



## NATURAL RESOURCE PROJECTS, INDIGENOUS PEOPLES AND THE ROLE OF INTERNATIONAL LAW

Article by Nigel Bankes\*

### What is the issue?

We know that natural resource projects frequently have a dramatic and adverse effect on the traditional territories of Indigenous Peoples. Here are some examples:<sup>1</sup>

- Example 1, tar sands developments in the Athabasca River area of Alberta. These developments, and in particular in situ recovery operations, have caused massive land disturbance within the traditional territory of Treaty 8 Peoples.<sup>2</sup> Much of the development has occurred in areas of intensive traditional use.
- Example 2, Texaco's oil and gas operations in Ecuador.<sup>3</sup> These operations caused significant contamination of ground and surface water as a result of pipeline spills and the deliberate discharge of petroleum contaminated water. Texaco's activities affected the traditional territories and lives of a number of Indigenous Peoples in Ecuador and also in Peru.
- Example 3, the Grand Coulee dam on the Columbia River in the United States. This dam, built during the 1940s, cut off the escapement of salmon to the entire upper Columbia affecting a number of First Nations.<sup>4</sup>

But what does international law have to say about this? Is it silent or does it impose limits upon the extent to which the state, may authorize projects in the traditional territories of Indigenous Peoples? Does it require that the state obtain the consent of affected Indigenous Peoples and if so under what circumstances? Does it require that a state take

special measures to ensure that indigenous interests are protected before it permits a natural resource project to proceed? What fora may be available to raise these issues? These are the types of questions that I want to try and address.<sup>5</sup>

### What are the applicable bodies of international law?

In seeking to answer these questions I think that we can draw on a broad range of international norms drawn principally from general international human rights law but also, and to a lesser extent, from international environmental law and the cross-over area between these two categories of law.<sup>6</sup> These norms include not only global norms, such as the Genocide Convention, the two International Covenants, and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), but also regional norms such as the American Convention on Human Rights of the Organization of American States (ACHR)<sup>7</sup> and relevant European instruments. While these Conventions generally do not speak specifically to the situation of Indigenous Peoples, the general argument is that if the norms contained in these conventions were applied to Indigenous Peoples in a non-discriminatory manner that would serve to limit or constrain state power. The norms in question include the right not to be deprived of the means of subsistence, the right to equal benefit of the law, the right to the use and enjoyment of property and the right of minorities to enjoy their own culture and practice their own religion.



## RÉSUMÉ

Cet article évalue dans quelle mesure le droit international peut aider à limiter les pouvoirs de l'État de disposer des droits afférents aux ressources et d'autoriser le développement des ressources dans les territoires traditionnels des peuples autochtones. L'article se penche sur l'application d'instruments généraux relatifs aux droits de la personne, tels le Pacte international relatif aux droits civils et politiques, plutôt que sur celle d'instruments spécifiques (par exemple les Projets de déclaration des Nations Unies et de l'OEA sur les droits des peuples autochtones) qui traitent plus directement de la situation des peuples autochtones. L'auteur attire notamment l'attention sur le fait que le système interaméricain des droits de la personne commence à étendre sa protection aux droits afférents aux terres et aux ressources des peuples autochtones par l'application non discriminatoire du droit de propriété. L'auteur identifie diverses tribunes, domestiques et internationales, au sein desquelles ces arguments pourraient être avancés.

I cannot canvass all of the possible ramifications of this claim but I can provide you with some selected examples. My examples are: (1) the decision of the Inter-American Court of Human Rights in *Awas Tingni Community v. Nicaragua*,<sup>8</sup> (2) the decision of the Inter-American Commission of Human Rights in *Maya Indigenous Communities of the Toledo District v. Belize*,<sup>9</sup> (3) the decisions of the High Court of Australia in *Mabo v. State of Queensland*, (4) the decisions of UN Human Rights Committee under Article 27 of the International Covenant on Civil and Political Rights (ICCPR), and (5) the practice of the Committee on the Elimination of Racial Discrimination under CERD.

