

**SUBMISSION TO THE JOINT SECTOR STANDING  
COMMITTEE ON NATURAL RESOURCES AND  
ECONOMIC SERVICES REGARDING THE  
QOLIQOLI BILL 2006**

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**SUBMISSION OF  
THE ALLARD K. LOWENSTEIN  
INTERNATIONAL HUMAN RIGHTS CLINIC  
AT YALE LAW SCHOOL**

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## EXECUTIVE SUMMARY

By its very nature, international law is a constantly evolving subject matter. This dynamic quality makes the interpretation and application of international law difficult. Nevertheless, it is generally possible to determine whether or not a particular principle has developed beyond the threshold required to become customary international law (CIL), by looking carefully at the content of international agreements, policies of multinational bodies, decisions of regional and international courts, examples of state practice, and commentary by experts in the field.

This submission analyzes the current state of international law regarding the duties of states to recognize the rights of indigenous peoples over lands, territories and natural resources traditionally owned or used by them. Our analysis focuses on the three primary international agreements concerning the rights of indigenous peoples – the International Labour Organization’s *Convention No. 169*, the United Nations’ *Draft Declaration on the Rights of Indigenous Peoples*, and the Organization of American States’ *Proposed American Declaration on the Rights of Indigenous Peoples* – together with the opinions of certain regional courts and the positions of various experts. Based on these sources, we draw the following conclusions:

- States are bound as a matter of CIL to recognize and respect the rights of indigenous peoples to *own* the lands that they have traditionally occupied.
- CIL also grants indigenous peoples the right to both *use* and *participate* in the management and conservation of territories and resources that they have traditionally used. However, where such resources are normally considered non-excludible, international law stops short of requiring that states extend *exclusive* rights of ownership or control to any individual or group.
- In order to ensure the effective participation of indigenous peoples in such resource management decisions, CIL requires *meaningful consultation* by the state.

- The rights of indigenous peoples are grounded in the broader discourse of international human rights law, which rests upon the principles of equality and non-discrimination.
- Finally, where indigenous peoples constitute a majority of a state's population, the exercise of their rights must be carefully tailored so as to avoid impinging upon the rights of minorities.

Based on these conclusions, our analysis yields two major recommendations concerning the proposed Qoliqoli bill. First, since international law does not require the extension of *exclusive* rights to the use – commercial or otherwise – of customary fishing grounds to indigenous peoples, and does require respect for the principles of equality and non-discrimination, the Qoliqoli bill should be drafted with great caution so as to ensure the protection of the rights of minority groups. Second, given the importance of customary fishing grounds to the culture of coastal indigenous populations, the Qoliqoli bill should *ensure the meaningful consultation* and effective participation of those peoples in any and all decisions that may affect these areas.

## **THE LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC**

The Allard K. Lowenstein International Human Rights Clinic is a Yale Law School course that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. Its projects have included efforts to promote the work of regional and international organizations that develop and protect human rights. The Clinic has prepared briefs and other submissions for the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, and various bodies of the United Nations, as well as for national courts, including courts in the United States and in other countries. These have included a number of documents arguing for the strong protection of indigenous peoples' rights and the rights of minorities.

## **INTRODUCTION**

Over the last half-century, the rights of indigenous peoples to native lands, territories and natural resources have received increased attention and protection. In many instances, the recognition of these rights has led to competition and conflict with other non-native conceptions of property use and ownership. While individual nations have made various attempts to resolve these issues, international bodies have helped foster consensus on certain points by developing and promoting "universal" conceptions of indigenous rights, monitoring and rebuking contradictory state practice, and providing forums for dispute resolution and litigation.

This submission seeks to provide an overview of international law standards and practices concerning the rights of indigenous peoples to native lands, territories and natural

resources. As independent observers with expertise in the subject matter, we hope to provide an objective analysis of the relevant international law in order to facilitate and encourage informed debate concerning Fiji's Qoliqoli Bill. Given the scope of this task, we have, by necessity, confined our analysis to those aspects of the topic that seem especially relevant given the particular historical, political and cultural context surrounding this piece of legislation. In particular, we confine our analysis to widely accepted tenets of international law and do not attempt to engage in comparative analysis of national practice in other states.<sup>1</sup> We recognize that our understanding of the uniquely Fijian context of this legislation is limited and therefore submit these comments in the spirit of information sharing, while offering minimal criticism and recommendation.

The submission begins by reviewing recent developments in international law regarding the rights of indigenous peoples to property and analyzing possible interpretations of its current state. We conclude Part One by isolating and examining three different but overlapping conceptions of indigenous property rights evidenced in recent international agreements, practices, policies and cases. In the second section, we analyze the Qoliqoli Bill and identify several areas where particular tenets of international law and practice might support, contradict or clarify it. The submission concludes by summarizing applicable international law and noting some observations that we hope will help clarify the relationship between the Qoliqoli Bill and relevant international law.

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<sup>1</sup> Comparative legal analysis can be useful in considering appropriate legislative responses to issues involving legal rights, and, with more time, we would be happy to conduct such research and analysis if it would be useful to relevant stake-holders.

## **PART ONE**

### **I. International law and Indigenous Rights**

#### *A. Background*

In the past, many indigenous peoples did not recognize or understand the authority of the sovereign, much less national political and judicial processes, through which they had to appeal for the recognition of their rights. Hidden behind cultural, linguistic and physical barriers, most indigenous peoples suffered from a cycle of marginalization that made the recognition and exercise of their rights extremely tenuous. It was not until fairly recently that two interdependent trends led to the interruption of this negative cycle. The first of these was the decolonization movement, which succeeded in establishing independence based on the principle of self-determination for much of the non-Western world. This movement made it clear that racial and religious distinctions could no longer be used to justify discrimination. Parallel to this movement, ethnic, religious and racial minorities within Western countries rallied to establish norms of equal protection, helping to enshrine the broad concept of “universal rights” along the way. Both of these movements took advantage of and helped strengthen the new, more effective international system established in the wake of World War II. The substantive rights and procedural strategies established by these movements facilitated the push by indigenous peoples for increased recognition of their rights. It was “[u]nder the battle cries of human rights and self-determination, [that indigenous peoples] have become recognized actors in the world constitutive process.”<sup>2</sup>

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<sup>2</sup> Siegfried Wiessner, “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis,” 12 HARV. HUM. RTS. J. 57, 58 (1999) (hereinafter Rights and Status).

