, it would be a legally binding international instrument to address land rights concerns.<sup>220</sup>

(explaining Agenda 21 encourages active participation in national legislation by indigenous peoples, but does not add new law).

216. See International Labour Conference, *Report III (IA)*, 87th Sess., (1999) (explaining Convention No. 169 as most expansive international legal protection indigenous peoples have to date); see also, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. Rodolfo Stavenhagen, Submitted Pursuant to Commission Resolution 2001/57*, U.N. GAOR, Hum. Rts. Comm., 58th Sess. at 7-8, U.N. Doc. E/CN.4/2002/97 (2002) [hereinafter *Report of the Special Rapporteur*] (stating importance of Convention No. 169 to indigenous people).

217. See *Report of the Special Rapporteur*, *supra* note 216, at 7-8 (explaining Convention No. 169 is sole international legal instrument specifically regarding indigenous peoples' rights open for ratification); Krause, *supra* note 117 (explaining Convention No. 169 as legally binding instrument which specifically pertains to indigenous peoples).

218. See ILOLEX, *Database of International Labour Standards*, available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited Nov. 6, 2004) (listing Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, Fiji, Guatemala, Honduras, Mexico, the Netherlands, Norway, Paraguay, Peru, and Venezuela as States that have ratified Convention No. 169); see also ILO MANUAL, *supra* note 118 (listing Convention No. 169's 17 ratifying countries).

219. See ILOLEX, *supra* note 218 (noting that Panama is not one of 17 States to have ratified Convention No. 169); see also *International Labor Standards: Indigenous and Tribal Peoples*, *supra* note 115 (stating Panama ratified Convention No. 169's predecessor, Convention No. 107); ILO MANUAL, *supra* note 118 (stating until Panama ratifies Convention No. 169 it remains legally bound by Convention No. 107); Hannum, *supra* note 80 (stating Convention No. 169 remains most important legally binding international instrument addressing indigenous rights).

220. See *Report of the Special Rapporteur*, *supra* note 216, at 7-8 (explaining Convention No. 169 is legally binding on member States); Krause, *supra* note 117 (explaining Convention No. 169 as legally binding instrument which specifically addresses indigenous peoples).



Many Latin American Nations, including Colombia and Costa Rica, have ratified Convention No. 169.<sup>221</sup> Since its adoption in these Nations, Convention No. 169 has exerted considerable influence at both the national and regional levels of the respective governments.<sup>222</sup>

### C. *The Organization of American States*

#### 1. The Inter-American Commission on Human Rights

IACHR serves three main functions.<sup>223</sup> First, IACHR recommends measures that would contribute to human rights protections, including the American Declaration.<sup>224</sup> Second, IACHR submits cases to the Inter-American Court and appears before the Court in the litigation of cases.<sup>225</sup> Third, it recommends cases to the Inter-American Court regarding questions of inter-

221. See ILOLEX, *supra* note 218 (listing Latin American countries that have ratified Convention No. 169 as Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru, and Venezuela); see also ILO MANUAL, *supra* note 118 (noting that while 13 of 17 ratifying Nations consist of Latin American Nations, Panama has not yet ratified it); Hannum, *supra* note 80, at 88 (noting Latin American countries comprise majority of Convention No. 169's ratifying members).

222. See *Report of the Special Rapporteur*, *supra* note 216, at 8 (discussing influence of Convention No. 169) (discussing influence Convention No. 269 has at various levels of government); see also Lisa Strelein, *The Price of Compromise: Should Australia Ratify ILO Convention 169?*, in MAJAH: INDIGENOUS PEOPLE AND THE LAW 63 (Greta Bird et al. eds., 1996) (explaining how Convention No. 169 has influenced governments); WAGENINGEN UNIVERSITY & UNITED NATIONS COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, WATER LAW AND INDIGENOUS RIGHTS TOWARDS RECOGNITION OF INDIGENOUS WATER RIGHTS AND MANAGEMENT RULES IN NATIONAL LEGISLATION – PHASE II (JAN. 1, 2003-DEC. 31, 2005) 49 (2002) (stating most important legal tool for indigenous peoples' recognition in Latin America remains Convention No. 169).

223. See *What is the IACHR?*, *supra* note 126 (explaining IACHR recommends to member countries of OAS adoption of measures which would contribute to human rights protection); see also *OAS-IACHR*, *supra* note 130 (noting that IACHR submits cases to Inter-American Court); *Permanent Council*, *supra* note 129 (explaining Inter-American Court remains vital part of OAS human rights structure).

