Emerging norms of international law confirm that indigenous people have a distinct status, have a right to self-determination, have rights to their traditional lands and resources, and are entitled to separate and preferential programs.

International law recognizes the right of self-determination of peoples as the most important of all human rights.

"Indigenous people" are "the living descendants of preinvasion inhabitants of lands now dominated by others," "culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest," with "ancestral roots...imbedded in the lands in which they live, or would like to live," who form "distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past."

The Global Treaty Regimes and Pronouncements by International Bodies.

Global and regional treaties that provide protection to indigenous people include the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by more than 145 countries, including the United States, the International Convention on the Elimination of All Forms of Racial Discrimination, which has been ratified by more than 155 countries, including the United States, and the Charter of the Organization of American States (OAS), which has been ratified by 35 countries, including the United States. The most relevant provision of the International Covenant on Civil and Political Rights is Article 27, which says that persons belonging to ethnic, religious, or linguistic minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

The International Covenant on Civil and Political Rights has created the Human Rights Committee, based in Geneva, to interpret the treaty and to monitor compliance with the its provisions. This Committee has 18 members, elected for four-year terms by the contracting parties. In the process of interpreting and applying Article 27, the Human Rights Committee has recognized the separate and unique status of native peoples in its comments and in a number of recent decisions. In its General Comment on Article 27, the Committee explained that this provision of the Covenant recognizes that countries have
affirmative obligations to protect and promote the rights of their indigenous peoples in particular, and it interpreted Article 27 as covering all aspects of an indigenous group’s survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices.

The Committee noted in particular 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.”

When reviewing the Report submitted by the United States in 1995, the Committee said that it was “concerned that the aboriginal rights of Native Americans may, in law, be extinguished by Congress” and recommended that “steps be taken [by the United States] to ensure that previously recognized aboriginal Native American rights cannot be extinguished.”

Similarly, in reviewing Canada’s recent report to the Committee, the Committee stated “the practice of extinguishing inherent aboriginal rights” was “incompatible” with the Covenant and that indigenous peoples have the right to control their land and resources and cannot be deprived of their means of subsistence.

The “General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR” and are “authoritative.”

Among the opinions handed down by the Human Rights Committee recognizing and protecting the rights of indigenous peoples are: Maori Fisheries Settlement Case (New Zealand), finding that 19 Maori claimants had standing to challenge the settlement of Maori fishing claims, reaffirming that “economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community,” finding in this case that the New Zealand government had been proceeding in good faith and had met the requirements of Article 27 but reminding the government to continue to do so and noting that the right of self-determination in Article 1 has the potential to be used by indigenous peoples to reinforce their rights under Article 27; Francis Hopu v. France, determining that France had violated the human rights of the indigenous people of Tahiti when it allowed the construction of a hotel on indigenous ancestral burial grounds; Kitok v. Sweden, ruling that Article 27 extends to economic activity “where that activity is an essential element in the culture of an ethnic community” and that the indigenous Sami People were entitled to exclusive rights to regulate the grazing of reindeer and were authorized to determine who was eligible to participate in this activity; Bernard Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada, ruling that Canada’s mistreatment and neglect of an Indian tribe – including expropriation of tribal land, granting of leases to developers, and delays in providing domestic procedures to address the claims – constituted a continuing violation of Article 27 of the International Covenant on Civil and Political Rights because they “threaten the way of life and culture of the Lubicon Lake Band;” and Lovelace v. Canada, recognizing the unique right of a native person who was ethnically a Maliseet Indian, and who had been absent from her home reserve for several years, to return to the reserve and live in community with other members of her native group.
The International Convention on the Elimination of All Forms of Racial Discrimination recognizing the unique right of a native person who was ethnically a Maliseet Indian, and who had been absent from her home reserve for several years, to return to the reserve and live in community with other members of her native group.

