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## This Land is Our Land: Indigenous Rights and Rural Development in Darien, Panama

Lauren Koller-Armstrong

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# THIS LAND IS OUR LAND: INDIGENOUS RIGHTS AND RURAL DEVELOPMENT IN DARIÉN, PANAMA

*Lauren Koller-Armstrong*<sup>1</sup>

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## I. INTRODUCTION

The incorporation and recognition of indigenous human rights into nationally and internationally sponsored development projects in

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1. Lauren Koller-Armstrong is a 2009 graduate from the University of New Mexico's dual degree program in Law (J.D.) and Latin American Studies (M.A.). She gratefully acknowledges the guidance and mentorship of Professor Jennifer Moore, and thanks the Tinker Foundation and UNM's Latin American & Iberian Institute for field research funding. She would also like to recognize and honor the individuals who are quoted in this work.

eastern Panama will be the challenge explored in this paper. Over the last 10 years, a variety of land use projects in Darién, Panama have placed constraints on indigenous peoples' ability to use and enjoy their land in ways consistent with evolving cultural practices. At the intersection of the particular projects and communities discussed here are human rights—rights that must be both recognized *and* enforced in order to be meaningful. As such, this paper discusses the role of international and domestic law in bridging the gap between the theory and the reality of Panama's rural development regimes. In doing so, the term "development" is redefined in a way that focuses not solely on the introduction of technology or infrastructure, but instead places it within the cultural and social context of indigenous peoples.

In order to properly situate indigenous rights, Section II discusses the historical development of human rights and the evolution of indigenous peoples' relationship with the state, by referencing in particular, the legacy of colonization and the influence of positivist law. Despite the complex interplay of values among domestic states, a formal body of human rights law has emerged from the following: United Nations (U.N.) and the Universal Declaration of Human Rights (UDHR);<sup>2</sup> the International Covenant on Economic, Social, and Cultural Rights (ICESCR);<sup>3</sup> the International Covenant on Civil and Political Rights (ICCPR);<sup>4</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>5</sup> There is a growing recognition of natural collective rights, and a codification of *jus cogens* norms such as non-discrimination.<sup>6</sup> As a result, indigenous rights have since developed beyond the scope of basic individual human rights. Through International Labor Organization (ILO) Con-

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2. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. DOC. A/810 (Dec. 12, 1948) [hereinafter UDHR].

3. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

5. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

6. *Jus cogens* norms are defined as norms, practices, or values that are so fundamental to international justice that states cannot derogate from them, even by declaration or agreement. JEFFERY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 59, 60 (Aspen 2006) (citing International Law Commission's commentary on final draft of Vienna Convention Article 53). See Vienna Convention on the Law of Treaties, arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). While slavery, piracy, and genocide are well-established peremptory norms, principles of equality and self-determination serve as other possible examples.

vention No. 169<sup>7</sup> and the Declaration on the Rights of Indigenous Peoples,<sup>8</sup> this focus has further evolved into one of full self-determination through collective land ownership.<sup>9</sup>

Once in context, specific human rights and indigenous rights are discussed with regard to land use projects in collective Emberá and Wounaan communities in Section III. Although competing development interests in eastern Panama range from logging to tourism to conservation, via national park designation, the effects on indigenous communities have been markedly similar and have resulted in restrictions on land use and a weakened sense of cultural and economic autonomy. Specifically, the collective indigenous community of Manené demonstrates how specific human rights are called into question as a result of Darién's national park designation. The most fundamental and threatened right in this scenario is that of self-determination, which stems from customary norms of equality, political and cultural freedom, personal integrity, and health and well-being through one's relationship with the land and natural resources.<sup>10</sup> Also implicated are rights to both development within a cultural context and social and economic security. In light of local case studies, a challenge is presented: is it possible to embrace both cultural autonomy and development in a given community project? If so, collective land ownership and titling may be the most effective way for indigenous peoples to set the terms of their own social, cultural, and economic development.

Whatever the method chosen to achieve culturally appropriate development, the discussion in Section IV highlights the duty of states and organizations to recognize, protect, and ensure human rights. While all three branches of every nation state are bound to protect and ensure rights stemming from customary norms and the treaties to

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7. Indigenous and Tribal Peoples Convention, 1989 (No. 169), June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter ILO Convention 169].

8. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 217A, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (2007) [hereinafter DRIP].

9. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 8 (Oxford U. Press, 2d ed. 2004) (noting how the concept of self-determination is rooted in the United Nations Charter and embodies core values of freedom and equality relevant to all segments of humanity, including indigenous peoples' social, political, and economic rights). See U.N. Charter at arts. 1, 55.

10. *Id.* at 97-98. See DRIP, *supra* note 8, Preamble ("recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures. . . especially their rights to their lands, territories, and resources.").

which they are a signatory,<sup>11</sup> the broad scope of this responsibility needs further explanation. In Panama, constitutional and administrative reform may be necessary to ensure that non-reservation Emberá and Wounaan are afforded the opportunity to collectively title their land. In addition to states, the governmental and political organizations responsible for human rights protection are briefly discussed; these encompass both the administrative groups carrying out projects on the ground and the international funding institutions behind them. The section concludes by noting the lack of community involvement in planning, implementation, and follow-up phases of rural development projects, which can be attributed to differences in underlying values between project stakeholders and community recipients.

In order to evaluate whether state and organizational duties are upheld in Panama, Section V explores the international monitoring mechanisms that evaluate countries compliance with human rights treaties. Relevant organizations are highlighted, including the Permanent Forum on Indigenous Issues,<sup>12</sup> the U.N. Human Rights Council,<sup>13</sup> the Committee on the Elimination of Racial Discrimination,<sup>14</sup> and the Human Rights Committee.<sup>15</sup> In addition to treaty-based reporting and oversight through these committees, country reports are also discussed—particularly those put forth by the U.S. State Department and the Inter-American Commission on Human Rights. Taken together, these resources help evaluate the success Panama has had with incorporating human rights protections into its recent development projects.

As is often the case, a gap exists between the formal, legal recognition of human rights and the reality in which many rural indigenous communities find themselves. As a result, the two most viable ways of vindicating indigenous rights in the event of non-compliance are explored in Section VI. These options are to request that the government enact and enforce communal land titling mechanisms and bring suit in an international forum if the requests are not met. While collective land titling certainly affords added rights to in-

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11. ANAYA, *supra* note 9, at 190. See also CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972, art. 2 (discussing collaboration of executive, legislative, and judicial branches), art. 4 (recognizing obligations under international law), art. 19 (affirming principles of non-discrimination), art. 20 (affirming principles of equality) (1972) (amended 2004), available at <http://pdba.georgetown.edu/Constitutions/Panama/panama1994.html>. (last visited Nov. 25, 2009).

12. ANAYA, *supra* note 9, at 217. See also ECOSOC Res. E/RES/2000/22 (July 28, 2002).

13. See *infra* note 104.

14. See *infra* note 110.

15. See *infra* note 111.

indigenous communities, it is important to note that the land titling process itself is based on a westernized model of land use and ownership. Additionally, in order to bring an international suit against Panama, the Emberá and Wounaan must have exhausted all domestic avenues of relief. Thus, two prominent land rights cases involving the Awas Tingni of Nicaragua<sup>16</sup> and the Mayans of Belize<sup>17</sup> will be discussed as models for potential international claims that may be brought by the Emberá and Wounaan.

The article concludes in Section VII with suggestions on how to ensure indigenous rights through the implementation of Panama's rural development projects. Model institutions and practices are identified and highlighted throughout the research. Should large-scale non-compliance continue, the most prudent avenue of redress would be to follow the steps of the Awas Tingni of Nicaragua and Mayans of Belize, by requesting that collective titling procedures be enforced, and that indigenous peoples are given autonomous direction over it before bringing suit. If unsuccessful at that level, the substance and procedure of an ensuing international claim is outlined, with a particular focus on state accountability in *providing* rather than simply *recognizing* indigenous peoples rights to self-determination.

## II. HISTORICAL CONTEXT AND EVOLUTION OF INDIGENOUS RIGHTS

As far back as the 15th century, questions have arisen regarding the relationship between European colonizers and the indigenous peoples living on newly encountered and acquired lands.<sup>18</sup> While the Emberá and Wounaan have long inhabited the eastern region of Panama, which then pertained to Colombia, there was much debate over how far to extend indigenous peoples' natural rights to the land. Dominican cleric Francisco de Vitoria (1486-1547) was influential in establishing the normative and legal parameters surrounding the Spanish conquest.<sup>19</sup> Vitoria held that while indigenous peoples had some inherent natural rights to land and personal autonomy, there were a number of ways colonizers could still acquire title to the land.<sup>20</sup>

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16. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Comm'n. H. R., REP. No. 79, Ser. C. (judgment on the merits and reparations of August 21, 2001), *reprinted in* 19 ARIZ. J. INT'L & COMP. L. 395 (2002).