## B. ILO Convention 169

The first international agreement dedicated exclusively to the rights of indigenous peoples was the International Labor Organization's (ILO) *Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, informally known as the *Indigenous and Tribal Populations Convention* (hereinafter, Convention 107) of 1957.<sup>3</sup> That convention displayed a distinctly "integrationist" perspective, which, by the 1970s, came to be seen as increasingly anachronistic and detrimental to the interests of indigenous peoples. After several years of discussion among states, indigenous peoples and other concerned parties, Convention 107 was replaced in 1989 by the *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* (hereinafter, Convention 169).<sup>4</sup> Convention 169 can be seen to represent "a marked departure in world community policy from the philosophy of integration or assimilation underlying the earlier convention."<sup>5</sup> Although there has been no shortage of criticism concerning Convention 169, most indigenous organizations have expressed support for it. Convention 169 remains the only binding international agreement dealing specifically with the rights of indigenous peoples.<sup>6</sup>

Article 2 of Convention 169 places the responsibility squarely on "governments" to guarantee equal rights and opportunities for indigenous peoples, as well as to "eliminate socio-economic gaps" between them and other segments of society. Meanwhile, article 4 states that those governments shall take "special measures" to safeguard the "persons, institutions, *property*,

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<sup>3</sup> International Labor Organization, *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).

<sup>4</sup> International Labor Organization, *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989, International Labour Conference (entered into force Sept. 5, 1991), 169 I.L.O. 1989 (hereinafter *Convention 169*).

<sup>5</sup> James Anaya, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, 2D EDITION, New York, Oxford: Oxford University Press, 2004, 58 (hereinafter *Anaya, INDIGENOUS PEOPLES*).

<sup>6</sup> *Id.*, at 61.

labour, cultures and environment” (emphasis added) of these peoples. In taking these steps, governments are bound by article 6 to: (1) consult with the peoples concerned, (2) ensure free and equal participation in all levels of decision making, and (3) help develop indigenous peoples’ own institutions and initiatives, providing necessary resources where appropriate. Finally, Article 8 establishes certain limits on the methods used to secure the aforementioned requirements. It states:

These peoples shall have the right to retain their own customs and institutions, *where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights*. Procedures shall be established, wherever necessary, to resolve conflicts which may arise in the application of this principle. (emphasis added)

Part II of the Convention is dedicated to the issue of “land”. It begins by emphasizing the principle that “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with their lands or territories . . . which they occupy or *otherwise use*.”<sup>7</sup> Article 14(1) establishes:

The rights of ownership and possession of the peoples concerned over the *lands which they traditionally occupy* shall be recognized. In addition, measures shall be taken in *appropriate cases* to safeguard the *right* of the peoples concerned to *use* lands not exclusively occupied by them, but to which they have traditionally had access. (emphasis added)

As Professor S. James Anaya has noted, “the use of the words *traditionally occupy* in article 14(1), as opposed to use of the past tense of the verb, suggests that the occupancy must be connected with the present in order for it to give rise to possessory rights.”<sup>8</sup>

The same article goes on to require that governments take steps “as necessary” to identify lands that indigenous peoples traditionally occupy and establish “adequate procedures” to resolve land claims by indigenous peoples. Article 17 ensures respect for customary land tenure

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<sup>7</sup> Convention 169, *supra* note 4, art. 13.1 (emphasis added).

<sup>8</sup> Anaya, INDIGENOUS PEOPLES, *supra* note 5, at 144.

practices and procedures and prevents non-indigenous peoples from “taking advantage of” indigenous customs or lack of understanding of the laws in order to “secure ownership, possession or use” of that land.

Article 13.2 defines the term “lands” with respect *exclusively* to articles 15 and 16 (that is, this more holistic definition does not apply to articles 14 and 17) to include “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.” Article 15 states: “The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically *safeguarded*. These rights include the right of these people *to participate in the use, management and conservation* of these resources.” (emphasis added). Article 16 stipulates that indigenous peoples cannot be removed from the lands that they occupy except in very limited exceptional circumstances.

Article 23 recognizes the importance of rural and community-based industries such as *fishing* as important factors in the maintenance of indigenous cultures and requires that these activities be “strengthened and promoted.” Also, in Part IX on “General Provisions”, article 34 states that “measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regards to the conditions characteristic of each country,” while article 34 ensures that such measures “shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.”

These relevant provisions of Convention 169 make it clear that while property rights (“rights of ownership and possession”) are extended via Article 14 to lands traditionally occupied by indigenous peoples, rights over natural resources (including the “total environment” definition of article 13.2) are limited to the right to participate in the use, management and

conservation of these resources (article 15). Nevertheless, Convention 169 clearly emphasizes the relationship between natural resource use and the preservation of indigenous culture. This is apparent in article 13.1's establishment of the "special importance for the cultures and spiritual values of the peoples concerned of their relationship with their lands or territories," as well as article 23's specific recognition of fishing as a cultural activity. However, article 8 requires that the customs and institutions of indigenous peoples are compatible with "fundamental rights defined by the national legal system and with internationally recognized human rights" (article 8). In conclusion, Convention 169 can be seen as a significant but not infinite expansion of the rights of indigenous peoples.

### *C. The Draft Declaration on the Rights of Indigenous Peoples*

Two other international instruments concerning the rights of indigenous peoples have been proposed but not yet adopted. Both of these go further than Convention 169 in developing the conception of indigenous ownership and usage rights as based on cultural and spiritual ties to the land. In 1971, the U.N. Economic and Social Council passed a resolution authorizing the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights) to study the "Problem of Discrimination against Indigenous Populations."<sup>9</sup> Work of this sub-commission resulted in 1994 in the *Draft Declaration on the Rights of Indigenous Peoples* (Draft Declaration).<sup>10</sup> The Draft

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<sup>9</sup> E.S.C. Res. 1589(L), May 21, 1971, U.N. ESCOR, 50<sup>th</sup> Sess., Supp. No. 1 at 16, U.N. Doc. E/5044 (1971).

<sup>10</sup> United Nations Human Rights Commission, *Draft Declaration on the Rights of Indigenous Peoples*, E/CN.4/Sub.2/1994/2/Add.1 (1994) (hereinafter *Draft Declaration*). On June 29, 2006, the new U.N. Human Rights Council passed a resolution recommending to the General Assembly that it adopt the *Draft Declaration*. U.N. Human Rights Council, Resolution 2006/2, Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994, Report of the Human Rights Council, First Session, A/61/53, at 18, available at, <http://www.ohchr.org/english/bodies/hrcouncil/docs/A.61.53.pdf>.

Declaration “goes beyond Convention No. 169, especially in its bold statements in areas of indigenous self-determination, land and resource rights, and rights of political autonomy.”<sup>11</sup>

The Preamble to the Draft Declaration expresses concern for deprivation caused to indigenous people through colonization and recognizes the “urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, *especially their rights to their lands, territories and resources.*” (emphasis added). Part VI of the Draft Declaration focuses on indigenous peoples’ rights to land, territories and natural resources. It begins by stating:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and *coastal seas* and other resources which they have *traditionally owned or otherwise occupied and used.*<sup>12</sup> (emphasis added)

Article 26 goes further in defining the right to “own, develop, control and use the lands and territories, including the total environment of the lands, waters, coastal seas . . . and other resources” so as to include:

the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, *and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.* (emphasis added)

Several other articles in the Draft Declaration highlight the emphasis placed on these strong property rights. Under the rubric of indigenous peoples’ “right not to be subjected to ethnocide and cultural genocide,” article 7 prohibits “any action which has the aim or effect of dispossessing them of their lands, territories or resources.” Like article 23 of Convention 169, article 21 of the Draft Declaration states that indigenous people have the right, *inter alia*, to “engage freely in all their traditional and other economic activities.”