The International Convention on the Elimination of All Forms of Racial Discrimination is interpreted and implemented by the 18-member Committee on the Elimination of Racial Discrimination. This body has characterized the deprivation of indigenous peoples of their lands and resources as a form of racial discrimination, and has called upon state parties to take special measures to protect the cultural patterns and traditional land tenure of indigenous peoples, in order to avoid the kind of discrimination that has deprived indigenous peoples of the enjoyment of their distinct ways of life.

The Committee has also concluded that Australian legislation facilitating loss of aboriginal lands violated the Racial Discrimination Convention.

The Organization of American States (OAS) has established the seven-member Inter-American Commission on Human Rights to protect regional human rights and to address petitions filed against OAS member states. This Commission has consistently acted to recognize and protect the rights of indigenous peoples, and has stated that "special protection for indigenous populations constitutes a sacred commitment" of all members of the OAS.

Among its specific rulings involving indigenous peoples are Case No. 1802 (Ache Indians – Paraguay), denouncing Paraguay’s treatment of the Ache Indians and calling upon the Paraguayan government to take "vigorous measures" to correct these violations; Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin, reviewing the grievances of the indigenous peoples on Nicaragua’s Atlantic Coast, recommending measures to secure indigenous land rights and to develop a new institutional order that would better accommodate to the distinctive cultural attributes and traditional forms of organization of the indigenous groups, and interpreting Article 4 of the American Convention on Human Rights, which broadly affirms the right to life, as requiring states to take measure to secure the natural environments of “indigenous peoples [that] maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein;” and Case 7615 (Yanomami Indians – Brazil), ruling that Brazil had violated the human rights of the Yanomami Indians by allowing a highway to be built into their land, bringing disease and social disorder to the tribe, that Brazil had an affirmative duty to “take timely and effective measures to protect the human rights of the Yanomamis,” and that Brazil should proceed with plans to demarcate Yanomami lands and secure them from encroachment by outsiders. In 1978, Paraguay returned 21,884 hectares of land to the indigenous communities of Lamenxay and Riachito, pursuant to an initiative of the Inter-American Human Rights Commission, to settle Case No. 11,713.

In 2001, the Inter-American Court of Human Rights, established to interpret and
enforce the American Convention on Human Rights, recognized the collective rights of indigenous peoples to land and resources on the basis of Article 21(1) of the American Convention on Human Rights, and ruled that Nicaragua had violated international law when it granted a concession for large-scale logging to a Korean corporation and failed to recognize and protect the land rights of the indigenous Mayangna community of Awas Tingni.

In this important ruling, the Court concluded that “the international human right of property embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions, such that ‘possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property.’”

In its opinion, the Court explained that indigenous peoples have “a communitarian tradition regarding a communal form of collective property of the land,” and that “[i]ndigenous groups...have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”

These rights entitle the indigenous people “to have the state demarcate and title those lands in their favor in circumstances where those rights are not otherwise secure.”

In 1999, the Inter-American Commission ruled that the case filed against the United States by Mary and Carrie Dann, traditional Western Shoshone ranchers alleging infringement of ancestral land rights by the United States, was admissible and that the facts warranted consideration by the Commission. In 2003, the Commission issued its report on this long-festering dispute, and ruled that the United States had violated the rights to due process and property held by the Danns under international human rights law. Relying directly on ILO Convention No. 169 and the Proposed American Declaration on the Rights of Indigenous Peoples, the Commission concluded that international law now requires countries to respect:

1. the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of control, ownership, use and enjoyment of their territories and property;
2. the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and
3. where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.

Applying these principles to the question whether the United States could require the Danns and the other Shoshone to apply for permits to graze their cattle on their traditional
lands, the Commission concluded that the United States had failed to apply to the natives the same standards that it applies to other cases of takings of property.

The Commission added that international law requires "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent."

In October 2000, the Inter-American Commission declared admissible a petition filed in 1998 by the Toledo Maya Cultural Council (TMCC) on behalf of 37 indigenous Maya communities in the Toledo District of southern Belize protesting government grants of logging and oil concessions to more than 700,000 acres of rain forest in Maya traditional territories, and the government's failure to recognize and protect Maya traditional land and resource tenure outside of small, confining reservations that were established by the British colonial government decades ago.