224. See *What is the IACHR?*, *supra* note 126 (mentioning that to fulfill its mandate IACHR recommends to member States of OAS adoption of measures which would contribute to human rights protection); see also *OAS-IACHR*, *supra* note 130 (noting IACHR recommends adoption of measures which would contribute to human rights protection to OAS member States). See generally Proposed American Declaration on the Rights of Indigenous Peoples, OEA/Ser.P AG/RES. 1780 (XXXI-O/01) (June 5, 2001) (Resolution Adopted at Third Plenary Session) (stating IACHR's recommendation towards adopting human rights protections regarding indigenous peoples).

225. See *Permanent Council*, *supra* note 129 (noting also that in order to have human rights violation submitted to Inter-American Court party claiming violation must have exhausted all appropriate national legal remedies and have failed); see also

pretation of the American Convention.<sup>226</sup> In 2002, IACHR processed about forty cases concerning indigenous peoples throughout the Americas, including *The Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua*.<sup>227</sup>

## 2. The Proposed American Declaration on the Rights of Indigenous Populations

The section of the American Declaration regarding indigenous land rights created controversy as member countries and indigenous groups have consistently proposed, and continue to propose, alterations to the section.<sup>228</sup> Consequently, the Working Group to Prepare the Draft of the American Declaration on the Rights of Indigenous People continues to hear from indigenous peoples' representatives, member States, *special rapporteurs*, and various experts in order to complete the American Declaration.<sup>229</sup> The American Declaration, like the U.N. Draft Declara-

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*OAS-IACHR*, *supra* note 130 (noting IACHR submits cases to Inter-American Court and appears before Inter-American Court in litigation of cases).

226. See *Permanent Council*, *supra* note 129 (explaining roles of IACHR and Inter-American Court); see also *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 (showing example how IACHR and Inter-American Court interact); *The Effect of Reservation on the Entry into force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Inter-Am. Ct. H.R. Opinion OC-2/82 (Ser. A) No. 2 (1982) (stating how IACHR requested opinion); *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)*, Advisory Opinion Inter-Am. Ct. H.R. OC-3/83 (Ser. A) No. 3 (1983) (mentioning IACHR requested opinion); *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)* Advisory Opinion Inter-Am. Court H.R., Advisory Opinion OC-14/94 (Ser. A) no. 14 (1994) (noting IACHR requested advisory opinion); *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights)*, Advisory Opinion Inter-Am. Ct. H.R. OC-11/90 (Ser. A) No. 11 (1990) (stating IACHR requested advisory opinion).

227. See Press Release, *Mayagna Awas Tingni Indigenous Community*, OAS News (Sept. 28, 2001) available at <http://www.cidh.oas.org/Comunicados/English/2001/Press23-01.htm> (mentioning that in 2001, IACHR considered about 40 cases involving various indigenous issues); FERGUS MACKEY, A GUIDE TO INDIGENOUS PEOPLES' RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 73 (2002) (stating IACHR processed about forty cases regarding indigenous peoples in 2002).

228. See Proposed American Declaration, *supra* note 134, § 5 (noting all proposed changes and substitutions to section); see also *Working Document Comparing the Original Proposed American Declaration on the Rights of Indigenous Peoples and Proposals by Indigenous Representatives*, OEA/Ser.K/XVI, OAS Doc. GT/DADIN/doc.41/01 (2001); *American Declaration*, *supra* note 134, ¶¶ 23-26 (discussing progress of American Declaration). See generally *Permanent Council*, *supra* note 129 (noting more documents regard Section Five of American Declaration than any other section).

229. See *Meeting of the Working Group on Chapter V of the proposed Declaration with Spe-*

tion, will not legally bind ratifying countries.<sup>230</sup>

### 3. The Inter-American Court of Human Rights

The Inter-American Court recently decided a landmark case where its holding reaffirmed land rights of indigenous peoples.<sup>231</sup> *The Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua* is the first case submitted to the Inter-American Court directly pertaining to indigenous peoples' rights.<sup>232</sup> The Court's judgment declared that indigenous peoples, by virtue of their very existence, have the right to live freely on their own lands.<sup>233</sup>