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<sup>11</sup> Anaya, INDIGENOUS PEOPLES, *supra* note 5, at 65.

<sup>12</sup> *Draft Declaration*, *supra* note 10, art. 25.

*D. Proposed American Declaration on the Rights of Indigenous Peoples*

In 1989, the General Assembly of the Organization of American States (OAS) requested “a juridical instrument relative to the rights of indigenous peoples.”<sup>13</sup> After a period of consultation, the Inter-American Commission on Human Rights (IACHR) responded by developing the *Proposed American Declaration on the Rights of Indigenous Peoples* (Proposed Declaration). The Proposed Declaration was approved by the IACHR in 1997,<sup>14</sup> and a working group of the OAS Committee on Juridical and Political Affairs has been composed to study it.

The Proposed Declaration tracks the Draft Declaration in many ways, including in its Preamble, paragraph 5 of which includes the recognition:

[T]hat in many indigenous cultures, traditional collective systems of control and use of land, territory and resources, *including bodies of water and coastal areas*, are a necessary condition for their survival, social organization, development and their individual and collective well-being. (emphasis added)

The link between property and culture is evident in the title of Article XVIII of the Proposed Declaration, which deals with “Traditional forms of ownership and cultural survival. Rights to land, territories and resources.” Paragraph 2 of Article XVIII establishes two distinct rights. It starts by recognizing the “right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied,” and then grants the right “to the use of those [lands, territories and resources to] which they have historically had access for their traditional activities and livelihood.” Nowhere does the Proposed Declaration define the terms “lands”, “territories” or “resources”, or extrapolate on the difference between “historical occupation” and “historical access”. Article XVIII goes on to state that property and

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<sup>13</sup> AG/RES. 1022 (XIX-0/89), as cited in Anaya, *INDIGENOUS PEOPLES*, supra note 5, at 66.

<sup>14</sup> *Proposed American Declaration on the Rights of Indigenous Peoples* (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session), *Annual Report of the Inter-American Commission of Human Rights, 1992-1993*, O.A.S. Doc. OEA/Ser.L/V/II.95 Doc.7 rev. (March, 14, 1996).

user rights that originate prior to the existence of the state shall be made “permanent, exclusive, inalienable, imprescriptible and indefeasible.” Paragraph 4 provides the right to an “effective legal framework for the protection of their rights with respect to the natural resources on their lands.”

The “draft” and “proposed” nature of these later agreements indicates that although there is some dissatisfaction with Convention 169, there is not yet a firm consensus regarding how to proceed forward in defining and protecting indigenous rights. This leaves space for interpretation and makes it difficult to discern the precise scope and application of indigenous rights in international law.

#### *E. Customary International Law*

In addition to the Draft and Proposed Declarations discussed above, several other international instruments, resolutions and policies have referenced and recognized the rights of indigenous peoples.<sup>15</sup> These documents have been cited by a variety of activists, scholars and commissions as evidence of a convergence of international opinion about the content of certain indigenous peoples’ rights. According to Anaya, this convergence “carries subjectivities of obligation and expectation attendant upon the rights, regardless of any treaty ratification or other formal act of assent to the norms articulated.”<sup>16</sup> That is, at some point, convergence reaches a critical mass after which universal obligations emerge – this “tipping point” is usually referred to as the establishment of customary international law (CIL).

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<sup>15</sup> See, e.g., Resolution on the Adoption of the “Report of the African Commission’s Working Group on Indigenous Populations/Communities,” African Commission on Human Rights, Banjul, Nov. 20, 2003; Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167 U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990 (referencing the rights of indigenous children in Articles 17, 29, and 30); Resolution of the Third Meeting of Ministers for Foreign Affairs of the State Parties to the Treaty for Amazonian Co-Operation Setting up a Special Commission in Indigenous Affairs, Mar. 7, 1989; Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, Feb. 9, 1994, Eur. Parl. Doc. PV 58(II) (1994); The World Bank Operational Manual, Operational Directive: Indigenous Peoples (OD 4.20) (1991), available at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/>.

<sup>16</sup> Anaya, INDIGENOUS PEOPLES, supra note 5, at 68.

It is Anaya's belief that "certain minimum standards concerning indigenous land rights, rooted in otherwise accepted precepts of property, cultural integrity, non-discrimination, and self-determination, have made their way not just into conventional law but also into general or customary international law."<sup>17</sup> This is undoubtedly so. It is still unclear, however, exactly what those "minimum standards" consist of. Some of the most important statements regarding indigenous property rights have come out of litigation before the Inter-American system. The Inter-American Commission on Human Rights (IACHR) has stated in various cases before the Inter-American Court of Human Rights that, as a matter of CIL, indigenous peoples have property rights in conformity with their traditional land tenure.<sup>18</sup> In the *Awas Tingni* case, the Court did not go so far as to adopt this argument wholesale, employing instead an "evolutionary interpretation" of article 21 of the American Convention on Human Rights ("Everyone has the right to the use and enjoyment of his property . . .") to determine that that this article protects "the rights of members of the indigenous communities within the framework of communal property."<sup>19</sup> Nevertheless, the Court did state that "[a]s a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration."<sup>20</sup> The IACHR has separately recognized communal property rights to land arising from "longstanding use and occupancy" by indigenous peoples, subject to protection under article XXIII of the

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<sup>17</sup> *Id.*, at 148.

<sup>18</sup> *See, e.g.*, The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser.C) No. 79 (Judgment on merits and reparations of Aug. 31, 2001), para. 140(d) (hereinafter *Awas Tingni*); *see also*, Case of Mary Dann and Carrie Dann v. United States, Case No. 11.140, *Inter-Am. Comm. H.R., Report No. 75/02* (Dec. 27, 2002).

<sup>19</sup> *Awas Tingni*, supra note 18, at para. 148.

<sup>20</sup> *Id.*, at para. 151.

American Declaration of the Rights and Duties of Man, as well as a “correspondent obligation on the State to recognize and guarantee the enjoyment of this right.”<sup>21</sup>

It is generally agreed that CIL “results from a general and consistent practice of states followed by them from a sense of legal obligations.”<sup>22</sup> This definition is composed of two distinct requirements: (1) general and consistent state practice; and (2) a sense of legal obligation.<sup>23</sup> It appears from the various documents and cases cited above, as well as from state practice, that the recognition of indigenous peoples’ rights to land stemming from longstanding occupancy has reached the status of CIL. International law can also be seen as requiring that states take action to ensure the rights of indigenous peoples to use, manage and conserve lands and resources that they have traditionally used but not exclusively owned. However, claims that seek to extend *exclusive rights of ownership* beyond physical land occupied by indigenous peoples to cover “territories”, “resources” or “areas of traditional use” appear less likely to satisfy the conditions required to be considered CIL.