17. Full decision cited at University of Arizona's Indigenous Peoples Law & Policy Program at para. 1, [http://www.law.arizona.edu/Depts/iplp/advocacy/maya\\_belize/index.cfm](http://www.law.arizona.edu/Depts/iplp/advocacy/maya_belize/index.cfm) (last visited Apr. 27, 2008).

18. ANAYA, *supra* note 9, at 15-16.

19. *Id.* at 16.

20. *Id.*

According to Vitoria, colonizers could obtain valid title through “just wars” spurred by Indian interference in Spanish Christianization efforts.<sup>21</sup> The theory was adopted and expounded on by international policies and case law, and grew to include the Doctrine of Discovery<sup>22</sup> and the concept of *terra nullius*<sup>23</sup> as additional justifications for claiming indigenous land. In all three situations, the subjugation of indigenous peoples and their land rights stemmed from the theory that while colonizers were not the original occupants of the land, they were nevertheless more civilized and thus better suited to administer this “new” territory. Perhaps the clearest evidence of such a practice in Panama was the widespread system of forced labor called the *encomienda*, whereby Spaniards were given property rights over indigenous lands as well as the people on those lands in exchange for protecting natives and teaching Christianity.<sup>24</sup>

Over time, the Naturalist framework evolved into a state-centered system of International law that embodied a Westernized worldview and perpetuated early Colonial practices. In the Positivist era, the concept of International law was based on the creation, rights and duties of states. These states were narrowly defined and mostly excluded indigenous peoples.<sup>25</sup> Additionally, this new form of law based on positivism meant that states alone shaped international and domestic policy by virtue of their sovereignty, and largely ignored indigenous peoples’ claims to territory based on inherent, natural rights.<sup>26</sup> By excluding indigenous peoples as subjects of International law, or by rendering them incapable of comprehending and enjoying sovereign status, positivist law became a method that legitimized colonization as “common sense.”<sup>27</sup>

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21. *Id.* at 18-19 (noting that the criteria for determining whether a war was “just” was rooted in a traditional European value system).

22. The Doctrine of Discovery was advanced by Justice Marshall’s Supreme Court decisions in the 19th century, holding that colonial powers could claim title to newly-discovered lands by virtue of the inadequacy or absence of aboriginal title. *See Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823).

23. Under international law, *terra nullius* refers to indigenous lands that were deemed vacant or legally unoccupied, if they had not yet be colonized. ANAYA, *supra* note 9, at 29 (citing LASSA F. L. OPPENHEIM, INTERNATIONAL LAW 383-84 (Ronald F. Roxburgh ed., 3d ed. 1920)).

24. Michael Busbin, *Encomienda System and the New World Indians*, THE HISTORICAL TEXT ARCHIVE: ELECTRONIC HISTORY RESOURCES at para. 1, <http://historicaltextarchive.com/sections.php/sections.php?artid=633&op=viewarticle> (last visited Apr. 27, 2008) (citing Timothy J. Yeager, *Encomienda or Slavery? The Spanish Crown’s Choice of Labor Organization in the Sixteenth-Century Spanish America*, 55 J. ECON. HIST. 842 (1995)).

25. ANAYA, *supra* note 9, at 26.

26. *Id.* at 27.

27. *Id.* at 29.

Consequently, Panama's independence from Spanish rule and its division from Colombia in 1903 did not end the system of internal colonialism. United States and French interests in constructing the Panama Canal were central to Panama's revolution for independence,<sup>28</sup> and resulted in a great deal of financial support and political influence in the country, particularly from the U.S. for decades to come. Economic, socio-cultural, and political spheres were greatly affected by the United States' 80-year occupation of the Canal Zone, which was only recently handed over to Panama in 1999.<sup>29</sup> As a result, Panama has been highly deferential to U.S. policy on most issues throughout the 20th century, including human rights. In fact, it was not until the development of the U.D.H.R. that indigenous rights were reborn.

Human rights law affecting indigenous peoples stem from two major international bodies: the United Nations (U.N.) and the Organization of American States (O.A.S.). The purpose of the U.N. is to facilitate cooperation among nations in security issues, economic development, social progress, and human rights compliance.<sup>30</sup> While the declarations coming from the U.N. are often seen as aspirational and non-authoritative,<sup>31</sup> a number of fundamental principles first introduced in the U.N. Charter are now considered binding in the international legal context, either as customary norms, particular convention or treaty provisions, or domestic laws adopted by a particular country.<sup>32</sup> On the other hand, the O.A.S. is a regional organization composed of member states in the Americas, and focuses on the recognition and protection of individual human rights through the Inter-American Court and Inter-American Commission on Human Rights.<sup>33</sup> Petitions come from individuals claiming that their country has violated a protected right, and that they have been unable to find justice within their own borders.<sup>34</sup>

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28. Panama Country Studies, *The 1903 Treaty and Qualified Independence*, available at <http://countrystudies.us/panama/8.html>.

29. Lynn Horton, *Contesting State Multiculturalisms: Indigenous Land Struggles in Eastern Panama*, 38 J. LAT. AM. STUD. 829 (2006).

30. U.N. in Brief at para. 2, <http://www.un.org/Overview/uninbrief/> (last visited Apr. 27, 2008).

31. RICHARD B. LILICH ET AL., *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE* 136 (4th ed. 2006) [hereinafter *INTERNATIONAL HUMAN RIGHTS*].

32. See U.N. Charter, Preamble (affirming faith in fundamental human rights regarding dignity and equality), art. 1, para. 2, 3 (promoting equal rights, self-determination, and non-discrimination).

33. Key O.A.S. Issues: Protecting Human Rights at para. 1, [http://www.oas.org/key\\_issues/eng/KeyIssue\\_Detail.asp?kis\\_sec=2](http://www.oas.org/key_issues/eng/KeyIssue_Detail.asp?kis_sec=2) (last visited Apr. 26, 2008).

34. *Id.* at paras. 4, 5.



The first step in defining human rights in general terms came from the U.N.'s U.D.H.R. and from the O.A.S.' American Convention on Human Rights.<sup>35</sup> The UDHR, adopted in 1948, sets forth international human rights standards that focus on individual and natural rights to equality, property, identity, and non-discrimination.<sup>36</sup> Enforced in 1978, the American Convention also espouses principles of equality, personal liberty, and social justice "based on respect for the essential rights of man."<sup>37</sup> It adds a clear obligation of state parties to uphold and protect such rights through the adoption of domestic laws.<sup>38</sup>

In 1976, the ICESCR and ICCPR expanded the scope of rights established in the UDHR by including rights to self-determination, cultural autonomy, and collective rights. Article I of both the ICESCR and ICCPR states that:

all *peoples* have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development. All *peoples* may . . .freely dispose of their natural wealth and resources. . .based upon the principle of mutual benefit, and international law. . .<sup>39</sup>

As noted, Article I underscores the notion of collective rights for peoples, and builds on the fundamental principles outlined in the UDHR by reinforcing the interconnectedness of civil, political, social, and cultural rights.

Also of great importance to the evolution of human rights is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which effectively codifies the *jus cogens* norm of non-discrimination.<sup>40</sup> This convention defines racial discrimination as any exclusion, preference, or restriction based on color, descent, or race,<sup>41</sup> and requires that parties condemn and eliminate such practices.<sup>42</sup> Although the CERD is a document of general applicability, it is particularly helpful to indigenous peoples in that it provides a broadly

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35. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

36. See UDHR, *supra* note 2, at art. 1 (natural right to freedom and equality), art. 2 (principle of non-distinction/universal entitlement), art. 7 (principle non-discrimination), art. 17 (right to own property), art. 18 (freedom of beliefs and practices), art. 19 (freedom of opinion and expression).

37. American Convention, *supra* note 35, at Preamble.

38. *Id.* at arts. 1, 2.

39. ICCPR, *supra* note 4, at art. 1; ICESCR, *supra* note 3, art. 1 (emphasis added).

40. See CERD, *supra* note 5, at Preamble.

41. *Id.* at art. 1.