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*cial Focus on "Traditional Forms of Ownership and Cultural Survival: Rights to Land and Territories", OEA/Ser.K/XVI, OAS Doc.GT/DADIN/doc.89/02 (2002) (explaining WGIP's Chair will coordinate discussion including State representatives and representatives of indigenous peoples); see also Presentation by Robert T. Coulter at the Meeting of the Working Group on the Fifth Section of the Draft Declaration with Special Emphasis on "Traditional Forms of Ownership and Cultural Survival: Rights to Land and Territories", (Nov. 5, 2002) OEA/Ser.K/XVI, OAS Doc. GT/DADIN/doc.97/02 (2002) (discussing section five of Draft Declaration; Draft Agenda – Meeting of the Working Group on the Fifth Section of the Draft Declaration with Special Emphasis on "Traditional Forms of Ownership and Cultural Survival. Rights to Land and Territories", OEA/Ser.K/XVI, OAS Doc. GT/DADIN/doc.90/02 rev. 2 (2002) (proposing discussion topics on section five of Draft Declaration); Draft Schedule for the Working Group on Indigenous Populations, OEA/Ser.K/XVI, OAS Doc. GR/DADIN/doc.91/02 rev. 2 (2002) (displaying schedule for discussion sessions regarding section five of Draft Declaration); Draft Schedule of Activities of the Working Group on Indigenous Population (2003-2004), OAS Doc. GT/DADIN/doc.141/03 (2003) (publishing draft schedule of WGIP meetings).*

230. See Government of Canada Comments on the Draft Inter-American Declaration on the Rights of Indigenous Peoples, *supra* note 161 (explaining Draft Declaration contains language more appropriate for convention rather than non-binding declaration); see also SAVE THE CHILDREN, PARTNERS IN RIGHTS 10 (2002) (reporting declarations not legally binding).

231. See *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79; Lopez, *supra* note 18, at 246 (explaining Inter-American Court held Nicaraguan Government must include indigenous Nicaraguans in policy-making over their lands).

232. *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 (noting case of Mayagna Awas Tingni Community as first case submitted to Inter-American Court pertaining to indigenous people); Press Release, Indian Law Resource Center, Awas Tingni Case – Fifteen Months Later: The Challenges to the Implementation of the Decision of the Inter-American Court of Human Rights (Jan. 2003) available at [http://www.indianlaw.org/awas\\_tingni\\_info\\_english.htm](http://www.indianlaw.org/awas_tingni_info_english.htm) [hereinafter Awas Tingni Case – Fifteen Months Later] (stating Awas Tingni case remains first case before Inter-American Court that directly addresses territorial rights of indigenous communities); *Topic 1: Inter-American Court on Human Rights Hears Awas Tingni Case*, NICAR. NETWORK HOTLINE (Nov. 20, 2000) (noting Awas Tingni case as first Inter-American Court case in which Court viewed indigenous property rights as human right).

233. See *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79, ¶ 149 (discussing Inter-American Court's Awas Tingni decision); see also Dodson, *supra* note 170, at 186 (realizing outcome of Awas Tingni Case established international legal precedent re-

The Inter-American Court relied on Article 21 of the American Convention, which recognizes the right to private property.<sup>234</sup> The court also relied on relevant provisions of the Nicaraguan Constitution of 1996 for its ruling.<sup>235</sup>

The Inter-American Court held that Nicaragua violated the Awas Tingni Community's right to judicial protection and its right to property.<sup>236</sup> The Court also required Nicaragua to adopt an effective mechanism for official titling of the Awas Tingni Community's property, in accordance with the customs and laws in compliance with Article 2 of the American Conven-

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garding extent of Nations' obligation to recognize and protect indigenous lands); Martin Edwin Andersen, *Thankful for Renewed Rights; Native Nicaraguans Needed Protection*, WASH. TIMES, Nov. 22, 2001, at A19 (mentioning indigenous peoples' landmark victory in Inter-American Court as likely to have important effect in numerous other land disputes throughout Latin America); Catherine Elton, *Indians' Heritage Gets a Legal Stamp*, CHRISTIAN SCI. MONITOR, Dec. 4, 2001, at 6 (stating experts on indigenous rights say recent Inter-American Court ruling establishes important precedent and valuable new interpretation of indigenous property rights, which could have far-reaching implications for indigenous people throughout Americas).

234. See American Convention on Human Rights, *supra* note 130, art. 21 (stating everyone has right to use and enjoy his property and law may subordinate such use and enjoyment to interest of society and no one should be deprived of his property except upon stated circumstances and that usury and exploitation of man by man should be illegal); see also *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 ¶¶ 142-145 (Nicaraguan Government violated Awas Tingni's right to property recognized by Article 21 of American Convention).

235. See NICAR. CONST. OF 1995, art. 5 (recognizing existence of Nicaraguan indigenous people and their right to communal forms of land ownership and to manage their lands); see also *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 ¶¶ 116, 142 (quoting American Convention on Human Rights Article 21 and explaining Article 5 of NICAR. CONST. OF 1995 which states that Nicaragua recognize existence of indigenous peoples, who have right to manage their local affairs, as well as maintaining communal forms of ownership of their lands, and also use and enjoy those lands, in accordance with law).