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<sup>21</sup> Maya Indigenous Communities of the Toledo District of Belize (Belize), Case No. 12.053, *Inter-Am. Comm. H.R., Report No. 96/03*, Oct. 24, 2003, paras. 127, 131 and 132.

<sup>22</sup> Restatement (Third) of Foreign Relations Laws of the United States, § 102 (1987).

<sup>23</sup> See *Id.*, Comments (b) and (c) (*b. Practice as customary international law*. “Practice of states,” . . . includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy . . . The practice necessary to create customary international law . . . must be “general and consistent.” A practice can be general even if it is not universally followed . . . *c. Opinio juris*. For a practice of states to become a rule of customary international law, it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary international law. . . . Explicit evidence of a sense of legal obligation (*e.g.*, by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions); See also, Myres McDougal et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY, 269 (1980), as cited in Anaya, INDIGENOUS PEOPLES, *supra* note 5, at 61 (stating that CIL is “generally observed to include two elements: a ‘material’ element in certain past uniformities in behavior and a ‘psychological’ element, or *opinio juris*, in certain subjectivities of ‘oughtness’ attending such uniformities in behavior.”).

## II. Different Conceptions of Indigenous Property Rights

As the preceding section makes clear, different countries, commentators, and indigenous peoples have developed a variety of understandings of the relationship between indigenous peoples and the lands, territories and resources that they have occupied and used. Although these conceptions often overlap, it is possible to distinguish three fairly distinct views, each with its own philosophical and historical underpinnings.

### A. Native Title

As indigenous peoples' rights to property have reached higher levels of acceptance through international law, many states have struggled to accommodate these newly perceived commitments with their traditional systems of land tenure. This effort was especially complicated in those common law jurisdictions where the law had developed precisely so as to minimize or abolish indigenous land claims. In these jurisdictions, the legal regime, based on the state-centric "positivist" philosophy of international law, determined that:

For international law purposes, indigenous lands prior to any colonial presence were considered legally unoccupied or *terra nullius* (vacant lands). Under this fiction, discovery was employed to uphold colonial claims to indigenous lands and to bypass any claim to possession by the natives in the "discovered".<sup>24</sup>

In order to recognize indigenous rights to property without radically altering the underlying property regime upon which these systems had been built, several courts and

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<sup>24</sup> Anaya, INDIGENOUS PEOPLES, *supra* note 5, at 29. The principle exceptions to this theory at the time stemmed from natural rights theory and are perhaps best summarized by U.S. Chief Justice John Marshall, who, in his landmark opinion in *Worcester v. Georgia*, acknowledged that the "discovery doctrine" "regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man." 31 U.S. 515, 554 (1832).

legislatures devised the concept of “native title”. This conceptualization is summarized in the Australian Supreme Court’s 1992 decision in *Mabo v. Queensland*.<sup>25</sup>

In *Mabo*, the Court was confronted with property right claims by the Meriam people over land that they had possessed on the Murray Islands with minimal disruption since before colonization. In his majority opinion, Justice Brennan concluded that “[t]he common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius*” and stated that “native title, being recognized by the common law, may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence.”<sup>26</sup> In order to accommodate evolving conceptions of indigenous rights without fundamentally disturbing the status quo, Justice Brennan tied native title not only to current occupation but also to the continual observation of traditional customs, concluding: “[a] native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.”<sup>27</sup> The opinion also established that “[w]here the Crown has validly alienated [or appropriated] land . . . native title is extinguished.”<sup>28</sup> Thus, while the concept of “native title” developed in *Mabo* effectively abolished the racist principle of *terra nullius* and recognized the inalienable rights of indigenous peoples over land that they contemporaneously occupy in accordance with their customary law, it did nothing to redress historical displacement or contemporary inequities.<sup>29</sup>

Certain elements of this conception are apparent in Convention 169 as well. As discussed above, the use of the present tense “traditionally occupy” in article 14(1) seems to

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<sup>25</sup> *Mabo v. Queensland* (1992), 175 C.L.R. 1 (Aust).

<sup>26</sup> *Id.*, at 58, 61.

<sup>27</sup> *Id.*, at 60.

<sup>28</sup> *Id.*, at 69-70.

<sup>29</sup> For a similar decision regarding “aboriginal title”, see *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (Canada).

make continuous occupation a requirement for the recognition of indigenous property rights.<sup>30</sup> Additionally, although article 16(3) provides that “[w]henver possible, these peoples shall have the right to return to their traditional lands,” article 34’s provision that the Convention be implemented in “a flexible manner” may indicate an unwillingness to uproot long-standing property rights in favor of resettlement. Furthermore, the rooting of indigenous property claims in traditional “laws and customs” is pervasive in international law, leaving the fate of claims by indigenous peoples who have ceased to practice them uncertain.

### *B. Inherent Rights*

The Draft Declaration’s focus on the “inherent rights and characteristics of indigenous peoples” reflects a shifting conception of indigenous rights. Rather than basing indigenous claims to property on their physical presence and traditional practices, this framing indicates a return to natural law precepts establishing both deeper roots and a broader scope for these rights. This view is consistent with the modern human rights discourse, which has emphasized the rights of individuals and groups vis-à-vis states. It is possible to conclude, therefore, that “indigenous peoples’ rights typically are regarded as, and can be demonstrated to be, *derivative of previously accepted, generally applicable human rights principles.*”<sup>31</sup>

Under this conception, indigenous peoples are accorded a degree of collective sovereignty and equal rights that was absent in “native title”, and the rights granted to indigenous peoples expand from simple possession of land and participation in decisions about management, to broader and more absolute rights to “develop, control and use.”<sup>32</sup> These expanded rights are evident, *inter alia*, in the rights to development (article 30 of the Draft Declaration, article XXI

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<sup>30</sup> Anaya, however, eventually concludes that “in light of the article 13 requirement of respect for cultural values related to land . . . a sufficient present connection with lost lands may be established by a continuing cultural attachment to them, particularly if dispossession occurred recently.” INDIGENOUS PEOPLES, *supra* note 5, at 144.

<sup>31</sup> Anaya, INDIGENOUS PEOPLES, *supra* note 5, at 69 (emphasis added).

<sup>32</sup> *Draft Declaration*, *supra* note 10, art. 26.

of the Proposed Declaration) and to environmental protection (article 28 of the Draft Declaration, article XIII of the Proposed Declaration).