In addition to these bodies of general norms there have also been efforts to develop regional and global instruments that focus on the situation of indigenous peoples. These efforts include the ILO's Convention 169,<sup>10</sup> the efforts to develop a Declaration of the Rights of Indigenous Peoples within the UN Human Rights Commission and its working groups,<sup>11</sup> and efforts within the OAS to develop an American Declaration on the Rights of Indigenous Peoples.<sup>12</sup> With the exception of ILO 169, these remain works in progress and while Convention 169 has attracted a broader measure of support than the earlier Convention 107 there are many states with indigenous populations, including Canada and the United States, that have yet to ratify 169.

### **The decision of the Inter-American Court of Human Rights in *Awas Tingni Community v. Nicaragua***<sup>13</sup>

James Anaya has hailed this decision as "the first legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples in

the face of a state's failure to do so."<sup>14</sup> The basic facts of the case were that Awas Tingni, one of numerous Sumo indigenous communities on the Atlantic coast of Nicaragua, alleged that Nicaragua was in breach of its obligations under Article 21 of the ACHR by failing to demarcate and title Awas Tingni traditional lands and by wrongfully granting a timber concession to a Korean company without the consent of the traditional owners. Article 21(1) provides that "Everyone has the right to the use and enjoyment of his property."

The Awas Tingni originally presented its petition to the Inter-American Commission on Human Rights and it was that body that pursued the claim before the Court. The Court ruled in favour of Awas Tingni and the Commission.

The Court noted that the ACHR used the generic phrase "property" rather than "private property" and concluded that "the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within a framework of communal property. What then were the implications of finding that indigenous property interests fell to be protected by the ACHR?"<sup>15</sup>

"... the members of the Awas Tingni Community have a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities. Nevertheless, the Court notes that the limits of the territory on which that property right exists have not been effectively delimited and demarcated by the State. This situation has created a climate of constant uncertainty among the members of the Awas Tingni Community, insofar as they do not know for certain how far their communal property extends geographically and, therefore, they do



not know until where they can freely use and enjoy their respective property. Based on this understanding, the Court considers that the members of the Awas Tingni Community have the right that the State

- a) carry out the delimitation, demarcation, and titling of the territory belonging to the Community;
- b) abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities.”

Based on the above ... the Court believes that, ... the State has violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property, and that it has granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled.

### **The decision of the Inter-American Commission of Human Rights in *Maya Indigenous Communities of the Toledo District v. Belize***

The Inter-American Commission on Human Rights is established by Chapter VII of the American Convention on Human Rights. Article 44 affords the Commission the jurisdiction to receive petitions from any person or group of persons alleging that a State Party has violated the Convention. In addition, the Commission may also consider petitions relating to alleged breaches of the American Declaration of the Rights and Duties of Man.<sup>16</sup> This latter is significant in relation to Canada since, while Canada has yet to ratify the Convention, it became bound by the Declaration when it became a member state of the OAS in 1990.<sup>17</sup> Other OAS countries are in the same position including Belize (the subject matter of this petition) and the United States of America.<sup>18</sup> The Commission has the jurisdiction to report on petitions “setting forth the facts and stating its conclusions” and, in transmitting its report to the states concerned “may make such proposals and recommendations as it sees fit.”<sup>19</sup> There is a general requirement that the petitioner exhaust local remedies before the Commission is able to accept jurisdiction.<sup>20</sup>

The basic claim in *Maya* was that Belize was in breach of Article XXIII of the Declaration because it had failed to assure the Maya of their traditional land rights and more particularly because Belize had granted extensive logging and oil concessions in Maya traditional territory and that activities carried on pursuant to those concession had a negative effect on the environment and hence on Mayan culture. Article XXIII of the Declaration provides that “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”

The Commission found the state to be in breach of this Article. The Commission reasoned that unlike the land rights of other Belizeans the nature of the interest of the Maya people in their lands was uncertain<sup>21</sup> and cannot be “defined exclusively by entitlements within a state’s formal legal system but also ... arises from and is grounded in indigenous custom and tradition.” The Commission went on to find that the Maya traditional communal property right was just as entitled to protection by Article XXIII as the state granted property rights of other Belizeans and noted further that the scope of the right “is not dependent upon particular interpretations of domestic judicial decisions concerning the possible existence of aboriginal rights under common law.” The state was in breach of Article XXIII by failing to take steps “to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect the territory on which their rights exist.”