42. *Id.* at arts. 2-5.

applicable definition of discrimination,<sup>43</sup> and identifies and protects groups on racial and ethnic grounds.<sup>44</sup>

Indigenous rights have emerged as a discrete category within the last 20 years, starting with the adoption of ILO Convention 169,<sup>45</sup> and reaffirmed most recently in the Declaration on the Rights of Indigenous Peoples.<sup>46</sup> Convention No. 169 became legally binding on numerous member states, excluding Panama, in 1991. Specifically, the Convention affirms indigenous peoples' rights to decide how to develop the lands they occupy and use by setting internal priorities and taking part in the plans and programs affecting their communities.<sup>47</sup> Most notably, it calls for respect of the collective nature of land ownership and highlights the special relationship between indigenous peoples and their lands.<sup>48</sup> Convention No. 169 also requires that adequate measures be taken to protect indigenous peoples' rights to use lands exclusively occupied by tribal groups as well as lands that have been historically used for cultural purposes.<sup>49</sup>

The U.N. Declaration on the Rights of Indigenous Peoples (DRIP), recently adopted by Panama and a number of other nation states, represents the culmination of years of human rights law pertaining to indigenous peoples and embodies the holistic nature of collective, indigenous rights. Broadly, DRIP focuses on the manifestation of self-determination and cultural autonomy through land and development rights. The preamble of the Declaration highlights the problems faced by indigenous peoples as a result of colonization, specifically noting the deprivation of native lands and resources.<sup>50</sup> It also indicates how control over development affecting indigenous peoples and their lands will ultimately promote cultural integrity and collective personhood.<sup>51</sup> Part VI of the DRIP addresses land rights in context, namely the right of indigenous peoples to develop and main-

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43. *See id.* at art. 1, para. 1 (encompassing any action that has the effect of impairing the exercise of one's rights in a political, social, cultural, economic, or other realm). Such an expansive definition of discrimination captures more subtle and systemic forms of exclusion that indigenous peoples often face.

44. *Id.* at art. 2, para. 2 (calling for "adequate development and protection of certain racial groups").

45. *See supra* note 7.

46. *See supra* note 8.

47. *See* ILO Convention 169, *supra* note 7, at art. 7, para. 1.

48. *Id.* at art. 13, para. 1.

49. *Id.* at art. 14, para. 1.

50. *See* DRIP, *supra* note 8, at Preamble, para. 6.

51. *Id.* at para. 10.

tain ties with the land, as well as the right to formulate development strategies for the use of indigenous territory and resources.<sup>52</sup>

Given the expansive body of human rights law available, Section III focuses on the specific rights pertaining to collective Emberá and Wounaan communities. The discussion on human rights implications of rural development projects shows how rights may preserve one another (e.g., indigenous rights that embrace fundamental civil and cultural rights), may complement one another (e.g., full enjoyment of civil and political rights when socio-economic rights are secured),<sup>53</sup> and may even compete with one another (e.g., certain rights to development are incongruent with rights to cultural integrity). Arguably, this article suggests that such rights need not be hierarchical or mutually exclusive of one another; rather, they should be viewed as part of a holistic system that allows for true self-determination—a practice already taking place within Emberá and Wounaan communities.

### III. RIGHTS PERTAINING TO DEVELOPMENT PROJECTS IN ÉMBERA AND WOUNAAN COMMUNITIES

#### A. *Background*

Over the last 20 years, eastern Panama has become an area subject to numerous and competing development interests. Covered primarily by lowland tropical rainforest and miles of rivers and coastlines, the Darién and Panama Este provinces are prime locations for tourism, conservation areas, national parks, logging operations, and the use of marine resources. Just as the land use projects taking place in eastern Panama are varied, so too are the interests of stakeholders. The parties involved include local residents, development project managers, international financial institutions, and local governmental bodies. Of the various projects taking shape in eastern Panama, this discussion is limited to conservation-related development (e.g. national park designation) and its implied changes in land use patterns. Conservation-related development projects are of particular relevance based on personal work experience in this field as a Peace Corps volunteer in rural Panama, and because this kind of development is often

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52. *Id.* at arts. 25, 26, 30.

53. See President Franklin Roosevelt, State of the Union Address (Jan. 11, 1944), 90 CONG. REC. 55, 57, available at <http://www.presidency.ucsb.edu/ws/print.php?pid=16518> (stating that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." "People who are hungry and out of a job are the stuff of which dictatorships are made.") (cited in DUNOFF ET AL., *supra* note 6, at 494).

assumed to be less intrusive to indigenous communities by virtue of its focus on resource management rather than infrastructure. However, the notion of conservation as facile or costless for these communities speaks to our underlying assumptions of who indigenous peoples are, or who they should continue to be and challenges us to think about conservation and development in different or perhaps broader terms. In this sense, we must become more aware of how conservation projects can impinge on cultural social rights while internally driven development may actually enhance them.

From 2002 through 2005, I worked on numerous environmental conservation and community development projects with non-indigenous farmers in central Panama. Most of the villages I worked with at that time were located in or near protected areas, and the projects implemented through the Peace Corps sought to modify land use and agricultural practices in ways that would meet household needs without placing an excessive burden on the local environment.<sup>54</sup> In 2006, I returned to Panama as a field researcher, and spent two months in the ethnically diverse province of Darién, tracking development projects from their inception at the institutional level, to implementation and follow-up phases at the community level. Through observation, interviews, and community consultations, it became evident that while the goals of most rural development and conservation projects were supportive of indigenous rights to self-determination, these aspirations rarely became a reality for project recipients. At the community level, environmental projects like water sanitation systems, reforestation plots, and agricultural systems did not materialize as originally envisioned, and the initial goals and funding for these projects had since dissipated.<sup>55</sup>

The most pressing problems voiced by *tierras colectivas*, or collective indigenous communities outside the official Emberá and Wounaan reservations, was the lack of collective land titling procedures available under current agrarian codes. As one outspoken leader of the *tierras colectivas* said:

The first step [for us] is passing a collective land titling law, because the recognition of this system of ownership is a primary issue, [and] equity and respect can only be gained through this. As of

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54. Examples of projects include agro forestry, organic gardening, and iguana farms that sought to prevent clear-cutting of agricultural plots, excessive use of chemicals, and illegal logging and hunting.

55. Some of the disintegration of regional projects was due to corruption and mismanagement of funds, unnecessarily high administrative costs, and cultural insensitivity of local project managers, etc.

now, loans are not given to collective land projects in agriculture because that form of ownership is not yet recognized. . .<sup>56</sup>

As such, the community itself focused collective land titling procedures as the most viable way to exercise rights to self-determination. For the community, collective land titling would ensure autonomous development as well as social, economic, and cultural well-being amidst the numerous conservation and development projects taking place.

### B. *Specific Rights at Issue*

As alluded to earlier, legal scholar James Anaya has deemed the right to self-determination “a foundational principle.”<sup>57</sup> According to Anaya, the holistic principle of self-determination is rooted in customary norms, which are manifested through the indigenous peoples’ relationship with the land. These norms include non-discrimination, equality, political and cultural freedom, integrity, and health and well-being. In more abstract terms, self-determination is regarded as the “affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human equality,”<sup>58</sup> and is now regarded as a *jus cogens* norm.<sup>59</sup>

While the right to development implies the more general right of self-determination, it carries with it some particular considerations for Emberá and Wounaan communities. In international human rights treaties and declarations addressing the right to development, the term “development” is now understood within a cultural context, and has come to embody more than simply the creation of infrastructure or introduction of technology. Under this interpretation, notions of cultural and social development must encompass indigenous peoples’ viewpoints on whether, and indeed how, their culture will change through the process of development.

The right to social and economic well-being of the Emberá and Wounaan speak to the right to life and the concept of survival. This right also recognizes collective land ownership and land management; its link to human sustenance through the provision of food. Additionally, the right to social and economic well-being entails the use of land

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56. Graciliano Cárdenas, President, Collective Land Titling Comm., Remarks at the Manené Community Meeting, Panama (June 16, 2006) (author’s unofficial translation) (taped remarks and corresponding notes on file with author).

57. ANAYA, *supra* note 9, at 97.

58. *Id.* at 98.

59. *Id.* at 97. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 489 (6th ed. 2003); HÉCTOR GROSS ESPIELL, “SELF-DETERMINATION AND JUS COGENS,” IN U.N. LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 167 (Antonio Cassese ed., 1979).

for cultural and social purposes. In this sense, land provides a place where indigenous culture is carried out collectively; it enables the Emberá and Wounaan to manage land in a way that is consistent with their worldview and allows for the maximum expression of cultural, religious, and communal values. While land use related to national park designation was the subject that arose most frequently in my field research and interviews, I also uncovered a resounding theme of how indigenous culture is inextricably linked to the territory occupied by the Emberá and Wounaan.<sup>60</sup> As Adolfo Mezua, President of the Emberá-Wounaan Youth Organization (OJEW), states:

Our [political, cultural] organization is hard for the *colonos* and for non-indigenous to understand. They have another way of looking at economic life. The *colonos*<sup>61</sup> come into indigenous communities, situate themselves on the land, title it, and sell it to another (and another and so on). . . In this sense they don't have a personal connection with the land. They see it as an economic means to an end, and simply continue on with other investments.<sup>62</sup>

### C. Rejoinder—How to Harmonize Distinct Rights

In light of the numerous indigenous rights discussed, the question arises of how to embrace both cultural autonomy and developmental rights in a given project or community. Some indigenous activists question the purpose of international treaties and declarations altogether, claiming that they need not “declare” rights they have always possessed. They claim that nation-states often limit the very rights that were promised to indigenous communities when national interests prevail.<sup>63</sup> While others may support an official declaration of indigenous rights, they may view rights to cultural autonomy and rights to development as mutually exclusive. As is the

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60. Other examples of the manifestation of indigenous culture through the environment include ceremonial body painting with plant-based dye, the centrality of the river along which a given community is established, and the use of local materials in artisan work such as basket weaving and woodcarving. See generally ASTRID ULLOA, *KIPARÁ: DIBUJO Y PINTURA, DOS FORMAS EMBERÁ DE REPRESENTAR EL MUNDO* (Universidad Nacional de Colombia 1992). See also STEPHANIE KANE, *THE PHANTOM GRINGO BOAT: SHAMANIC DISCOURSE AND DEVELOPMENT IN PANAMA* (Smithsonian Institute Press 1994).