The inherent nature of these rights also makes requirements of continuous historical occupation more difficult to sustain. The Draft Declaration, for example, goes beyond the “traditionally occupy” language of Convention 169, using instead the past-tense “traditionally owned or otherwise occupied or used.”<sup>33</sup> Article 27’s “right to restitution of the lands, territories and resources . . . which have been confiscated, occupied, used or damaged without their free and informed consent,” which has its analog in article VII of the Proposed Declaration, follows logically from the concept that rights based on “traditional occupation” are inherent to indigenous peoples.

In certain instances, the more sovereign-like characteristics implicit in this conception are explicitly limited by the relevant international agreements. One instance of such limitation arises with respect to subsurface resources, which traditionally belong to the state. The Draft Declaration deals with this scenario in article 30, which requires “free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” Thus, where state sovereignty trumps indigenous property rights, “the equality norm [prevents] the state from appropriating ownership of those resources without indigenous peoples’ consent.”<sup>34</sup> Another example of where indigenous sovereignty runs up against state authority is with regard to the right to enforce indigenous rights. Thus, article 26 of the Draft

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<sup>33</sup> The Proposed Declaration employs similar semantics, by using the phrase “historically occupied.”

<sup>34</sup> James Anaya, “Indigenous Peoples’ Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources”, 22 *ARIZ. J. INT’L & COMP. L.* 7, 16 (2005) (hereinafter *Resource Extraction*). It is worth noting that the Proposed Declaration provides somewhat less explicit language in its Article XVIII (“In the event that ownership of the minerals or resources of the subsoil pertains to the state or that the state has rights over other resources on the lands, the governments must establish or maintain procedures for the participation of the peoples concerned . . .”), which is much closer to Convention 169’s language in article 15 requiring simple consultation and participation.

Declaration, while going further than Convention 169 by requiring states to provide effective enforcement measures to prevent interference with indigenous property rights, likely precludes *sua sponte* enforcement by indigenous peoples themselves. Finally, Convention 169's requirement that the practice of indigenous customs or institutions not be "incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights" can be seen as a general limitation on the practice and expression of indigenous peoples' rights.

### C. *Distinctive Rights*

A third conception of the property rights of indigenous peoples is reflected in recent discourse. This view grounds the rights of indigenous peoples in their *distinctive* spiritual relationship with the land. Anaya may be making reference to this expanded conception when he writes that "[i]ndigenous peoples' rights over land flow not only from possession, but also from indigenous peoples' articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional nexus with the earth and its fruits."<sup>35</sup>

Because each of the primary conceptions of indigenous peoples' rights to property acknowledge the spiritual and cultural connections of these peoples to land and resources, it can be difficult to isolate this third view from the others. What makes it different, however, are the remedies that it prescribes as flowing from these connections. Thus, whereas "native title" used the concept of "connection" to *limit* indigenous property rights to those groups who have maintained (in the eyes of non-indigenous authorities) sufficient adherence to their "laws and customs," the distinctive rights paradigm uses the idea to *expand* the rights of indigenous peoples to resources that are otherwise not seen as "ownable". This third perspective can also be distinguished from the "inherent rights" conception in that it departs from the "equal rights"

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<sup>35</sup> *Id.*, at 7-8.

component of that view by employing the “distinctiveness” of the indigenous peoples’ relationship to certain property in a way that potentially *trumps* the competing rights of other non-indigenous peoples.

Hints of this more radical conception can be seen in certain aspects of the Draft and Proposed Declarations. As was already mentioned, the Draft Declaration’s requirement of “informed consent” represents a departure from prior practice and an important restriction on state action. Additionally, the significant spatial expansion of indigenous peoples’ property rights from the core of “lands occupied” to the broader “total environment of lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources” in article 26 of the Draft Declaration can be seen as reflecting a broader, more holistic relationship between indigenous peoples and their surroundings.<sup>36</sup> The combination of these two principles – informed consent and expanded “total environment” – was at play in the IACHR’s *Maya Indigenous Communities* decision, which determined that the Mayan populations in question:

demonstrated a communal property right . . . [that has] arisen from the longstanding use and occupancy of the territory . . . [and] extended to the use of the land and its resources for purposes relating to the physical and cultural survival of the Maya communities.<sup>37</sup>

Based on this demonstrated right, the Commission concluded that “the State, by granting logging and oil concessions to third parties . . . without effective consultations with and the informed consent of the Maya people . . . further violated the right to property.”<sup>38</sup> In this instance, the requirement of consultation and consent can be read so as to extend to state actions that will affect the resources used by indigenous peoples. To the extent that this determination is based on the unique relationship between indigenous peoples and those resources, it grants those

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<sup>36</sup> Part 5 of the Proposed Declaration’s Preamble indicates a similarly expanded conception by referring to “bodies of water and coastal areas.”

<sup>37</sup> *Maya Indigenous Communities*, supra note 21, at 127.

<sup>38</sup> *Id.*, at 153.

peoples a right not applicable to other populations who may be affected by the same or similar actions. This conception becomes particularly problematic when it is used in order to seek *exclusive* rights (as opposed to usage rights) for indigenous peoples over resources that are not otherwise excludable.

In some ways, this conception can be seen as using Western rights language in order to carve out a broader exception for practices by indigenous peoples that would otherwise be considered inimical to the underlying property regime. The problem with this is that, if taken to its logical extreme, it can be seen as undermining the Western rights framework upon which it is based. It therefore tends to provoke a harsh reaction not only from those hoping to protect the status quo, but also from those whose work depends on the invocation of rights language.

To the extent that the Draft and Proposed Declarations represent, or, perhaps more importantly, *are seen to represent*, an implicit “challenge [to] notions of state sovereignty, which are especially jealous of matters of social and political organization within the presumed sphere of state authority,”<sup>39</sup> they have drawn resistance. Even Convention 169, which does not go as far as these later agreements, evoked opposition along these lines.<sup>40</sup> Although some of this resistance can be traced to political concerns regarding “self-determination” and sovereign independence, the importance of other concerns based upon the economic, social and political consequences of the redistribution of property rights may also explain in part why these declarations remain in “draft” and “proposed” forms.

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<sup>39</sup> Anaya, *INDIGENOUS PEOPLES*, supra note 5, at 59.

<sup>40</sup> *Id.*, at 65 (“a number of states that abstained from voting in favor of adoption of Convention No. 169 . . . expressed concern about the use of the term *territories* in the convention . . . . [S]ome governments expressed fear that its usage would imply a competing sovereignty”).