In an extraordinary measure, the Commission specifically requested that the State of Belize suspend all permits, licenses, and concessions for logging, oil exploration and other natural resource development activity on lands used and occupied by the Maya communities in the Toledo District until the Commission has had the opportunity to investigate the substantive claims raised in the case. In its ruling on the merits in 2004, the Commission reaffirmed that international law upholds indigenous peoples’ land and resource rights and that the granting of the concessions by the Belize government "without effective consultations with and the informed consent of the Maya people" constituted a violation of their human rights.

These consistent rulings of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights give teeth to the treaties and principles governing the status and rights of indigenous peoples. Indigenous peoples have the right to political autonomy, they have enforceable rights to lands and resources, and they have the right to be involved in any decisions affecting their property rights in these lands and resources.

Customary International Law Also Recognizes and Protects the Rights of Indigenous Peoples.

In addition to these treaty-based norms and the opinions issued by treaty-created bodies recognizing the rights of indigenous peoples to their lands, resources, cultural practices, and autonomy, the rights of indigenous peoples are also recognized under customary international law. Norms of customary law arise when a preponderance of states and other authoritative actors agree upon a common understanding of the norms' content and accept a legal obligation to act in conformity with the norms. Such binding norms can be determined by examining practices, decisions, and actions undertaken with a recognition that these actions are legally required. Customary international law
principles regarding indigenous peoples can thus be determined by examining the specific actions taken by countries with regard to their own indigenous peoples, by statements made by countries in contexts in which they are explaining their views of international law, by the texts of international treaties (even if they are not universally ratified), and by resolutions of international and regional organizations.

Efforts by scholars to explain and codify customary international law constitute another reliable source of these norms.

Customary international law principles are binding and are enforceable.

Two key sources of evidence of the customary international law norms regarding indigenous people are the International Labor Organization’s Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, and the Draft Declaration of the Rights of Indigenous Peoples, now under consideration at the United Nations.

ILO Convention No. 169 has already been ratified by countries now under consideration at the United Nations.

ILO Convention No. 169 has already been ratified by countries – mostly in the Western Hemisphere – that comprise a substantial part of the indigenous world. As of January 2006, this treaty had been ratified by 17 countries: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru, and Venezuela.

The treaty was developed by a 39-nation drafting committee, with representatives from employee and employer groups as well as governments. This convention is “meaningful as part of a larger body of developments that can be understood as giving rise to new customary international law with the same normative thrust.”

Its principles can thus be viewed as evidence of existing customary international law.

ILO Convention No. 169 is explicit in requiring governments to assist native peoples in regaining their lands and resources. Article 14 states:

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. 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 for their subsistence and traditional activities...

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Other provisions of ILO Convention No. 169 also require states to take an active role in protecting the rights of the indigenous peoples within their borders. Article 2 of the convention calls for governments to play an active role with indigenous peoples in
developing and protecting their rights. Article 4 requires governments to take “special measures” to safeguard the institutions, property, and culture of native people, and Article 6.1.c requires governments, in appropriate situations, to provide the resources necessary to enable native people to establish their own institutions and initiatives.

In 1982, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities created the Working Group on Indigenous Populations to draft a declaration of indigenous rights. During the following 12 years, the Working Group conducted meetings and collected comments, and in August 1994 it presented its Draft Declaration on the Rights of Indigenous Peoples to the United Nations Commission on Human Rights.

Article 27 of the current version of the Draft Declaration on the Rights of Indigenous Peoples emphasizes the right of indigenous peoples to their lands and resources: Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. When this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

The Human Rights Commission has been considering this Draft Declaration since 1995. Among the issues that still divide states is whether the concept of “indigenous peoples” can be applied to populations in Asia in the same manner that it is applied to populations in the Western Hemisphere and the Pacific Islands. Some Asian countries, particularly the People’s Republic of China, resist the idea that it is useful to identify “prior occupants” of Asian countries and that the process of doing so would undermine “other values with which the state is properly concerned.”