61. *Colonos* are Mestizo settlers that migrate from the central region of Panama in search of land, which is often clear-cut for timber sales and/or used for intensive agriculture.

62. Interview with Adolfo Mezua, President, Org. for Emberá-Wounaan Youth (OJEW), in Pan. City, Panama (May 16, 2006) (author's unofficial translation) (interview and corresponding notes on file with author).

63. Francesco Mauro and Preston D. Hardison, *Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives*, 10 *ECOLOGICAL APPLICATIONS* 1263, 1267 (2000).

case with conservation programs on collective indigenous communities, tribal members have stated that land use restrictions imposed on them for the sake of the conservation-related projects have interfered with cultural practices. Alonso, a former chief of Manené, described the effect of national park designation on the community:

In 1980, they created the Park, and now it's on top of us- it's trampling us, and we [here in the community] haven't received any benefit. We can't raise animals, or cut trees, or plant rice [the way we traditionally have]. . . We certainly can't sell wood; and we can't even use the timber to make our *piraguas*,<sup>64</sup> even though this is something customary and not commercial.<sup>65</sup>

Alonso's concerns highlight the difficulties arising from development and conservation-related projects. As Colombian anthropologist Astrid Ulloa recognizes, Western notions of individual property rights and "best use" are, at times, in conflict with the recognition of collective autonomy and practices of indigenous peoples.<sup>66</sup> With respect to environmental management programs, she states that "the recognition of biodiversity as a new commodity that can be valued . . . and marketed . . . creates new political, economic, and cultural situations for indigenous people regarding the management of their resources."<sup>67</sup> Given the economic potential of eco-tourism, the Emberá of Manené have arguably become what Ulloa broadly refers to as "caretakers of their own cultures and territories" under Westernized values and preservationist assumptions.<sup>68</sup> In this sense, the particular cultural rights of the Emberá and Wounaan may be seen as exclusive of rights to economic development or universal environmental rights.

Members of the Emberá and Wounaan communities, however, have explained that collective land titling is a key avenue through which they can simultaneously take control of both cultural evolution and development, thereby moving beyond binary concepts of indigenous peoples as either "noble savages" or "modernized." The autonomy gained through collective land ownership will also allow communities

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64. *Piraguas* are traditional dugout canoes used by many Emberá and Wounaan communities along the rivers, and serve as the main form of transportation. Additionally, the construction of a *piragua* is an exhausting, yet extremely important task in which most members of the community participate.

65. Interview with Alonso Moreno, Community Leader, in Manené, Panama (June 15, 2006) (author's unofficial translation) (interview and field notes on file with author).

66. ASTRID ULLOA, *THE ECOLOGICAL NATIVE: INDIGENOUS PEOPLES' MOVEMENTS AND ECO-GOVERNMENTALITY IN COLOMBIA* 9-10 (Routledge Press 2005) [hereinafter *ECOLOGICAL NATIVE*].

67. *Id.* at 9.

68. *Id.* at 10.

to create development plans akin to self-identified goals and needs, and will facilitate the adoption of culturally-appropriate technology. But Leonides Quiroz,<sup>69</sup> Project and Program Coordinator for the Wounaan Development Foundation, notes that land titling must come first before both cultural and developmental rights can be embraced:

The principal thing—before development—is legal and judicial recognition and ownership of ancestral lands. Until this is accomplished, we are prevented from developing or investing in any sort of infrastructure because the land is not yet officially ours, and before we know it, we could be on private property, like what has happened with the national parks. We're imprisoned in the land essentially—land that we've occupied for three, four generations . . .<sup>70</sup>

As Leonides aptly points out, a gap exists between the theory and reality of indigenous rights. In order to understand this disparity, Section IV focuses on how indigenous peoples' rights to development, land, and culture are articulated by the Panamanian government, both in theory and in practice. This section sheds light on the unique situation of collective Emberá and Wounaan communities, which lack reservation status. Such reservations are not privately or individually owned in accordance with current agrarian codes. The discussion also illustrates the duty of states to not only recognize and affirm rights, but also to provide mechanisms through which those rights may be realized.

#### IV. DOMESTIC AND INTERNATIONAL IMPLEMENTATION OF INDIGENOUS RIGHTS

##### A. *Current State of Affairs*

At roughly 22,500 and 6,900 people respectively, the Emberá and Wounaan comprise close to 10% of Panama's indigenous population, and 1% of the nation's population.<sup>71</sup> While a large portion of other indigenous groups are encompassed within the country's *comar-*

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69. Leonides Quiroz is a Wounaan community leader who I met with during my field research. He has spoken extensively about the history of the Wounaan people and the struggle for both the Emberá and Wounaan living outside the *comarca* to collectively title their land.

70. Interview with Leonides Quiróz, Esq., Project and Program Coordinator, Wounaan Pueblo Development Foundation, in Pan. City, Panama (Dec. 16, 2005) (author's unofficial translation) (taped interview and corresponding notes on file with author).

71. Comisión Económica Para América Latina (CEPAL), LOS PUEBLOS INDÍGENAS DE PANAMÁ: DIAGNÓSTICO SOCIODEMOGRÁFICO A PARTIR DEL CENSO DEL 2000 37 (United Nations 2005), available at <http://www.eclac.org/publicaciones/xml/7/22277/LCW20-panama.pdf>.



*cas*, or reservations, less than one quarter of the Emberá and Wounaan live inside the bounds of such territory.<sup>72</sup> This may be attributed in part to the tribes' dispersed settlement along the rivers of eastern Panama in response to Spanish colonization in the 15th and 16th centuries, which resulted in difficulty outlining distinct areas for reservations.<sup>73</sup> In 1972, however, Panama's new Constitution explicitly granted indigenous peoples the right to reservation lands for the social and economic well-being of the country's seven tribes (Emberá, Wounaan, Kuna, Ngöbe, Bugle, Naso, Teribe).<sup>74</sup> An office for indigenous affairs was created, and worked in conjunction with Wounaan and Emberá leaders to draft a bill known as Law 22 that declared the bounds of the Emberá and Wounaan Comarca.<sup>75</sup> This area, however, only encompassed 31 of 53 villages in the region, and at present there are at least 37 Wounaan and Emberá communities located outside of the legally protected *comarcas*.<sup>76</sup> Thus, Panama's Law 22, which delineated indigenous reservations into two separate blocks of territory in 1983, (i.e.—the Cémaco and Sambú regions—) does not accurately reflect the settlement pattern of the Emberá and Wounaan. A large percentage of the Emberá and Wounaan reside on *tierras colectivas*, or collective lands, that are not yet recognized as part of Panama's semi-autonomous indigenous reservation system.

### B. State Duties

Panama is a nation bound by customary norms and governed by international treaties. However, the Panamanian Constitution and other enacted legislation define additional rights which are to be afforded by the state to the indigenous population. The extent to which a country views its domestic and international obligations is based on whether the country adopts a monist or dualist form of government.<sup>77</sup>

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72. *Id.* at 35-39.

73. See PATRICIA VARGAS, IMPACTO Y REACCIÓN ANTE LA OCUPACIÓN ESPAÑOLA, SIGLOS XVI Y XVII at 6 (Instituto Colombiano de Antropología 1993).

74. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972, *supra* note 11, at art. 127.

75. Ley No. 22 de 8 de Noviembre, Por la Cual se Crea La Comarca Emberá de Darién, No. 19.976 *Gaceta Oficial*, Jan. 14, 1984, available at [http://www.asamblea.gob.pa/legispan/PDF\\_NORMAS/1980/1983/1983\\_016\\_1874.pdf](http://www.asamblea.gob.pa/legispan/PDF_NORMAS/1980/1983/1983_016_1874.pdf) [hereinafter Law 22].