## PART TWO

### I. The Qoliqoli Bill Expands Indigenous Rights Beyond the Requirements of International Law

As is evident from the analysis above, various conceptions and understandings exist within international law regarding indigenous peoples' rights to property. However, it is probably safe to say that the current generation of international documents and decisions relating to this topic is most firmly rooted in the broader human rights discourse, most importantly perhaps in the concepts of "equal rights" and "self-determination". Thus, "[g]enerally applicable human rights principles combine with developments specifically concerning indigenous peoples to establish the applicable normative regime."<sup>41</sup> It follows then, that:

[i]nasmuch as property is a human right, the fundamental norm of nondiscrimination requires recognition of the forms of property that arise from the traditional or customary land tenure of indigenous peoples, *in addition to the property regimes created by the dominant society.*<sup>42</sup>

What remains unclear is what exactly the applicable normative regime prescribes in instances where the recognition of these two forms of property rights results in conflict. This conundrum is made particularly difficult in situations, such as the one in contemporary Fijian society, where indigenous people *are the dominant society* and property regimes based on customary land tenure run the risk of marginalizing other, non-indigenous populations.

The provisions of the Qoliqoli Bill that seek to protect indigenous peoples' rights to customary use of qoliqoli areas go beyond the requirements of international law. Under Convention 169, the rights of indigenous peoples to natural resources include usage rights but do not extend to exclusive ownership rights.<sup>43</sup> Although international law may evolve to embrace a

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<sup>41</sup> Anaya, INDIGENOUS PEOPLES, *supra* note 5, at 97.

<sup>42</sup> *Id.*, at 142 (emphasis added).

<sup>43</sup> See Convention 169, *supra* note 4, art. 15 ("These rights include the right of these people to participate in the use, management and conservation of these resources.").

broader conception of indigenous rights, the current law is framed by the provisions of Convention 169. The Qoliqoli Bill expands the rights of indigenous peoples by granting them proprietary rights to qoliqoli areas.<sup>44</sup> Such an expansion of rights from usage to complete ownership of natural resources exceeds the demands of international law.

## **II. By Granting Indigenous Peoples Rights Beyond Those Required by International Law, the Qoliqoli Bill May Violate the Internationally Protected Rights of Minority Populations to Equality and Freedom from Discrimination**

The Qoliqoli Bill seeks to protect and expand the rights of indigenous Fijians by granting qoliqoli owners proprietary rights to qoliqoli areas. Although international legal principles generally support the enactment of special measures to safeguard the rights of indigenous peoples,<sup>45</sup> the grant of exclusive proprietary rights exceeds what international law requires<sup>46</sup> and may violate the rights of minorities to equality and freedom from discrimination. Minority rights, like indigenous rights, find extensive protection in international law.

Several legal instruments recognize and codify the rights of all people to equality under the law and freedom from discrimination. The *Universal Declaration of Human Rights* (Universal Declaration) provides that “[a]ll human beings are born free and *equal* in dignity and rights”<sup>47</sup> and that “[e]veryone is entitled to *all* the rights and freedoms set forth in this Declaration, without distinction of *any* kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>48</sup> Although

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<sup>44</sup> Qoliqoli Act 2006, Bill No. 12 of 2006, Section 4(2) (hereinafter Qoliqoli Bill) (The bill defines proprietary rights and interests as “all legal interests and rights which are conferred upon the owners of native land under the Native Lands Act and the Native Land Trust Act”).

<sup>45</sup> See Convention 169, *supra* note 4, art. 4; See generally Part One *supra*.

<sup>46</sup> See Part Two (I) *supra*.

<sup>47</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 1, U.N. Doc A/810 (1948) (hereinafter Universal Declaration) (emphasis added).

<sup>48</sup> *Id.*, art. 2 (emphasis added).

the Universal Declaration does not explicitly recognize minority rights,<sup>49</sup> the universal nature of the individual rights set forth there guarantee minorities the right to be free from discriminatory practices. The Universal Declaration is not a treaty, and its establishment of equality and its prohibition of discrimination are not, therefore, directly binding on states,<sup>50</sup> but it is now widely accepted that these provisions have achieved the status of customary international law.<sup>51</sup>

The *International Covenant on Civil and Political Rights* (ICCPR), states: “All persons are *equal* before the law and are entitled without any discrimination to the *equal protection* of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>52</sup>

The ICCPR goes further than the Universal Declaration in identifying and protecting minority rights. Article 27 of the ICCPR states, “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.”<sup>53</sup> Although the ICCPR is legally binding upon

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<sup>49</sup> See John R. Valentine, *Toward a Definition of National Minority*, 32 DENV. J. INT’L L. & POL’Y 445, 453 (2004) (“Because the Universal Declaration of Human Rights adopted an individual rights approach to minority rights, no mention is made of minority rights in either the UN Charter or the Universal Declaration of Human Rights.”).

<sup>50</sup> James D. Willets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT’L & COMP. L. REV. 1, 10 (“The Universal Declaration is a resolution of the U.N. General Assembly. Resolutions are not treaties and therefore are generally not binding under international law.”).

<sup>51</sup> Hurst Hannum, *The State of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 342 (1995-96) (“Articles 1, 2 . . . express the fundamental right of equal treatment and non-discrimination with respect to guaranteed human rights ‘without distinction of any kind.’ It would seem difficult to deny the widespread acceptance of such a right to equal treatment under the law . . .”).

<sup>52</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S 171, art. 26 (entered into force Mar. 23, 1976) (hereinafter ICCPR) (emphasis added).

<sup>53</sup> ICCPR, *supra* note 52, art. 27; see Valentine, *supra* note 49, at 454 (“The ICCPR, by contrast, provides more protection than the mere nondiscrimination principle of the UDHR. Article 27 of the ICCPR specifically provides for the protection of the rights of minorities as minorities . . .”).

States Parties, Fiji has not ratified it.<sup>54</sup> Nevertheless, the ICCPR is critical to understanding Fiji's human rights obligations<sup>55</sup>, and rights to equality and non-discrimination have become well established as customary international law.

In 1992, the U.N. General Assembly adopted the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (Minority Rights Declaration). In accordance with Article 1 of the Declaration, "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity."<sup>56</sup> Under Article 4(1) of the Minority Rights Declaration, "States shall *take measures* where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms *without any discrimination and in full equality* before the law."<sup>57</sup> Article 4(5) provides, "States should consider appropriate measures so that persons belonging to minorities may participate *fully* in the economic progress and development in their country."<sup>58</sup> The Minority Rights Declaration is not binding on states, but it represents the international community's commitment to protect minority rights.

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<sup>54</sup> According to the United Nations Office of the High Commissioner for Human Rights 9 June 2004 update, available online at <http://www.unhchr.ch/pdf/report.pdf> (last visited October 20, 2006).

<sup>55</sup> The Fijian High Court acknowledges the importance and universal applicability of the ICCPR under the Fijian Constitution: "Fiji is not a signatory to the ICCPR. However, that does not mean the courts of this country can ignore its provisions given the clear and mandatory words of Section 43(2) which says 'courts ... must, if relevant, have regard to public international law.'" See *Reginald Alan Lyndon vs. Legal Aid Commission and The State*, [High Court] Misc. Case No. HAM 38 of 2002, 11 available at [http://www.humanrights.org.fj/pdf/Pdf\\_Compendium/Reginald%20Alan%20Lyndon%20vs%20Legal%20Aid%20Commission%20and%20the%20State.pdf](http://www.humanrights.org.fj/pdf/Pdf_Compendium/Reginald%20Alan%20Lyndon%20vs%20Legal%20Aid%20Commission%20and%20the%20State.pdf).