236. See *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 (Ser. C) No. 79 (2001) ¶ 173(1) (finding that Nicaragua violated Awas Tingni Community's right to judicial protection enshrined in Article 25 of American Convention); see also *Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. Rodolfo Stavenhagen, Submitted Pursuant to Commission Resolution 2001/57*, U.N. GAOR, Hum. Rts. Comm., 58th Sess. ¶ 45, U.N. Doc. E/CN.4/2002/97 (2002) [hereinafter *Human Rights and Indigenous Issues Report*] (mentioning Inter-American Court decided Nicaragua had violated Awas Tingni's right to judicial protection as contained in American Convention); 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. LAW 1, 11-12 (2002) (noting Inter-American Court found violations of Article 25 of Convention and thus established that faithful implementation of domestic legal protections for rights of indigenous peoples as obligation under American Convention on Human Rights and that countries may incur international responsibility if they fail to make those rights effective).

tion on Human Rights.<sup>237</sup> Further, Nicaragua was instructed by the Inter-American Court to officially demarcate, issue title for, and recognize those lands belonging to the members of the Awas Tingni Community.<sup>238</sup>

In its decision, the Inter-American Court specified a communitarian tradition regarding a communal form of collective property of the land that exists among indigenous people.<sup>239</sup> The Court recognized that the close bond of indigenous peoples with their land represents an essential element of their culture, economic survival, and well-being.<sup>240</sup> The Inter-American Court stated that the relationship between land and indigenous peoples is a material and spiritual element necessary to preserve their cultural heritage and pass it on to future generations.<sup>241</sup>

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237. See *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 ¶ 173(3) (holding that Nicaragua must adopt in its domestic law, pursuant to Article 2 of American Convention on Human Rights, administrative, legislative, and any other measures necessary to create effective mechanism for delimitation, demarcation, and titling of Awas Tingni property); see also American Convention on Human Rights, *supra* note 130, art. 2 (stating where exercise of any of rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, Nation parties undertake to adopt, in accordance with their constitutional processes and provisions of this Convention, such legislative or other measures necessary to give effect to those rights or freedoms).

238. See *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 ¶ 173(4) (mentioning Inter-American Court's ruling to repair Nicaragua's human rights violations towards Awas Tingni); see also *Human Rights and Indigenous Issues Report*, *supra* note 236 (quoting Inter-American Court's Awas Tingni Case paragraph 173(4) and construing decision as holding Nicaragua must demarcate and title lands to Awas Tingni Community).

239. See *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 ¶ 149 (recognizing special type of land use Awas Tingni use); see also Anaya & Grossman, *supra* note 236, at 12 (mentioning Inter-American Court held that concept of property, as articulated in American Convention on Human Rights, includes communal property of indigenous peoples defined by their customary land use).

240. See *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 ¶ 149 (stating indigenous groups have right to live freely in their own territories and that Nations must recognize and understand close ties between indigenous peoples and their lands as fundamental bases of their cultures, their spiritual life, their integrity, and their economic survival); see also Press Release, Inter-American Commission on Human Rights (Feb. 22, 2002), available at <http://www.cidh.oas.org/Comunicados/English/2002/Press8.02.htm> (last visited Nov. 17, 2004) (explaining Inter-American Court's recognition of Awas Tingni's close ties with its land).

241. See *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 ¶ 149 (recognizing Awas Tingni relationship with land goes beyond traditional capitalistic relationship); see also *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous Peoples and Their Relationship to Land*, U.N. GAOR, Hum. Rts. Comm., 53rd Sess. ¶ 13, U.N. Doc. E/CN.4/Sub.2/2001/21 (2001) (stating it remains difficult to separate concept of indigenous peoples' relationship with their lands, territories and resources

The judgment against Nicaragua, however, has not been enforced.<sup>242</sup> The Inter-American Court gave Nicaragua fifteen months from August 2001 to enforce its decision.<sup>243</sup> The Nicaraguan Government did not meet this deadline, thereby violating the Court's order.<sup>244</sup>

To enforce the order, the Awas Tingni Community has filed an *amparo* action<sup>245</sup> (an action seeking a constitutional guarantee of civil rights), in the Nicaraguan courts against the Nicaraguan President and other government officials requesting that the Supreme Court of Nicaragua accept the case for its consideration.<sup>246</sup> Additionally, the Awas Tingnis Community has asked

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from that of their cultural differences and values and that their relationship with land and all living things remains at core of their societies).