76. Native Futures, *The Wounaan Story: A Short History of Wounaan Villages in Panama*, <http://www.nativefuture.org/wounaan.html> (last visited Apr. 28, 2008).

77. See Fred Einbinder's review of *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* by Virginia A. Leary, 78 AM. J. OF INT'L L. 258-60 (1984).

Though, it must be noted that elements of both are often present in any given legal system.

With respect to the U.N.'s human rights instruments in place, Panama is a signatory to the ICESCR (ratified in 1977), the ICCPR (ratified in 1977), the CERD (ratified in 1969), and the DRIP (ratified in 2007). While Panama has not ratified ILO Convention No. 169, it did ratify its predecessor ILO Convention No. 107,<sup>78</sup> which recognizes indigenous rights to customary law, social organization, land tenure, collective land ownership, and customary practices.<sup>79</sup> The rights outlined in Convention No. 107, however, are viewed as individual rather than sovereign rights, and are more focused on integrating indigenous peoples in the labor markets of participating nation states.<sup>80</sup> Within the Inter-American system and the OAS, Panama has ratified the American Convention on Human Rights without reservations in 1978.<sup>81</sup>

While the preceding human rights instruments to which Panama is a signatory are indicative of a theoretical recognition of indigenous rights in the country, there are also domestic laws, including agrarian codes, which affect Emberá and Wounaan rights. Such rights are based on the occupation of land as either private property, state land, or tribal land.<sup>82</sup> The benefits and protections afforded to those on reservation land are quite apparent, and have been outlined with respect to the creation of Emberá and Wounaan reservations.<sup>83</sup> Article 5 of the Panamanian Constitution provides that political subdivisions may be created within the nation in order to ensure that indigenous peoples' social and economic rights, as outlined in Article

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78. Convention (No.107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, International Labour Conference, 328 U.N.T.S. 247 (entered into force June 2, 1959) [hereinafter ILO Convention No. 107].

79. David E. Cahn, *Homeless for Generations: Land Rights for the Chochoe Indians from Mogue, Panama*, 28 *FORDHAM INT'L L.J.* 232, 288 (2004).

80. Mauro and Hardison, *supra* note 63, at 1264.

81. Organization of American States, *Panama's International Obligations in the Area of Human Rights*, <http://www.cidh.org/countryrep/Panama89eng/chap.1.htm> (last visited Apr. 28, 2008).

82. Cod. Agr. at art. 10 (indigenous land), art. 12(b) (distribution of national property), art. 12(d) (takings of private property), art. 22(a)-(b) (main classifications of land as either state or private property), art. 27(5) and commentary (indigenous land as an exception to state land) (Pan. 1962), available at [http://webserv-mida.mida.gob.pa/MIDA/pdfsleyes/1962\\_ley\\_00037.pdf](http://webserv-mida.mida.gob.pa/MIDA/pdfsleyes/1962_ley_00037.pdf) [hereinafter Agrarian Code].

83. See Law 22, *supra* note 75, at art. 2 (outlining collective land ownership, cultural heritage embedded in reservation lands, and promotion of integrated development).

127 are met.<sup>84</sup> More specifically, Article 5 states that in addition to the country's division into provinces, districts, and townships, "other political divisions may also be created."<sup>85</sup> The resulting *comarcas* are politically-autonomous lands held collectively by the indigenous group occupying it, and are thus protected from outside appropriation.<sup>86</sup> Such recognition is quite valuable, not only because land ownership itself is secured, but also because of the political and cultural autonomy that flow directly from that ownership.

Though the primary purpose of Panama's Law 22 was to establish and delineate the Emberá and Wounaan Reservations, it also explicitly secures a bundle of rights associated with autonomous land ownership. The *Carta Orgánica Administrativa*, a 70-page booklet outlining Law 22, explicitly secures the right to 1) economic independence and development; 2) cultural discretion in the use and management of natural resources; and 3) the implementation of bilingual (Spanish-Emberá or Spanish-Woun Meo) education in grade school.<sup>87</sup>

Although Article 127 of the Panamanian Constitution also recognizes general indigenous rights to property outside the *comarca*, the reality of that situation is quite different from the text. Article 127 states that:

The State guarantees to indigenous communities the reservation of necessary lands and collective property to achieve their social and economic well-being. The law shall regulate the procedures that are to be followed in order to achieve this end and its corresponding delineations, within which the appropriation of private property is prohibited.<sup>88</sup>

A broad reading of this text would imply that collective land rights for the Emberá and Wounaan are simply a matter of recognizing that such ownership is necessary for the social and economic well-being of the group. Although the formal recognition of *comarcas* has accomplished this goal for a number of indigenous communities, the country's Agrarian Code typically governs land usage and the land titling process for territory outside the reservations. While it is unfortunate that a large percentage of Emberá and Wounaan people

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84. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972, *supra* note 11, at art. 5.

85. *Id.* (author's unofficial translation).

86. Law 22, *supra* note 75, at art. 2.

87. *See id.* at arts. 16-21.

88. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972, *supra* note 11, at art. 127 (author's unofficial translation).

reside outside the *comarca*, it is nevertheless encouraging that the Panamanian government has provided for cultural and political autonomy through indigenous land recognition in several parts of the country.<sup>89</sup>

As such, collective ownership of land outside the *comarcas* is not specifically secured or recognized as it is with the formal reservations system created by Law 22. The Agrarian Code, a set of statutes that work in conjunction with the Panamanian Constitution, recognizes all land as either state land or private property.<sup>90</sup> Additionally, the titling procedure for unoccupied state lands through the Agrarian Reform requires that individual petitioners must: 1) be of the proper age; 2) not possess any other lands, or be putting currently-owned land to good use; and 3) promise to put the land in question to its “best use.”<sup>91</sup> The Code also indicates that those who currently occupy and cultivate the land are given priority over all others who may claim title to it.<sup>92</sup>

Additionally, the Agrarian Regime section of Panama’s Constitution notes that “the State will pay special attention to the integrated development of the agricultural sector,” and will “encourage the maximum use, or productivity, of the soil” and will “guarantee every farmer the right to a proper existence.”<sup>93</sup> Other statements that follow include both the prohibition of “areas that are uncultivated, unproductive” and the national goal of “promoting the economic, social, and political participation” of rural and indigenous people.<sup>94</sup> Thus, these provisions illustrate underlying national values of westernized agricultural practices, private land ownership, and a normative concept of what “best use” is. It is also apparent that despite Panama’s endorsement of the DRIP, the country’s antiquated Agrarian Code in place, which has been unrevised since 1962, continues to favor a mainstream system of land ownership and resource management, and lacks deference to the

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89. Panama was listed as one of several Latin American countries showing a high level of commitment to indigenous rights through the legal recognition of native lands. See Roque Roldán Ortega, *Models for Recognizing Indigenous Land Rights in Latin America II* (World Bank Environment Department, Oct. 2004, Washington D.C.), available at [http://lnweb18.worldbank.org/ESSD/envext.nsf/48ByDocName/ModelsforRecognizingIndigenousLandRightsinLatinAmerica/\\$FILE/Indigenous+PeoplesEDP99.pdf](http://lnweb18.worldbank.org/ESSD/envext.nsf/48ByDocName/ModelsforRecognizingIndigenousLandRightsinLatinAmerica/$FILE/Indigenous+PeoplesEDP99.pdf).

90. Agrarian Code, *supra* note 82, at art. 22.

91. *Id.* at arts. 57, 58.

92. *Id.*

93. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1972, *supra* note 11, at art. 122 (author’s unofficial translation).

94. *Id.* at arts. 123, 124 (author’s unofficial translation).

customary and cultural practices employed by many indigenous farmers.<sup>95</sup>

### C. *Obligations of Development Organizations*

In general, resource management programs involve a number of stakeholders who partake in the planning, funding, and implementing phases of those projects. However, the community recipients interviewed were often unclear as to whether a given program was being run by a non-governmental organization (NGO), financial institution, international organization, or other state/governmental body. Nevertheless, these institutions and organizations play a large part in how resource-management projects affect indigenous peoples and their lands, and bear some responsibility in ensuring and protecting human rights in project implementation. One such organization—the National Association for the Conservation of Nature (ANCON)<sup>96</sup>—has been criticized by some for its culturally-insensitive practices. ANCON is a private non-profit organization that owns a nature reserve encompassing the indigenous community of Mogue, and currently runs a fishing and ecotourism operation in the area.<sup>97</sup> In discussing the work and impact of this organization, one interviewee explained that “Juan Navarro, executive director of ANCON, bought the land, bought the Indian, bought everything.”<sup>98</sup> Such a description indicates that this organization is perceived not only as insensitive to the Emberá and Wounaan as specific ethnic groups (using the term *indio* when referring to ANCON’s dealings with indigenous people), but also that it views native people and their land as market-based commodities. As anthropologist Astrid Ulloa has noted, conservation-oriented projects are often problematic when directed by those with a westernized perspective on property rights, and whose views conflict with local people

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95. A recent report by Panama’s National Program for the Administration of Lands (PRONAT) reported that a new Agrarian code was slated for 2007, and was expected to include provisions for ancestral land claims to be made over collective lands. See Programa Nacional de Administración de Tierras, *Panamá Avanza Hacia Nuevo Código Agrario* at paras.3,4, [http://www.pronatpanama.org.pa/index2.php?option=com\\_content&do\\_pdf=1&id=23](http://www.pronatpanama.org.pa/index2.php?option=com_content&do_pdf=1&id=23) (last visited April 29, 2008).