The Commission also found that the grant of the concessions constituted a breach. The reasoning here was that the duty to protect indigenous property imposed a duty to consult where a proposed decision might have an impact upon indigenous lands and their communities, or if the concession in question could fall within the traditional lands of the Maya.

In addition to alleging a breach of Article XXIII of the Declaration, the Maya also alleged that these same actions constituted breaches of other articles of the Declaration and in particular the right of all persons under Article II to equality before the law and the Article XVIII right to judicial protection.<sup>22</sup> The Maya right to equality before the law was breached because Belize failed to provide the same level of protection it provided to other land titles but the Commission also noted that special or affirmative measures might be necessary to ensure true equality rather than simply sameness of treatment.<sup>23</sup> The right to judicial protection was breached because of the failure of the Belizean court system to provide for the expeditious disposition of a title claim that the Maya had first lodged with the courts in 1996.<sup>24</sup>





## The decisions of the High Court of Australia in *Mabo v. Queensland*

The 1992 decision of the High Court of Australia in *Mabo v. Queensland*<sup>25</sup> (*Mabo #2*) is well known in the common law world. It is important here principally because in reaching his conclusion that the *res nullius* doctrine formed no part of Australian law Justice Brennan relied in part on Australia's accession to the Optional Protocol to the ICCPR and noted that "A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."<sup>26</sup>

Somewhat less well known is the High Court's 1988 decision in *Mabo #1*.<sup>27</sup> *Mabo #1* paved the way for *Mabo #2*. In 1985 Queensland passed an Act known as the *Queensland Coast Islands Declaratory Act* which purported to declare that the Murray Islands, the subject of *Mabo's* aboriginal title claim on behalf of the Miriam people, had all along been vested in the Crown "freed from all other rights, interests and claims of any kind whatsoever". The statute went on to affirm that no compensation was payable in respect of any right, title or interest that might have existed prior to any annexation by the Crown. Queensland sought to rely upon the statute as a complete defence to *Mabo's* aboriginal title claim and *Mabo* in turn sought a preliminary ruling that Queensland could not rely upon the defence.

In a 4:3 decision the High Court agreed with *Mabo*. There are three steps to the reasons. Step one was the conclusion that the Act "extinguishes all legal rights which take their origin from native law and custom while confirming all legal rights which take their origin from the relevant statutory law of Queensland, namely, Crown lands legislation."<sup>28</sup> Step two was the conclusion that the Queensland legislation was inconsistent with valid federal/Commonwealth legislation. And step three was the application of section 109 of the Commonwealth Constitution that provides that "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

But what did all of this have to do with international law? The international law connection was of course that the federal legislation in question was the Commonwealth's Racial Discrimination Act, which was Australia's implementing legislation to accompany its ratification of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). The particular inconsistency was that the Queensland legislation effectively denied the Miriam people the right to own property and to inherit property while not similarly denying that right to other Queenslanders. In sum, there was a breach of Article 5(2) of CERD and the state law would have to be read down to ensure that native

title enjoyed the same degree of protection as other persons in the community: "The attempt by the 1985 Act to extinguish the traditional legal rights of the Miriam people therefore fails."<sup>29</sup>

## Article 27 ICCPR

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides for the protection of minorities in the following terms:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

Supervision of state implementation of the ICCPR is provided by the Human Rights Committee established by Part IV of the Convention. The HRC has three roles that are important here. First, Article 40 of the Convention requires Parties to submit reports from time to time on measures taken to give effect to the rights recognized by the Convention. The same article affords the Committee the jurisdiction to study and assess those reports. Second, the Committee, from time to time, provides interpretive guidance on the various articles of the Convention in the form of "General Comments". Third, and for those states accepting the Optional Protocol to the Convention, the Committee has the jurisdiction to consider "communications" from individuals claiming to be victims of violations of rights set out in the Covenant.