242. See also Paul Baker Hernandez, *Government Slow to Obey Awas Tingni Ruling*, NICAR. NEWS SERVICE, available at [http://www.tulane.edu/~libweb/RESTRICTED/NICANEWS/2002\\_0708.txt](http://www.tulane.edu/~libweb/RESTRICTED/NICANEWS/2002_0708.txt) (last visited Oct. 15, 2004) (noting slow negotiations between Awas Tingni's and Nicaraguan Government); see also Robert Spain, *Indigenous Nicaraguans Sue President*, 4 HOND. THIS WEEK (2003), available at [www.marrder.com/htw/2003/jan](http://www.marrder.com/htw/2003/jan) (last visited Nov. 5, 2004) (reporting Awas Tingni filed lawsuit against Nicaraguan President to have Inter-American Court ruling enforced).

243. See *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 ¶ 164 (ruling Nicaragua must delineate, demarcate, and title corresponding lands of Awas Tingni's Community within maximum of 15 months); see also *Awas Tingni Case – Fifteen Months Later*, *supra* note 232, at 1 (stating how much time Inter-American Court gave Nicaragua to comply with ruling); Spain, *supra* note 242 (noting Inter-American Court gave Nicaragua 15 months to comply with its ruling).

244. See *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79 ¶ 164 (stating that Nicaragua violated Inter-American Court's ruling); see also *Awas Tingni Case – Fifteen Months Later*, *supra* note 232, at 1 (noting status of Nicaragua's compliance with Inter-American Court's ruling); Spain, *supra* note 242 (noting status of Awas Tingni Case decision); see also Press Release, Indian Law Resource Center, *Indigenous Community Sues the President of Nicaragua for Failure to Implement Decision of International Tribunal* (Jan. 16, 2003), available at [http://www.indianlaw.org/awas\\_tingni\\_info\\_english.htm](http://www.indianlaw.org/awas_tingni_info_english.htm) (stating 15 month demarcation period for Nicaragua to comply with Inter-American Court's order expired).

245. See DICTIONARY OF LEGAL TERMS 11 (Louis A. Robb ed., 1955) (defining *amparo* action as constitutional guarantee of protection of civil rights); see also SOREN HVALKOF & MARCOS GUEVARA, *EXTERNAL EVALUATION OF THE PROJECT: "COLLECTIVE LANDS OF THE EMBERA AND WOUNAAN, PHASE II"* DOBBO YALA FOUNDATION AND NEPENTHES 41 (2004) (describing *amparo* action as remedy or constitutional motion filed with Panamanian Supreme Court).

246. See *Awas Tingni Case – Fifteen Months Later*, *supra* note 232, at 1 (mentioning Awas Tingni Community filed *amparo* action with Appellate Court requesting to forward case to Supreme Court of Nicaragua for its consideration against President of Nicaragua, various ministers and government officials claiming that these officials have failed to uphold constitutional and international legal obligations of Nicaragua to implement decision); see also Press Release, Indian Law Resource Center, *Meeting with President Bolaños About the Awas Tingni Case* (Mar. 26, 2003), available at <http://>

the Nicaraguan Supreme Court to order the government officials to comply with the Inter-American Court's decision.<sup>247</sup> Due to the precedential importance of this case for the protection of indigenous people's rights in the Americas, the successful implementation of *The Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua* decision would be an important step forward for indigenous peoples' land rights.<sup>248</sup>

### III. FINDING THE KEY THAT FITS: HOW THE MOGUE COMMUNITY ACQUIRES ITS HOME

While international law does not immediately translate into local law, it may help the Mogue Community attain ownership over the lands they have lived on, occupied, and used for generations.<sup>249</sup> The United Nations as well as OAS have made efforts to help indigenous peoples regain their land rights.<sup>250</sup> At the present time, however, the OAS is further along in that regard thanks to the recent Inter-American Court decision *The Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua*.<sup>251</sup>

#### A. United Nations

Land rights for indigenous people have taken the spotlight

[www.indianlaw.org/awas\\_tingni\\_info\\_english.htm](http://www.indianlaw.org/awas_tingni_info_english.htm) (noting Awas Tingni Community filed *amparo* action against President of Nicaragua and 10 other senior government officials); Spain, *supra* note 242 (stating Awas Tingni Community claims that these individuals, in their official capacities, violated Nicaragua's international legal obligations and Nicaragua's Constitution by failing to implement Inter-American Court's ruling).

247. See Awas Tingni Case – Fifteen Months Later, *supra* note 232, at 1 (mentioning Supreme Court of Nicaragua as being asked to order Nicaraguan government officials to comply with decision of Inter-American Court); see also Spain, *supra* note 242 (stating Awas Tingni filed suit in Nicaraguan Appeals Court to require Nicaraguan government to enforce Inter-American Court's ruling).