96. See generally Asociación Nacional para la Conservación de la Naturaleza, *ANCON en Síntesis*, <http://www.ancon.org/ancon-sintesis/index.php> (last visited Apr. 29, 2008).

97. See *id.* at *Reserva Natural Privada Punta Patiño*, <http://www.ancon.org/notas-generales.html> (last visited Apr. 29, 2008).

98. Interview with anonymous community member, in Manené, Panama (June 15, 2006) (author’s unofficial translation) (interview and field notes on file with author).

who may not see nature as the possession of any one generation, or something that can, or should, be bought or sold.<sup>99</sup>

How then, do we measure whether a state is complying with the human rights standards it has set forth and agreed to be bound by? As the next section explains, human rights compliance is determined by more than written laws or political proclamations—it is also based on the input and evaluations of international monitoring bodies. Though criticized at times for their own bureaucracy, international working groups, commissions, and forums are instrumental in assessing the human rights compliance of a particular country or region. International monitoring bodies are unique in that they: reduce bias or personal incentive in reporting; provide a broad base of support and research; and increase a sense of domestic accountability via “naming and shaming,” due to their high profile in the international community.

#### V. INTERNATIONAL MONITORING OF STATE COMPLIANCE, OR INCORPORATION OF RIGHTS

As noted, many human rights instruments outline not only a particular set of rights to be secured, but also set forth the mechanisms and committees through which compliance will be monitored. James Anaya has written in depth on the relationship between monitoring organizations and nation states, noting that it is regulated by the principle of noninterference whereby states retain broad jurisdiction over matters within their borders, a concept analogous to the doctrine of state sovereignty reflected in Article 2(7) of the UN Charter.<sup>100</sup> Such affirmations of sovereignty, however, do not provide immunity for a country that fails to meet its treaty obligations domestically (e.g., to secure and protect the rights of indigenous people). Of the existing monitoring mechanisms in place, those most relevant to the Emberá and Wounaan land rights struggle in Panama are the UN Permanent Forum on Indigenous Issues, the UN Human Rights Council, and the UN’s treaty-based reporting and oversight committees for the ICESCR, ICCPR, and CERD.

The Permanent Forum on Indigenous Issues (PFII) was established through the UN Economic and Social Council (ECOSOC) and

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99. ULLOA, *supra* note 66, at 9.

100. ANAYA, *supra* note 9, at 217. *See also* U.N. Charter, art. 2 at para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . .”).

met for the first time in 2002.<sup>101</sup> The Forum was created with the goal of advising and making recommendations to ECOSOC on indigenous rights issues and the larger UN system as well.<sup>102</sup> Among the indigenous issues covered, the PFII focuses primarily on the environment, economic and social development, health and human rights, culture, and education.<sup>103</sup> While ECOSOC has faced criticism for having been too politicized to provide effective and unbiased human rights monitoring, the PFII maintains a fair degree of independence and broad representation. The forum consists of sixteen independent experts, eight of whom are nominated by governments and eight of whom are nominated directly by indigenous organizations that represent the seven socio-cultural regions of the world.<sup>104</sup>

The Human Rights Council is a UN Charter-based body that has replaced the old Commission on Human Rights and its Sub-Commission, and “ensures transparency, predictability, and impartiality.”<sup>105</sup> Relying on research and advice from its newly-formed Advisory Committee, the Human Rights Council’s primary method of monitoring human rights compliance is through a universal, periodic review of member states. In the context of indigenous rights, this review is carried out by the Council’s Working Group on Indigenous Peoples (WGIP). It is facilitated by several Council-appointed Rapporteurs,<sup>106</sup> one of whom is Professor James Anaya, the new Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.<sup>107</sup> Some have referred to the WGIP as one of the most important monitoring bodies because of its ability to review indigenous issues as they develop, and because it helps shape international standards on indigenous rights.<sup>108</sup> Other scholars, however, have referred

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101. ANAYA, *supra* note 9, at 219.

102. *Id.* at 220.

103. U.N. Permanent Forum on Indigenous Peoples, *Indigenous Voices at the United Nations* at para. 1, available at <http://www.un.org/esa/socdev/unpfii/> (last visited Apr. 29, 2008).

104. *Id.* at *Structure Within ECOSOC* at para. 1, available at <http://www.un.org/esa/socdev/unpfii/en/structure.html> (last visited Apr. 29, 2008).

105. *Fact Sheet: Work and Structure of the Human Rights Council* at paras. 2, 5, available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/FACTSHEET\\_OUTCOMES\\_FINAL.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/FACTSHEET_OUTCOMES_FINAL.pdf) (last visited Apr. 29, 2008).

106. *Id.* at para. 3, note 4. Under the new structure of the Human Rights Council, both Special Rapporteurs and working groups are part of the Council’s “special procedures” meant to address a particular country or issue. *Id.* at FN 1.

107. Prof. James Anaya was appointed as Special Rapporteur on March 26, 2008. See Office for the U.N. High Commissioner for Human Rights, <http://www2.ohchr.org/english/issues/indigenous/rapporteur/> (last visited Apr. 29, 2008).

108. Cahn, *supra* note 79, at 248-49.

to its monitoring work as less formal and effective, but nevertheless complementary to the goals and operation of the ECOSOC's Permanent Forum on Indigenous Peoples.<sup>109</sup>

Treaty-based reporting and oversight, on the other hand, is a direct product of the seven principal human rights treaties coming from the UN, including the ICESCR, the ICCPR, and the CERD, which are most pertinent to the discussion of indigenous rights.<sup>110</sup> The CERD Committee consists of individuals who are well-established in the field of human rights, and require state parties to submit periodic reports on their implementation of the *jus cogens* norm against discrimination and promotion of equality.<sup>111</sup> As such, CERD functions similarly to the Human Rights Committee,<sup>112</sup> which monitors ICCPR compliance and encompasses the integrity and cultural development of indigenous peoples.<sup>113</sup> The CERD Committee also focuses on the principle of self-determination in light of a nation state's developing policy,<sup>114</sup> and was recently briefed on the UN DRIP provisions that highlight self-determination and non-discrimination.<sup>115</sup>

Just as civil and political rights can enhance social and economic rights, this section has shown how the work of one monitoring body can often reinforce that of another. At the intersection of minority rights, indigenous rights, and social and political rights a common thread of self-determination emerges. For the Emberá and Wounaan, collective land titling is the mechanism through which tribal self-determination may be fully exercised—both in the titling process itself and through autonomous ownership and use of the land, which preserves rights to equality, political freedom, and social and cultural development. As such, section VI covers the movement of a claim for redress through the international forum by first looking at two examples of successful indigenous land claims made in Latin America. Thereafter,

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109. ANAYA, *supra* note 9, at 221.

110. *Id.* at 228.

111. *Id.*

112. Specifically, the Human Rights Committee is a body of independent experts that monitors state party compliance with the ICCPR. See *Human Rights Committee: Monitoring Civil and Political Rights* at para. 1, <http://www2.ohchr.org/english/bodies/hrc/index.htm> (last visited Apr. 29, 2008).

113. See ICCPR, *supra* note 4, at art. 1 (“all peoples have the right to . . .freely pursue their economic, social and cultural development”), art. 27 (“persons belonging to minorities shall not be denied the right. . .to enjoy their own culture”).

114. ANAYA, *supra* note 9, at 230-31.

115. CERD Committee Briefing on UN DRIP (Feb. 19, 2008), available at [http://www.unog.ch/unog/website/news\\_media.nsf/\(httpNewsByYear\\_en\)/0EBE95135C24178CC12573F400493343?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/0EBE95135C24178CC12573F400493343?OpenDocument) (last visited Apr. 28, 2008).



domestic reform on the political plane is discussed as the creative starting point for the Emberá and Wounaan.