In its General Comments on Article 27<sup>30</sup> the Committee has chosen to emphasise that although expressed in negative terms, Article 27 does require that the rights not be denied and accordingly positive measures of protection may be required. Several passages of the Comments speak specifically to the situation of indigenous peoples. Most relevant for our purposes is paragraph 7 which provides as follows:

"7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and



measures to ensure the effective participation of members of minority communities in decisions which affect them.”

Representatives of indigenous communities have brought a number of cases to the Committee that involve conflicts between state authorized resource projects and traditional land use activities. The Lubicon took their case to the Committee and Sami peoples in Norway, Sweden and Finland have also brought a number of petitions to the Committee.<sup>31</sup> In considering these petitions the Committee has suggested that there are limits to state action. A case in point is the Committee’s decision in *Ilmari Lansman et al. v. Finland*.<sup>32</sup>

In *Lansman* the petitioners were Sami reindeer herders who argued that the state had violated their Article 27 rights when it authorized quarrying and related transportation activity in a traditional area which was important for herding activities but was also of spiritual significance. The Committee found that the scope of the authorization and the activities to be carried out pursuant to that authorization did not breach the petitioners’ Article 27 rights. The Committee noted that state authorized activities that have only a limited impact on the way of life of persons belonging to a minority would not necessarily amount to a denial of an Article 27 right and that the relevant question was whether the impact of the authorized activity is so substantial that it effectively denies the petitioners the right to enjoy their cultural rights in this region. The Committee emphasized that the quarrying activities were limited, that the herders had been consulted about the decision, that the activities to date did not seem to have had an adverse impact upon the grazing operations and that permit terms and conditions were designed to limit the impact of quarrying activities on herding. As to the future, the Committee observed that:<sup>33</sup>

“... economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors’ rights under Article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending contracts or granting new ones.”

## The Practice of CERD

Part II of the Convention on the Elimination of All Forms of Racial Discrimination establishes CERD (the Committee on the Elimination of Racial Discrimination). As with ICCPR, Article 9 of the Convention authorizes CERD to make suggestions and general recommendations as part of discharging its obligation to examine the reports of States parties.<sup>34</sup> In 1997 CERD issued Recommendation XXIII pertaining to Indigenous Peoples.<sup>35</sup> In addition to calling upon parties to ensure that they included information on the situation of Indigenous Peoples in their regular reports, CERD specifically addressed the question of indigenous land and resource rights and called:<sup>36</sup>

“... upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.”

The Committee routinely comments on the land and resource rights of Indigenous Peoples as part of summative assessments of the regular state reports. For example, in its 1993 report on Finland, CERD commented as follows:<sup>37</sup>

“While the Committee notes the continuous efforts undertaken by the State party to solve the issue of Sami land rights, it regrets that the problem has not yet been resolved and that Finland has so far not adhered to [ILO] Convention No. 169 ... The Committee draws the State party’s attention to general recommendation XXIII on the rights of indigenous peoples which, *inter alia*, calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.”

Finally, the Committee has, on at least one occasion, used its early warning or emergency procedure to comment on proposed state action in relation to the land and resource rights of Indigenous Peoples. The comments in question were directed at Australia and followed the introduction of a series of amendments to the post-*Mabo Native Title Act*. The Committee suggested that “the amended Act appears





to wind back the protections of indigenous title offered in the *Mabo* decision ... and raises concerns about the State party's compliance with articles 2 and 5 of the Convention." The Committee drew particular attention to the lack of participation by indigenous communities in the formulation of the amendments.<sup>38</sup>

### The question of forum

I think that I have already provided a general answer to this question of available fora through the examples I have given but let me summarize and offer some additional observations.<sup>39</sup>