248. See Awas Tingni Case – Fifteen Months Later, *supra* note 232, at 2-3 (explaining importance to indigenous peoples throughout Americas of implementation of Inter-American Court's Awas Tingni ruling); see also Anaya & Grossman, *supra* note 236 (noting Inter-American Court's decision forged international legal precedent with implications for indigenous peoples throughout world).

249. See *supra* notes 19-155, 232-241 and accompanying text (explaining different international conventions, bodies of international organizations and discussing recent Inter-American Court of Human Rights' decision).

250. See *supra* notes 19-155 and accompanying text (describing both U.N. and OAS international conventions and bodies of international organizations that address indigenous peoples' land rights concerns).

251. See *supra* notes 232-41 and accompanying text (explaining what *The Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79, case means to indigenous peoples living in member States of OAS).

at U.N. conventions, especially throughout the "International Decade of the World's Indigenous People."<sup>252</sup> The U.N. Charter, which established international human rights standards for individuals, continues as an outline and foundation for what the United Nations seeks to accomplish, but focuses on the individual rather than groups.<sup>253</sup> UDHR, originally a statement of guiding human rights principles, further developed and expanded the human rights function of the U.N., but also focused on the rights of individuals rather than groups.<sup>254</sup> ICERD, which addresses racial discrimination, stretches UDHR further towards helping the Mogue Community realize its land ownership through extending the right to own property to the community rather than limiting it to the individual.<sup>255</sup>

CHR, a U.N. body which formally addresses various human rights concerns, continues as the most important and most active U.N. human rights forum, yet the Mogue Community cannot easily access it.<sup>256</sup> Also, due to the size of the annual meeting, the Chochoe's claims of human rights violations will not be heard by people outside the Panamanian Government, who already know the situation and ignore it.<sup>257</sup> Although taking their concerns to CHR might not directly help the Mogue Community's cause immediately, it could help influence CHR's future resolutions.<sup>258</sup>

WGIP, a U.N. working group which reports to the Sub-Commission and receives its mandate from CHR, is also one of the most important U.N. bodies for indigenous peoples and pro-

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252. See *supra* notes 53-124 and accompanying text (noting how United Nations has advanced indigenous peoples' land rights since 1945).

253. See *supra* note 66 and accompanying text (explaining how U.N. CHARTER applies to individuals rather than groups).

254. See *supra* notes 68-69 and accompanying text (discussing UDHR and its original purpose).

255. See *supra* note 74 and accompanying text (stating UDHR's position on property ownership).

256. See *supra* notes 75, 176, 180 and accompanying text (describing importance of CHR within U.N. human rights fora and mentioning indigenous peoples' underutilization of *special rapporteurs*).

257. See *supra* notes 178-80 and accompanying text (describing how audience at CHR's annual meeting will not have audience as large as other bodies within U.N. system).

258. See *supra* note 181-84 and accompanying text (discussing how indigenous peoples have influenced CHR resolutions).



vides an easily accessible forum to indigenous communities.<sup>259</sup> Further, WGIP has helped advance the Draft Declaration, a non-binding international declaration regarding indigenous rights.<sup>260</sup> Although the Draft Declaration does not have a legal effect, once adopted it will allow the Mogue Community to apply immense diplomatic pressure on Panama to achieve land ownership.<sup>261</sup>

Part VI of the Draft Declaration, the most important section dealing with indigenous land rights, gives the Mogue Community assistance from Panama in gaining control of and protecting their lands.<sup>262</sup> Panama would also have to get the Mogue Community's consent in order to conduct any project on their lands.<sup>263</sup> Also, Part VI entitles the Mogue Community to fair compensation for any negative impact on their lands from Ancon.<sup>264</sup> This compensation aspect of the Draft Declaration remains important to the Mogue Community's situation since Ancon currently claims ownership of the property on which the Mogue Community has lived on for generations.<sup>265</sup> While the Draft Declaration's completion will become a key tool for the Mogue Community to gain land ownership, Part VI of the Declaration remains far from settled.<sup>266</sup> In fact, if Nations successfully subject indigenous peoples to each country's domestic laws and systems rather than their own tribal laws, it will limit Part VI to

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259. *See supra* notes 88-89, 190 and accompanying text (addressing importance and accessibility of WGIP for indigenous peoples).

260. *See supra* notes 94-96, 194-196 and accompanying text (explaining importance of completion of Draft Declaration to Mogue Community's achieving land ownership).

261. *See supra* notes 195-96 and accompanying text (discussing usefulness of Draft Declaration despite its lack of legal accountability for member States).