## VI. REALIZATION OF RIGHTS: ENFORCEMENT MECHANISMS AND DOMESTIC REFORM

In considering their own course of action, the Emberá and Wounaan can seek guidance from the land rights claims made by the Awas Tingni of Nicaragua and the Mayans of Belize. In the *Awas Tingni* case,<sup>116</sup> the Inter-American Court invoked the state's duty to secure enjoyment of human rights as mentioned in Articles 1 and 2 of the American Convention on Human Rights,<sup>117</sup> finding specifically that Nicaragua had an obligation to: 1) take necessary steps to recognize and protect indigenous peoples' land rights and 2) respond effectively to their claims.<sup>118</sup> These findings were not based solely on the action or inaction of one branch of the Nicaraguan government, but rather, the particular policies and omissions of legislative, executive and judicial agencies that collectively denied protection of indigenous land rights.<sup>119</sup>

The Mayan land claims case in Belize has been considered "the most far reaching application of international law by a domestic court to recognize the rights of indigenous groups to their traditional lands and resources."<sup>120</sup> In a historic decision, the Supreme Court of Belize found that the country was obligated by its own Constitution as well as by international treaty and customary norms to recognize, respect, and protect Maya customary land rights through the demarcation and titling of traditional lands in the Conejo and Santa Cruz villages.<sup>121</sup> The Mayan land claim case built on the ruling in the *Awas Tingni* case by holding that indigenous rights to collective ownership over traditional lands and resources stem from international human rights law, regardless of whether or not those rights are recognized under domestic

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116. *Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Inter-Am. Ct. H. R., REP. NO. 79, Ser. C (Judgment on the merits and reparations of August 21, 2001)

117. American Convention on Human Rights at arts. 1,2, Nov. 22, 1969 O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

118. ANAYA, *supra* note 9, at 185-86.

119. *Id.* at 190.

120. Quote by Professor Anaya from University of Arizona article/website, *IPLP Program Helps Lead Maya Communities to Victory in the Supreme Court of Belize* at para. 2, [http://www.law.arizona.edu/Depts/iplp/advocacy/maya\\_belize/index.cfm](http://www.law.arizona.edu/Depts/iplp/advocacy/maya_belize/index.cfm) (last visited Apr. 30, 2008).

121. *Id.*

law.<sup>122</sup> The case also forged a new path in international law as it was the first court to use the provisions of the Declaration on the Rights of Indigenous Peoples in its decision.<sup>123</sup>

### A. *The Process*

Just as the Awas Tingni of Nicaragua and Mayans of Belize relied on numerous land provisions in the DRIP, so too will the Emberá-Wounaan in seeking international support for a potential claim before the Panama international court system. While Articles 8, 10, 25, 26, 29, and 32 of the DRIP all mention land rights specifically,<sup>124</sup> the document as a whole protects the right to maintain cultural autonomy *through* land ownership and other practices, rather than simply securing cultural and land rights exclusive of one another. In this sense, the Declaration embodies indigenous values of reciprocity and harmony by seeking to protect both culture and land in a holistic way. In particular, Article 26 of the Declaration states:

1. Indigenous peoples have the right to the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.<sup>125</sup>

On April 28, 2007, eleven indigenous leaders in Panama signed a declaration addressing the legal recognition of collective lands.<sup>126</sup> This powerful document outlines the struggles faced by collective indigenous communities and includes the fact that, despite the demarcation of five indigenous reservations created by Law 22, the government continues to maintain a situation of social, economic, terri-

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122. *Id.*

123. *Id.*

124. DRIP, *supra* note 8, at art. 8 (right to not be dispossessed of land, territory, or resources), art. 10 (right to not be forcibly removed from their territory), art. 25 (right to a spiritual relationship with lands and resources), art. 26 (right to protection and development of lands traditionally owned or otherwise occupied), art. 29 (right to conservation and protection of lands with productive capacity).

125. *Id.* at art. 26.

126. DECLARACIÓN DE LOS PUEBLOS INDÍGENAS DE PANAMÁ (Pan. Cty., Apr. 28, 2007) (author's unofficial translation) (on file with author).

torial exclusion, and marginalization of the country's indigenous people.<sup>127</sup> The Declaration also referred specifically to the territorial invasion of collective indigenous land by Latino farmers (or *colonos*), logging companies, transnational mining corporations, and tourism enterprises.<sup>128</sup> However, as discussed earlier, a considerable degree of invasion has been allowed under national law because lands are classified as either public, private, or reservation-based, and because no mechanism exists under the Agrarian code to title communal and ancestral lands.

As such, the Emberá and Wounaan have a valid claim against the national government through numerous international organizations, the two most prominent of which are the United Nations and the Organization of American States.<sup>129</sup>

### B. *United Nations Claim*

As discussed in Section V, the Human Rights Committee is a treaty-based organization responsible for enforcing the Covenant on Civil and Political Rights (ICCPR). Since its inception, the Committee "has been active in examining government reports bearing upon the rights of indigenous peoples and in encouraging official policies and behavior in line with contemporary norms." The Committee has also reviewed the policies outlined in the ICCPR.<sup>130</sup> This Covenant, of which Panama is a signatory, was adopted in 1966 and was entered into force in 1976.<sup>131</sup> Broadly, Articles 1 and 27 provide for the special rights of indigenous groups and their members. Article 1 affirms the principle of self-determination with regard to the social, cultural, and economic development of all peoples, while Article 27 states that members of a minority group have the right to enjoy their own culture.<sup>132</sup> In addition to the protections outlined in the article's text, the Committee has broadly interpreted Article 27 provisions in an effort to protect the cultural integrity of indigenous groups.<sup>133</sup> While many claims are

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127. *Id.* at 1.

128. *Id.*

129. For further discussion of Wounaan land rights claims before the United Nations and Organization of American States, see Zachary McNish, *The Awas Tingni Decision and the Land Rights of the Wounaan Indigenous People of Eastern Panama* (Feb. 23, 2007) (unpublished manuscript, Duke University School of Law) (on file with author).

130. ANAYA, *supra* note 9, at 3, 229.

131. See ICCPR, *supra* note 4.

132. *Id.* at arts. 1, 27.

133. ANAYA, *supra* note 9, at 229.

traditionally brought by one state party against another,<sup>134</sup> there is an Optional Protocol within the Covenant that enables individuals to bring claims for the violation of individual rights such as those covered in Article 27.<sup>135</sup>

Since Panama has also ratified the Optional Protocol, the Emberá and Wounaan are eligible to bring a claim individually for violation of collective cultural rights as outlined in the ICCPR's Article 27. However, the Optional Protocol requires that all domestic remedies be exhausted before a claim can be brought,<sup>136</sup> and in this instance, the relief that the Emberá and Wounaan are seeking must be read implicitly from Article 27, as no specific reference to ancestral land rights and land titling processes exist. Nevertheless, this particular approach has proven successful in the prior cases discussed, and underscores the notion of socio-cultural and political rights as mutually reinforcing.

The complaint procedure for violations of rights outlined in the ICESCR and CERD are more problematic. According to the Office of the UN High Commissioner for Human Rights, individual complaints may only be received from four of the human rights treaty bodies: the ICCPR's Human Rights Committee, the CERD Committee, the mechanisms established by the Convention Against Torture (CAT), and the Convention on the Elimination of Discrimination Against Women (CEDAW).<sup>137</sup> Unfortunately, the ICESCR Committee is not mentioned as one of the bodies that may receive individual petitions, and complaints submitted to the CERD Committee require that the state party in question make a declaration under Article 14 of the CERD to bring themselves under the jurisdiction of the Committee.<sup>138</sup> Presently, there is no indication that Panama has acknowledged the competence and jurisdiction of the Committee under Article 14 of the CERD. Nevertheless, Panama has signed both treaties and has agreed to secure and protect the various rights outlined in them. Further, these treaties enable the monitoring committees for both the ICESCR and CERD to submit periodic reports and recommendations.

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134. See ICCPR, *supra* note 4, at art. 41

135. Office of the High Commissioner for Human Rights, *Optional Protocol to the International Covenant on Civil and Political Rights*, art. 1, Dec. 16, 1966, 999 U.N.T.S. 302, available at [http://www.unhchr.ch/thml/menu3/b/a\\_opt.htm](http://www.unhchr.ch/thml/menu3/b/a_opt.htm) (last visited Apr. 27, 2008) [hereinafter *Optional Protocol*].

136. *Id.* at art. 2.

137. *Human Rights Bodies—Complaints Procedures* at para. 4, <http://www2.ohchr.org/english/bodies/petitions/index.htm> (last visited Apr. 30, 2008).

138. *Id.* at para. 9. See CERD, *supra* note 5, at art. 14.