First, in some cases relevant rules and principles of international law may be directly applicable in domestic law. Much will depend upon the relevant rules for the adoption of domestic law in the particular jurisdiction. In those jurisdictions with a dualist tradition in relation to treaties the actual steps taken to implement treaties will be important. Nevertheless, *Mabo #1* confirms the potential importance of applying international treaty norms in domestic courts. Most jurisdictions, including Canada, adopt a monist tradition in relation to custom and accordingly customary norms form part of the domestic law of Canada.<sup>40</sup>

Second, indigenous communities may have direct access to independent expert bodies with the competence to issue reasoned but non-binding decisions evaluating whether a state's action in relation to that community violates its international obligations. The Human Rights Committee under the ICCPR affords an example of this type of procedure, at least for those states that have ratified the Optional Protocol. Another example is the Inter-American Commission on Human Rights.

Third, in some cases indigenous communities may have indirect access to international tribunals capable of handing down binding decisions<sup>41</sup> affirming collective rights. The key example here is the capacity of the Inter-American Human Rights Commission to bring cases before the Inter-American Court of Human Rights alleging a breach of the American Convention on Human Rights. The Commission may do this even though the indigenous communities themselves have no standing to bring an action.<sup>42</sup>

### Conclusions

Let me return to the questions that I said I would like to try and answer.

First, does international law provide relevant standards against which to evaluate state authorized projects on the lands of Indigenous Peoples? The answer to this threshold question is clearly yes.

Second, how does international law constrain the actions of states in authorizing resource projects in the traditional territories of Indigenous Peoples? The jurisprudence of the HRC under Article 27 of the ICCPR supports the somewhat limited proposition that a state cannot authorize or permit resource activities where those activities, either on the basis of an individual project or the cumulative effect of a series of projects, would threaten the way of life or culture of an Indigenous People.

The decision of the Inter-American Court on Human Rights in *Awás Tingni* supports a much broader set of propositions based upon the protection afforded to the right to own property and the obligation of a state to take effective measures to adequately protect Convention rights. The decision suggests that a state needs to have in place an effective system for "titling" or otherwise confirming the land and resource rights of traditional owners and that state decisions to afford resource rights to other parties prior to confirming the rights of traditional owners breach Convention obligations and, by extension, obligations under the Inter-American Declaration.

Finally, the reports and decisions of the Human Rights Committee, the Inter-American Commission and the CERD Committee all emphasise the importance of procedural protections and the right of Indigenous Peoples to be involved in decisions that affect their traditional territories. This suggests that the duty to consult (which in domestic law is based on section 35 of the *Constitution Act, 1982* and the Supreme Court's decision in *Sparrow*,<sup>43</sup>) also finds support in international law.

Third, what are the available fora for litigating or raising these claims? There is a variety of fora available including expert commissions, domestic courts and even international courts with the capacity to make binding decisions.

I think that we can expect Indigenous Peoples increasingly to seek the assistance of international law and tribunals in redressing the power imbalance between the nation state and Indigenous Peoples. The jurisprudence of the Inter-American Human Rights Commission and Court seems to be particularly supportive of claims of Indigenous Peoples to protect their traditional territories against resource development interests.