262. *See supra* notes 101-104 and accompanying text (detailing specifics of Part VI of Draft Declaration).

263. *See supra* note 201 and accompanying text (mentioning how Part VI of Draft Declaration would mandate Mogue Community's consent before anyone, including Panama's government engaged in any project on Mogue Community's land).

264. *See supra* note 202 and accompanying text (noting Part VI of Draft Declaration's requirement that Panama compensate Mogue Community for any adverse cultural, economic, environmental, social, or spiritual impact on their land).

265. *See supra* notes 19-39 and accompanying text (describing history of who has owned land on which Mogue Community lives and who currently owns it).

266. *See supra* notes 96, 208 and accompanying text (stating U.N. target date for completing Draft Declaration and expressing Latin American Nations' continued commitment to adopt Draft Declaration by 2004).

the point of being ineffective.<sup>267</sup>

While Nations adopted Agenda 21 to protect the environment rather than human rights, it nonetheless remains an important tool for the Mogue Community to gain land ownership.<sup>268</sup> An important aspect of Agenda 21 remains helping ease the friction between governments and indigenous peoples.<sup>269</sup> According to Agenda 21, Panama should support and adopt the Draft Declaration in addition to ratifying all international conventions which apply to indigenous peoples.<sup>270</sup>

ILO Convention No. 169, a legally-binding convention which focuses on indigenous land rights concerns, continues as a very important legally binding tool that could help the Mogue Community achieve ownership over their lands.<sup>271</sup> It states that Panama needs to take measures to protect the Mogue Community's ability to provide for themselves on lands they do not own, but have historically used for their sustenance and traditional activities.<sup>272</sup> This remains very crucial for the Mogue Community's survival since the owner of the land on which they live told them they cannot use the land they have historically used in order to provide for their livelihood.<sup>273</sup>

The ILO has influenced laws at all levels.<sup>274</sup> A huge hindrance to Convention No. 169 helping the Mogue Community, however, remains Panama's failure to ratify Convention No. 169

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267. *See supra* notes 206-07 and accompanying text (discussing various States' attempts to limit Draft Declaration's effectiveness).

268. *See supra* notes 106-13 and accompanying text (explaining Agenda 21's usefulness as tool to help Mogue Community achieve land ownership).

269. *See supra* note 111 and accompanying text (discussing how Agenda 21 proposes to relieve tensions between indigenous communities and governments).

270. *See supra* note 113 and accompanying text (expressing Agenda 21's view towards other international conventions regarding indigenous peoples).

271. *See supra* notes 114, 118 and accompanying text (describing what makes Convention No. 169 such important tool to indigenous peoples and remarking on legal significance of Convention No. 169 to indigenous communities).

272. *See supra* note 117 and accompanying text (addressing Convention No. 169's view towards land that indigenous peoples do not own, but have traditionally inhabited, occupied, and used).

273. *See supra* notes 34-36 and accompanying text (depicting historical situation of Mogue Community's use of land it has sustained itself with for generations and conveying present condition of Mogue Community's restriction of land it uses to sustain itself).

274. *See supra* note 222 and accompanying text (describing influence Convention No. 169 has had on various levels of government).

even though Panama ratified its predecessor.<sup>275</sup> Hopefully, Panama will follow its neighbors and soon ratify Convention No. 169 creating legally-binding obligations on Panama which the Mogue Community could use to achieve land ownership.<sup>276</sup>

### B. *Organization of American States*

Action through the OAS probably remains the best way for the Mogue Community to gain ownership over its land.<sup>277</sup> The Inter-American Court's recent decision against Nicaragua gives much hope for the Mogue Community to legally win its land rights through the judicial system.<sup>278</sup> In order for the Mogue Community to have its case heard, they need to petition IACHR to submit the case to the Inter-American Court.<sup>279</sup>

In the Court's recent *Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua* decision, it mandated that Nicaragua comply with its constitutional and legal guarantees to the Awas Tingni Community to have a communal property right to the lands it currently inhabits, even though the limits of the territory on which the property rights exist are not yet effectively demarcated.<sup>280</sup> Likewise, the Constitution of Panama and Panamanian Laws call for the demarcation of indigenous lands, however, the Panamanian Government has not yet taken steps towards this end.<sup>281</sup> In its decision, the Court also relied heavily on Article 21 of the American Convention which applies to both

275. *See supra* notes 115-16, 219 and accompanying text (stating that Panama, while ratifying Convention No. 107, has failed to ratify its successor, Convention No. 169).

276. *See supra* note 219 and accompanying text (conveying which Latin American countries have ratified Convention No. 169).