<sup>56</sup> United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Agenda Item 97(b), U.N. Doc. A/RES/47/135, art. 1 (1) (1993) (hereinafter *Minority Rights Declaration*).

<sup>57</sup> *Minority Rights Declaration*, supra note 56, art. 4(1) (emphasis added).

<sup>58</sup> *Minority Rights Declaration*, supra note 56, art. 4(5) (emphasis added).

Assessing the conformity of the Qoliqoli Bill with international law requires recognition of the unique Fijian context.<sup>59</sup> The drafters of the relevant international legal instruments, as well as legal scholars and commentators, have generally shown a tendency to adopt an assumption that indigenous peoples were minorities in their countries or, even if a majority of the population, were politically disempowered. Minority status has been an important factor in the protection of indigenous rights to the use of traditional lands. The United Nations Human Rights Committee, responsible for monitoring the implementation of the ICCPR, found:

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.<sup>60</sup>

The Human Rights Committee implicitly assumes that indigenous peoples are minority communities. Although the Committee makes clear that “positive legal measures” are desirable when indigenous peoples are in the minority, its comment provides no guidance when indigenous peoples are in the majority. Generally, the principles underlying minority rights and indigenous rights have tended to overlap;<sup>61</sup> as a result, they do not lend themselves to easy resolution when these rights come into conflict with each other.

International law embodies the proposition that legal rights to equality and freedom from discrimination may be limited in certain circumstances in order to preserve the rights of

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<sup>59</sup> Article 34 of Convention 169 notes the need to take into account “the conditions characteristic of each country.”

<sup>60</sup> Human Rights Committee, General Comment No. 23, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 51st Sess., para. 7 (1994).

<sup>61</sup> See Li-ann Thio, *Battling Balkanization: Regional Approaches Toward Minority Protection Beyond Europe*, 43 HARV. INT'L L.J. 409, 421 (“there is an overlap between ‘minorities’ and ‘indigenous peoples.’ Indeed, these terms have been used interchangeably by states in their reports and discussions before international bodies.”).

indigenous peoples or minorities.<sup>62</sup> However, if, in protecting the rights of one group, state action goes too far in limiting the rights of another, it may violate international law.<sup>63</sup> In Fiji, where the indigenous and minority populations are distinct, protections of indigenous rights must be balanced carefully with protections of the rights of the minority population. Where indigenous peoples are a majority of the population, as they are in Fiji, and the rights of the indigenous and minority populations diverge, the state bears the difficult responsibility of balancing the rights of both.

The Qoliqoli Bill transfers ownership rights of qoliqoli areas from the state to indigenous peoples. This transfer is likely to unfairly disadvantage the non-indigenous minority people who may currently use coastal areas for their own noncommercial and commercial purposes.<sup>64</sup> Current Fijian law provides extensive protection to the usage rights of indigenous peoples. The Constitution of Fiji contains provisions allowing the rights to equality and freedom from discrimination to be limited when “providing for the application of the customs” of indigenous peoples “to the holding, use or transmission of, or to the distribution of the produce of, land or fishing rights. . . .”<sup>65</sup> Although it is unclear from the text of the Constitution whether fishing rights are meant to be treated distinctly from rights to land, the distinctive qualities of those two types of resources suggests differentiation. In addition, an interpretation that grants more extensive rights to land ownership, and therefore less extensive rights over fisheries, is in

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<sup>62</sup> See Minority Rights Declaration, supra note 56, art. 8(3) (“Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not *prima facie* be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.”)

<sup>63</sup> Article 8 of Convention 169 recognizes this possibility, stating that indigenous peoples shall have rights “where they are not incompatible with fundamental rights defined by . . . internationally recognized human rights.” Article 34 also states that measures to protect indigenous rights do not “adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties . . . or agreements.”

<sup>64</sup> The bill prevents the full participation of minorities in the economic development of the nation, because the bill gives qoliqoli owners the ability to raise the costs of commercial activities without regard to national interest or market price. This consequence does not comport with Article 4(5) of the Minority Rights Declaration.

<sup>65</sup> Fiji Constitution of 1997, § 38(8)(a) (hereinafter Constitution).

accordance with the current understanding of international law (as reviewed in Part One). In contrast, the Qoliqoli Bill appears to conflate usage and ownership rights, granting indigenous peoples a full range of exclusive property rights to qoliqoli areas.<sup>66</sup> The effect of this change could be detrimental to Fiji's minority community.

If existing law already protects the usage rights of indigenous peoples from infringement by members of the minority community, the state should not take measures that would expand indigenous rights beyond what is necessary to protect use and would discriminate against the minority community. In a multiparty republic with an indigenous majority, the state has an obligation to ensure that legislation limiting the rights of the minority population advances a legitimate state interest and is necessary and proportional to the realization of that interest. Since Fiji already protects indigenous usage rights and the Constitution requires that the state pay qoliqoli owners royalties for money the state earns by selling resource extraction rights, it is unclear that this bill is necessary.<sup>67</sup> Furthermore, although the state's overall interest in protecting indigenous rights is legitimate and worthy, the bill appears to be disproportionate because it excludes all members of the minority community from an entire class of ownership rights. No provisions in the Qoliqoli Bill attempt to mitigate the negative impact the legislation may have on minorities. For these reasons, the Qoliqoli Bill's expansion of indigenous rights beyond the requirements of international law appears to discriminate against members of the minority community, in violation of the fundamental rights under international law to equality and freedom from discrimination.

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<sup>66</sup> Section 8 of the Qoliqoli Bill places some qualifications on the "exclusive possession" (for free maritime transportation, public non-commercial recreational activities, and free passage).

<sup>67</sup> Constitution, § 186.

### **III. By Inadequately Defining the Duties of the Native Land Trust Board and the Qoliqoli Commission to Consult with Qoliqoli Owners, the Qoliqoli Bill May Fail to Meet the Requirements of International Law**

The Qoliqoli Bill creates a complex system of state administration. It provides that the Native Land Trust Board (NLTB) will “administer and manage non-fisheries commercial operations within qoliqoli areas”<sup>68</sup> and proposes the creation of the Qoliqoli Commission (Commission) to “administer and manage fisheries operations within qoliqoli areas.”<sup>69</sup> The bill states that the Board must act “on behalf and for the benefit of the qoliqoli owners”<sup>70</sup> and “consult with the Commission and qoliqoli owners” before taking action.<sup>71</sup> The bill provides that “[i]f the Board is satisfied that the result of the consultation with the qoliqoli owners does not show a majority of support for the commercial operation, the Board shall not approve an application” but does not define what it means for the Board to “consult.”<sup>72</sup> The Qoliqoli Bill leaves ambiguous the extent and nature of the consultation with qoliqoli owners in which the state, through the NLTB, is required to engage. The bill also fails to specify the duties of the Qoliqoli Commission; without defining these duties, it cannot be assumed that the Commission will act on behalf of qoliqoli owners.<sup>73</sup>

A norm requiring consultation with indigenous peoples over decisions affecting them has emerged in international law.