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## Notes

1. For a more comprehensive discussion emphasizing both the importance of land to indigenous peoples and the varying threats to indigenous ownership interests see Daes, *Indigenous Peoples and Their Relationship to Land*, 2001.
2. Tanner, Gates & Ganter, *Some Effects of Oil Sands Development on the Traditional Economy of Fort McKay*, 2001.
3. Texaco's activities were the subject of litigation in US Courts under the *Alien Tort Claims Act*: *Aguinda v. Texaco Inc.*, 142 F.Supp. 534 (S.D.N.Y. 2001), aff'd 303 F. 3rd 470 (2nd Cir.). US courts ultimately declined jurisdiction on terms that required Texaco to submit to the jurisdiction of the courts of Ecuador where litigation is currently pending.
4. Nigel Bankes, *The Columbia Basin and Columbia River Treaty*, 1996. We should also recognize other threats to traditional territories of indigenous peoples including agricultural settlement and urbanization. See generally, Cole Harris, *Making Native Space: Colonialism, Resistance and Reserves in British Columbia*, 2002.
5. For more extensive discussions see, for example, Thornberry, *Indigenous Peoples and Human Rights*, 2002.
6. See for example Article 12(5) of the Draft International Covenant on Environment and Development prepared by Commission on Environmental Law of IUCN – The World Conservation Union, Third Edition 2004.
7. In force July 18, 1978, available at [www.cidh.org/basic.eng.htm](http://www.cidh.org/basic.eng.htm). Canada is not a party to the Convention. It is however bound by the American Declaration of the Rights and Duties of Man. Approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948, available at [www.cidh.org/basic.eng.htm](http://www.cidh.org/basic.eng.htm) Canada joined the OAS in 1990.
8. Judgement of August 31, 2001 and available at: [www.corteidh.or.cr/juris\\_ing/index.html](http://www.corteidh.or.cr/juris_ing/index.html).
9. Report #96/03, October 24, 2003.
10. Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, in force, 5 September 1991: [www.unhchr.ch/html/menu3/b/62.htm](http://www.unhchr.ch/html/menu3/b/62.htm). See in particular Article 14 which provides for the recognition of rights of ownership and possession to traditional territories.
11. For details of ongoing work and a link to the declaration see [www.unhchr.ch/indigenous/main.html](http://www.unhchr.ch/indigenous/main.html).
12. For a copy of the draft see [www.cidh.oas.org/Indigenous.htm](http://www.cidh.oas.org/Indigenous.htm).
13. *Supra* note 8. And see also *Yakye Axa Indigenous Community of the Enxet-Lengua people v. Paraguay*, Report #2/02 of the Inter-American Commission on Human Rights offering the preliminary view (at para. 45) based on *Awas Tingni* of a potential breach of Article 21 by reason of the state's alleged failure to assist the community in pursuing its claim for traditional territory (at para. 19). Other claims along similar lines are also pending against Paraguay; see Reports #11/03 and 12/03.
14. S. James Anaya & Claudio Grossman, "The Case of *Awas Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples" (2002), 19 *Arizona Journal of International and Comparative Law* 1 at 2.
15. *Supra* note 8 at para. 153.
16. *Supra* note 7.
17. In 2003 the Commission accepted as admissible a petition from Grand Chief Mitchell alleging that Canada was in breach of Article XIII of the Declaration. Mitchell claims that the right to culture protected by Article XIII protects a right to bring goods across the Canada/United States border without paying customs duties *Grand Chief Mitchell v. Canada*, Inter-American Commission, Report #74/03 and reproduced at [2004] 1 C.N.L.R. 115.
18. See Report #75/02 *Mary and Carrie Dann v. United States* especially paras. 95-97.
19. Convention, *supra* note 7, Article 50. Reports contain detailed reasoning. The Commission may make further recommendations if a matter remains without a remedy, Article 51.
20. Convention Article 46(1)(a).
21. Report 96/03 at para. 119. Subsequent quotations are from paras. 116, 130, 134 and 141-143.
22. The Maya also alleged breaches of other Articles but the Commission (*id.* at para. 155) found it unnecessary to pass upon these allegations.
23. *Id.* at paras. 160-161.
24. *Id.* at paras. 177-185.
25. (1992), 66 A.L.J.R. 408.
26. *Id.* at 422. The ICCPR does not specifically protect the right to own or enjoy property and consequently Brennan's judgement rests on the claim of equality before the law (see esp. para. 63, on-line version). Brennan also refers to other international sources including the Advisory Opinion of the International Court of Justice in *Western Sahara*, 1975 I.C.J. Rep.
27. (1988), 63 A.L.J.R. 84.
28. *Id.* at 94.
29. *Id.* at 96.
30. General Comment #23, available at: [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/fb7fb12c2fb8bb21c12563ed004df11?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df11?Opendocument).
31. See, for example, *Kitok v. Sweden*, Communication #197/1985, decision of 10 August 1988 and for other decisions see *Mahuika et al. v. New Zealand*, Communication #547/1993, Decision of 27 October 2000 (Maori fishing rights). In some cases the Committee has taken the view that the petitioners have failed to exhaust local remedies, e.g., *Jarle Jonassen and members of the Riast/Hylling reindeer herding district v. Norway*, Communication #942/2000, decision on inadmissibility 25 October 2002, but see dissenting opinion of Henkin *et al.*
32. Communication #511/1992, decision of 26 October 1994.
33. *Id.* at para. 9.8. The Committee has also emphasised that "the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision making process in relation to those measures and whether they will continue to benefit for their traditional economy" *Mahuika*, *supra* note 31 at para. 9.5.
34. Note that Article 14 of the Convention also contemplates the possibility of individual petitions for those states that make the appropriate declaration. Thornberry notes that CERD's work in this area has been driven by the reporting system and not by the procedure for individual communications: *supra* note 5 at 223-224.
35. CERD General Recommendation #23, 1997 available at [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf).
36. *Id.* at para. 5.
37. 1993 Report at para. 11
38. Decision 2(54) on Australia and see also paras. 8-10 of CERD's Concluding Comments re Australia, 19 April 2000.
39. What follows is not a complete catalogue. Other examples include the UN Permanent Forum on Indigenous Issues as well as other fora dealing with more specific issues such as intellectual property rights and biological diversity or, in relation to the Arctic, the Arctic Council.
40. Some general references on this point include Jutta Brunée & Stephen Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 C.Y.B.I.L. 3 (offers a judicial primer as well as good survey but suggests that courts need to be much more discriminatory and demanding in their use of international sources) and, in relation to treaties Gibrán Van Ert, "Using Treaties in Canadian Courts" (2000) 38 C.Y.B.I.L. 3 (very useful and thorough survey in which Van Ert attempts to explain the Canadian case law on the basis of the tension between two competing principles: the principle of self-government and the principle of respect for international law). In the specific context of indigenous land rights see *Montana Band of Indians v. Canada*, [1991] 2 F.C. 30 (F.C.A.) (judgement refusing the Crown's motion to strike, plaintiffs' based their claim, *inter alia*, on Articles 1 and 27 of the ICCPR. Paragraph 8 of the judgement at trial makes it clear that the plaintiffs were also proceeding on the alternative basis that these provisions represented customary law.
41. Convention, *supra* note 7 Article 68(1): state parties oblige themselves to comply with the judgements of the Court.
42. Convention Article 61(1): "Only the States Parties and the Commission shall have the right to submit a case to the Court."
43. [1990] 1 S.C.R. 1075.