The DRIP, therefore, could provide the broadest support for an ensuing land titling claim from Emberá and Wounaan for several reasons. First, it is specifically relevant to indigenous rights. Additionally, it affirms the universal principle of self-determination found in the other three human rights treaties discussed (the ICCPR, ICESCR, and CERD). Finally, it was recently used in Belize's Supreme Court decision, which ordered the government to enact legislative and administrative reform for land titling of Mayan territory based on customary and collective use.<sup>139</sup> While violations of customary law and declaration provisions may be addressed to the UN General Assembly through the Office of the High Commissioner for Human Rights, the body most likely to receive these reports would be the Human Rights Council.<sup>140</sup> By directing a report to one of the Council's Special Rapporteurs (specifically, the Rapporteur for human rights and fundamental freedoms of indigenous people)<sup>141</sup> or the Working Group on Indigenous Peoples,<sup>142</sup> the Human Rights Council can then formulate recommendations based on those findings and issue them publicly to the international community.<sup>143</sup> The new complaint procedure through the Human Rights Council is still being established, however, and is expected to build on the previous Commission's work and incorporate special procedures and expert advice.<sup>144</sup>

### C. Organization of American States Claim

In addition to relief via the UN, the Emberá and Wounaan may also consider bringing a claim through OAS. As an OAS member state, Panama has adopted a number of treaties and conventions designed to protect indigenous rights, perhaps most notably the American Convention on Human Rights (American Convention).<sup>145</sup> This Convention

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139. Univ. of Ariz., *IPLP Program Helps Lead Maya Communities to Victory in the Supreme Court of Belize* at paras. 10, 14 [http://www.law.arizona.edu/Depts/iplp/advocacy/maya\\_belize/index.cfm](http://www.law.arizona.edu/Depts/iplp/advocacy/maya_belize/index.cfm) (last visited Apr. 30, 2008).

140. Office for the High Commissioner for Human Rights, *Human Rights Bodies* at paras. 1, 6, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Apr. 30, 2008).

141. See *supra* note 106.

142. See *supra* note 105.

143. See *Human Rights Bodies*, *supra* note 140, at para. 6.

144. Office for the High Commissioner for Human Rights, *Human Rights Council Complaint Procedure* at para. 2, <http://www2.ohchr.org/English/bodies/chr/complaints.htm> (last visited Apr. 30, 2008).

145. See American Convention, *supra* note 117. See also OAS Department of International Affairs, *General Information of the Treaty*, <http://www.oas.org/juridico/english/Sigs/b-32.html> (last visited Apr. 29, 2008).

was adopted by OAS in 1969, entered into force in 1978, and has since developed its own Inter-American Commission that investigates human rights violations committed by governmental authorities and makes recommendations to those states charged with violations.<sup>146</sup>

The Commission's chief enforcement mechanism is the Inter-American Court of Human Rights,<sup>147</sup> which interprets and applies the provisions of the Convention.<sup>148</sup> As with the Optional Protocol of the United Nations' ICCPR, all domestic remedies must be exhausted before a petition alleging a violation of rights may be filed with the Commission.<sup>149</sup> After deciding to accept the petition, the Commission determines whether a human rights violation has occurred, and if such a violation is found, makes recommendations to the state in violation.<sup>150</sup> If the nation state fails to comply with the recommendations set forth by the Commission, the case may be referred to the Inter-American Court of Human Rights which can order a remedy and/or award compensatory damages.<sup>151</sup>

The procedure available to the Emberá and Wounaan, is very similar to that of the Awas Tingni tribe of Nicaragua and the Mayans of Belize. Because Panama is a signatory to the American Convention and recognizes the binding jurisdiction of the Inter-American Court on Human Rights, the Emberá and Wounaan may file a petition with the Inter-American Commission asserting their right to communal land-titling mechanisms after having exhausted all domestic remedies. If the Inter-American Commission determines that the conflict cannot be resolved between the Panamanian government and the Emberá and Wounaan, it has the authority to refer the case to the Inter-American Court. Based on the success of both the Awas Tingni of Nicaragua and the Mayans of Belize in gaining possession and titling of ancestral lands through these mechanisms, this appears to be a viable option for other indigenous communities that are struggling with similar issues.

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146. Inter-American Commission on Human Rights, *What are the Functions and Powers of the Commission?*, <http://www.cidh.org/what.htm> (last visited Apr. 29, 2008).

147. *Id.*

148. Inter-American Court on Human Rights, *Welcome* at para. 1, <http://www.corteidh.or.cr/index.cfm?CDIF=229133&CFTOKEN=11325797> (last visited Apr. 29, 2008). As the supreme body of the OAS, the General Assembly may also enforce Commission findings. See Organization of American States, *General Assembly: Competence* at para. 1, <http://www.oas.org/consejo/GENERAL%20ASSEMBLY/overview.asp> (last visited Apr. 30, 2008).

149. American Convention, *supra* note 117, at art. 46, para. 1.

150. *Id.* at art. 51, para. 2.

151. *Id.* at art. 63, para. 1.

*D. Other Methods: Internal Political Leverage*

While it is possible to seek redress on the international plane through various UN bodies and the OAS' Inter-American system, the Emberá and Wounaan were principally focused on affirming their rights domestically on the political and governmental planes. During a community meeting in Manené, one possible method of garnering support for collective land titling reform was suggested:

The land titling law has been under review and is up for approval in the government. There is an opportunity to gain leverage through our canal votes. . .<sup>152</sup> If we respect and support the vote to expand the canal, they must respect and support Proposition 99.<sup>153</sup>

Proposition 99 initially sought the development and recognition of the Embera and Wounaan rights to collective land ownership.<sup>154</sup> After passing the primary and secondary debates before the National Assembly of Congress, the proposed legislation evolved into a formal law providing collective titling mechanisms for *all* indigenous communities remaining outside reservation land.<sup>155</sup> Additionally, the Emberá and Wounaan communities have also brought their concerns to a national forum through the creation of a collective land titling committee. As Adolfo Mezua, President of the Emberá-Wounaan Youth Organization, explains:

Despite our differences [between Emberá and Wounaan pueblos], the collective land titling committee encompasses both groups, regardless of our distinct customs, traditions, and political views. . .and while there are Wounaan individuals seeking land title reform exclusively through their own government, there are still mixed communities in addition to Emberá and Wounaan pueblos that participate on the committee.<sup>156</sup>

The formation of a land titling committee served as a uniting factor for both the Emberá and Wounaan, despite internal political and

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152. At this time, the Panamanian Canal Authority and President Martín Torrijos had presented a national plan to expand the Canal, which would be voted on in an October 2006 country-wide referendum.

153. Graciliano Cárdenas, President of the Collective Land Titling Committee, Remarks at the Manené Community Meeting, Panama (June 16, 2006) (author's unofficial translation) (taped remarks and corresponding notes on file with author).

154. Asamblea Nacional, ACTA DE LA SESIÓN ORDINARIA at 7 (Sept. 7, 2006), [http://www.asamblea.gob.pa/actas/actas-2006/septiembre/07\\_09\\_06.pdf](http://www.asamblea.gob.pa/actas/actas-2006/septiembre/07_09_06.pdf) (last visited Apr. 30, 2008).

155. E-mail from Adolfo Mezua, President, Organization for Emberá-Wounaan Youth (OJEWY) (Oct. 20, 2008, 10:52 CST) (on file with author).

156. Interview with Adolfo Mezua, President, Embera-Wounaan Youth Organization in Panama City, Panama (May 16, 2006) (author's unofficial translation) (interview and field notes on file with author).

administrative divisions. Such organization and solidarity will not only help establish an effective claim before the Inter-American Court, but will also assure that both groups are active participants in the negotiation process.

## VII. CONCLUSION

International and domestic laws play an important role in bridging the gap between the theory and the reality of indigenous people's rights in Panama. Discussing the various bodies of law and human rights texts in support of collective land titling for the Emberá and Wounaan, the underlying value of self-determination emerges. This guiding principle speaks not only to the connection between political and cultural rights, but also to the intersectionality of minority rights and indigenous rights. As a result, the term "development" is thus redefined in a way that focuses on more than the introduction of technology or infrastructure, but places it within the cultural and social context of indigenous peoples themselves.

When moving from theory to reality, the Emberá and Wounaan communities have pressed for change within their domestic political system by empowering local people and effectively promoting national respect for indigenous rights. Domestic requests and negotiations are the first steps in testing whether a country is willing to uphold the human rights principles affirmed in the treaties and declarations it has endorsed. Although slow-moving and difficult at times, such activism provides an effective foundation for a future international claim.

Should large-scale non-compliance continue despite the creation of collective land titling procedures, the most prudent avenue of redress would be to follow the steps of the Awas Tingni of Nicaragua and the Mayans of Belize by filing a report with the Inter-American Commission. If still unsuccessful in gaining collective land title after receiving suggestions for compliance, the Emberá and Wounaan may then file a claim before the Human Rights Committee or Human Rights Council asserting their rights to self-determination and non-discrimination as established by the CERD, ICESCR, ICCPR, and DRIP. In either approach, the Emberá and Wounaan will be sending a powerful message to the international community regarding state accountability for *providing*, rather than simply *recognizing*, indigenous rights.



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