It has become a generally accepted principle in international law that indigenous peoples should be consulted as to any decision affecting them. This norm is reflected in articles 6 and 7 of the I.L.O Convention No. 169, and . . . is also generally accepted by states in their contributions to discussions surrounding the draft declarations on indigenous peoples’ rights, at both the United Nations

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<sup>68</sup> Qoliqoli Bill, § 5(1)(a).

<sup>69</sup> *Id.*, § 5(1)(b).

<sup>70</sup> *Id.*, § 4(3).

<sup>71</sup> *Id.*, § 20(2).

<sup>72</sup> *Id.*, § 20(4).

<sup>73</sup> Qoliqoli Bill, §§ 10 and 11.

and the Inter-American system. This widespread acceptance of the norm of consultation demonstrates that it has become part of customary international law.

Ambiguity remains, however, as to the extent and content of the duty of consultation owed to indigenous peoples. In particular, there is much debate as to whether indigenous peoples' right to participation in decisions affecting them extend to a veto power over state action.<sup>74</sup>

Although the exact extent of the duty to consult is ambiguous, international law requires, at the very least, *meaningful* consultation. The vague language of the Qoliqoli Bill does not adequately ensure the rights of indigenous peoples to be consulted in decisions affecting their lives and rights.

Under the Qoliqoli Bill, qoliqoli owners ostensibly enjoy proprietary rights to qoliqoli areas. However, by having the Minister and Fijian Affairs Board appoint members of the Qoliqoli Commission, and by placing responsibility for managing certain operations in the qoliqoli areas in the hands of the NLTB, the bill gives the state a significant role in decisions affecting the qoliqoli owners. In effect, qoliqoli owners would enjoy proprietary rights until the NLTB identifies a commercial operator who makes an acceptable offer to lease the area in question. In any potential non-fisheries commercial agreement, the NLTB has the ultimate discretion to approve the agreement. The bill provides only an ambiguous requirement that the NLTB consult with affected qoliqoli owners and provides no guarantees that the Qoliqoli Commission will enjoy adequate independence from the state to fulfill its responsibilities in a way that ensures indigenous peoples' meaningful participation in decision-making.

Although the state would not formally retain control over the qoliqoli areas as a whole under the proposed legislation, it would act as a quasi-owner. In cases of dual ownership of land, where "the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands," Convention 169 requires governments to consult with the relevant

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<sup>74</sup> Anaya, *Resource Extraction*, supra note 34, at 7.

indigenous groups prior to exploration of the subsurface resources. Specifically, governments must “establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.”<sup>75</sup> The right to consultation is well established in international law, and the content of that consultation is intended to be robust, but the law as codified in Convention 169 stops short of requiring the actual consent of indigenous communities to resource extraction activities affecting their traditional lands. Nevertheless, consultation must meet a high standard in order to ensure that consultation is not formalistic or unresponsive to indigenous concerns. Convention 169 attempts to prevent such hollow consultation.

The ILO’s guide to Convention 169 for indigenous and tribal peoples expressly defines consultation as “[t]he process by which a government consults its citizens about policy or proposed actions. It is not consultation unless those consulted have a chance to *make their views known*, and to *influence* the decision.”<sup>76</sup> The ILO guide states, “This means that governments have to supply the enabling environment and conditions to permit indigenous and tribal peoples to make a *meaningful contribution*.”<sup>77</sup> In the context of dual ownership, indigenous peoples do not have the right to veto decisions, but consultations must be undertaken with the aim of achieving an agreement or consent to the measures proposed.<sup>78</sup> Recent developments in the international law protecting indigenous rights may obligate states to a requirement of actual

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<sup>75</sup> Convention 169, *supra* note 4, art. 15(2).

<sup>76</sup> Manuela Tomei & Lee Swepston, *International Labour Organization, Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169*, (July 1996), at <<http://www.ilo.org/public/english/employment/strat/poldev/papers/1998/169guide>> (last visited Oct. 9, 2003), Glossary (emphasis added) [hereinafter ILO Guide]; *also id.* at § 1 (calling for “*actual* consultation in which these peoples have a *right to express their point of view* and a *right to influence the decision*).

<sup>77</sup> *Id.*, at § 1 (emphasis added).

<sup>78</sup> *Id.*, at § 1.

consent.<sup>79</sup> Even if international law does not unequivocally require consent, however, states must ensure a process of meaningful consultation concerning decisions affecting indigenous peoples. Therefore, the Qoliqoli Bill must unambiguously ensure meaningful consultation with indigenous peoples before decisions affecting qoliqoli areas. The bill should define precisely how the NLTB is to determine when a consultation has or has not garnered sufficient support from qoliqoli owners<sup>80</sup> and provide clear guidelines for consultation in order to protect the rights of indigenous Fijian peoples.

## CONCLUSION

International law is constantly evolving. This simple fact makes definitive statements regarding its application to any particular area of law easy to make but difficult to prove. The documents, commentary and decisions reviewed here confirm: “There is . . . a clearly discernible trend toward legal recognition of the special spiritual bond between indigenous peoples and their land, the demarcation and legal guarantee, if not return of lands of traditional indigenous use, and a recognition of Native title conferring the right to, at least, use the resources of nature in the traditional, communal ways (hunting, fishing, for example).”<sup>81</sup> Although this trend may be moving toward the increased recognition of the rights of indigenous peoples to own and control lands, territories and natural resources, it is inherently limited by the fundamental tenets of the human rights discourse upon which it is based. As a result, it is our conclusion that international law does not require states to take measures to protect and expand indigenous peoples’ rights when their exercise may simultaneously contradict the principles of equality and minority rights. On the other hand, where protections of indigenous rights respect these

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<sup>79</sup> See *supra* note 34; *supra* note 38.

<sup>80</sup> See *supra* note 72.

<sup>81</sup> Wiessner, “Rights and Status,” *supra* note 2, at 93.

principles, a trend has emerged toward requiring that states consult indigenous peoples in a meaningful way when making decisions that affect their lives. Although international law does not necessarily demand that indigenous peoples consent to these decisions, it does require that they have the opportunity to be heard and influence the final outcome. We conclude that legislation affecting indigenous peoples must explicitly require consultation and define consultation in a way that meets the principles of international law.

For the foregoing reasons, we urge the relevant parties to reconsider the proposed Qoliqoli bill so as to ensure equal treatment under the law, the protection of minorities and meaningful consultation.

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