**A WORKSHOP FOR THE PUBLIC: "HEALTH, CULTURE AND OIL AND GAS – SOME HUMAN RIGHTS ISSUES"**

**Saturday, January 15, 2005**  
**Ma-Me-O Beach Community Hall**  
**Pigeon Lake, AB**

This Workshop will explore the links between human rights law and oil and gas development in Alberta. It will focus on two primary areas of concern – health and culture (or way of life). The Workshop will ask what human rights law has to say about health and cultural impacts from oil and gas development. It will examine such human rights as the right to health, the right to a clean and healthy environment, and the right to cultural integrity. The Workshop will also examine how human rights law might apply to the regulatory process through which oil and gas development proceeds in Alberta.

The Workshop is organized by the Canadian Institute of Resources Law and the Alberta Civil Liberties Research Centre with funding from the Alberta Law Foundation. For more information, contact Pat Albrecht at 403.220.3974, fax 403.282.6182, e-mail [palbrech@ucalgary.ca](mailto:palbrech@ucalgary.ca) or visit [www.cirl.ca](http://www.cirl.ca) or [www.aclrc.com](http://www.aclrc.com).

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The Institute was incorporated on the basis of a proposal prepared by a study team convened by the Faculty of Law at the University of Calgary. The Institute continues to work in close association with the Faculty of Law. It is managed by its own national Board of Directors and has a separate affiliation agreement with the University of Calgary.

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