277. *See supra* notes 223-48 and accompanying text (discussing merits of various OAS human rights instruments).

278. *See supra* notes 231-41 and accompanying text (discussing Inter-American Court's *Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79, decision).

279. *See supra* note 225 and accompanying text (explaining how cases are brought before Inter-American Court).

280. *See supra* notes 235-36 and accompanying text (conveying part of Inter-American Court's *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79, decision regarding Nicaragua's Constitution).

281. *See supra* notes 42-48; 163-66 and accompanying text (asserting Panama's Constitutional guarantees and laws Panama promises its indigenous peoples regarding land ownership).

Panama and Nicaragua.<sup>282</sup>

Nicaragua, however, has so far failed to abide by the Inter-American Court's ruling and demarcate the Awas Tingni Community's territory.<sup>283</sup> Nicaragua's compliance with the decision remains imperative if other Nations within the Inter-American Court's jurisdiction are to take notice and adhere to the newly set precedence regarding indigenous group's land ownership.<sup>284</sup>

The American Declaration is another tool which, if adopted, will provide pressure on the Panamanian Government to give the Mogue Community control over its land.<sup>285</sup> It remains important that the American Declaration recognizes that collective land ownership is fundamental for indigenous peoples' survival.<sup>286</sup> It also asserts the Mogue Community's entitlement to ownership recognition by Panama, giving the Mogue Community land the right to use lands that it has traditionally used to sustain itself.<sup>287</sup>

Under the American Declaration, Panama would have to protect the Mogue Community from any unwanted intrusion upon its land and Panama would also have to punish the offender.<sup>288</sup> These obligations includes protection from Ancon's owners.<sup>289</sup> Also, the Mogue Community could receive restitution for lands it has lived on for generations but are owned by

282. See *supra* note 234 and accompanying text (describing Inter-American Court's reliance on American Convention Article 21).

283. See *supra* notes 242-44 and accompanying text (asserting Nicaragua's lack of compliance with Inter-American Court's *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79, decision).

284. See *supra* note 248 and accompanying text (discussing precedential importance of *Awas Tingni*, [2001] Inter-Am. Ct. H.R. (Ser. C) No. 79, decision and how Nicaragua's compliance with decision has implications for not only Mogue Community in Panama but indigenous peoples throughout Americas).

285. See *supra* notes 134-42, 228-30 and accompanying text (generally discussing American Declaration and explaining controversial portion of American Declaration section regarding land rights).

286. See *supra* note 136 and accompanying text (expressing American Declaration's recognition of importance of collective ownership to indigenous people).

287. See *supra* note 139-40 and accompanying text (explaining American Declaration's attitude towards indigenous peoples' property rights towards lands they have historically occupied for their livelihood).

288. See *supra* note 142 and accompanying text (expressing American Declaration calls to protect indigenous peoples' land from intrusion by unauthorized persons).

289. See *supra* notes 34-36 and accompanying text (discussing various encroachment upon and usurpation upon Mogue Community's traditional land).

people outside the Mogue Community.<sup>290</sup> The member States of the OAS, however, have not adopted the American Declaration and it still remains in the discussion stage.<sup>291</sup> Also, like the U.N. Draft Declaration, the American Declaration will not have any binding authority on OAS member States.<sup>292</sup>

### CONCLUSION

There has been a flurry of activity in international law regarding indigenous peoples' property rights in the Americas. The "International Decade of the World's Indigenous People" is coming to a close, but between the United Nations and OAS, there are more international tools currently available to indigenous peoples in the Americas (including the Mogue Community), than ever before to help with their fight to own their land. Despite this optimistic future, the Mogue Community needs to continue to diplomatically fight for the lands it has lived on and used for survival for generations. Members of the Mogue Community remain ever hopeful Ancon will eventually give them the land promised to them. They have endured generations' worth of violence, including hanging themselves to escape the misery imposed upon them, shooting over the heads of fishing boys, and even the murder of a Chochoe Indian by another Chochoe Indian. Hopefully, the Mogue Community's generations worth of shed blood, strife, and struggle will allow it the security to ensure the sustainability of its people for future generations. With the recent developments in international law, especially the Inter-American Court's *Mayagna (Sumo) Awas Tingni Indigenous Community v. Nicaragua* decision there are many different avenues the Mogue Community can pursue in order to achieve land autonomy peacefully, with no more bloodshed.

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290. See *supra* note 141 and accompanying text (conveying American Declaration's position on compensation of indigenous peoples for land usurped from them).

291. See *supra* notes 228-229 and accompanying text (stating current status of American Declaration).

292. See *supra* note 230 and accompanying text (explaining American Declaration will not legally bind ratifying States).