Others have argued that “broadening the concept of ‘indigenous peoples’” to cover tribal and mountain peoples in Asia “will weaken it” by watering down central tension between native inhabitants and colonizing settlers.

Although the “Draft Declaration” has not yet emerged as a formally-adopted “Declaration,” two important steps have been taken recently to protect and promote the rights of indigenous peoples. In 2000, the U.N. Economic and Social Council established the Permanent Forum on Indigenous Issues, as a subsidiary organ of the Council.

And on April 24, 2001, the 53 members of the Human Rights Commission adopted a resolution appointing a Special Rapporteur on Human Rights and Indigenous Issues with the responsibility to protect and monitor the human rights and fundamental freedoms of indigenous peoples.

Although “not all are satisfied with all aspects of the draft declaration...a new common ground of opinion exists among experts, indigenous peoples, and governments about indigenous peoples’ rights and attendant standards of government behavior, and
that widening common ground is in some measure reflected in the sub-commission
draft.”

Although “the specific contours of these norms are still evolving,” it is now established
that indigenous peoples have rights under customary international law and that
governments have an obligation to protect those rights.

State Practice Confirms the Obligation to Recognize the Separate and Distinct Status of
Indigenous Peoples, and Their Rights to Land and Resources.

The actions of numerous states to define and protect the rights of the indigenous
peoples living within their borders confirm that compelling state interests exist to provide
such protections. Among the many such actions that could be mentioned would be the
establishment in New Zealand of the Waitangi Tribunal in 1975, followed by the
systematic examination and settlement of the claims of all Maori groups. In these
settlements, the Maori have received land, but have also received factories, fishing
vessels, fishing rights (which are privately-owned in New Zealand), and money, and are
now Maori groups are major economic participants in the country’s economy.

New Zealand’s courts have cited decisions from other Commonwealth countries to
explain the New Zealand government’s fiduciary responsibility toward indigenous
peoples.

The Maori utilize no blood quantum, but include all persons with any amount of Maori
ancestry among the groups that share the benefits of these settlements.

In Australia, in the case of Mabo v. Queensland [No.2], the High Court recognized the
underlying land and resources rights of the aboriginal people, relying on the principles of
customary international law to guide them in rejecting the notion that the lands of
Australia were terra nullius when white settlers arrived.

Section 35, Schedule B of Canada’s 1982 Constitution recognizes and affirms the
“existing aboriginal and treaty rights of the aboriginal peoples of Canada.” In 1992,
Canada’s Supreme Court officially recognized the nation’s fiduciary duty to its
indigenous peoples and ruled that any legislative enactment that might impact existing
aboriginal rights triggers a strict-scrutiny level of judicial review.

In August 1998, Canada granted sovereign autonomy to Nisga’a people in British
Columbia, conveying to them control of resources and internal affairs in an area of about
750 square miles near southern Alaska.

Even more dramatically, on April 1, 1999, Canada formed the new territory of Nunavut,
containing 1,900,000 square kilometers (one-fifth of Canada) which will be governed by
the indigenous Inuit people (because they constitute 82% of the population of that vast
area), and also conveyed to the Inuit People fee simple title to 352,191 square kilometers
(4% of all of Canada), including lands containing valuable mineral resources.

The Canadian Supreme Court has permitted indigenous groups to present oral history to
substantiate the boundaries of their ancestral homelands, has accepted the customs of
indigenous peoples as part of the common law of Canada, and requires good-faith
consultation whenever the land rights of indigenous peoples are at issue.
On March 27, 1997, Japan’s Sapporo District Court issued a landmark decision declaring illegal a governmental public works project based on the long history of unjust deprivations imposed upon the indigenous Ainu People by the dominant Japanese culture, and ruling explicitly that Article 27 of the International Covenant on Civil and Political Rights and the Japanese Constitution required the Japanese government to respect the rights of the Ainu People.

The very next day, on March 28, 1997, the Prime Minister of Japan, Ryutaro Hashimoto, acknowledged as a “historical fact” that the Ainu People are Japan’s indigenous people, and later that same year, the Japanese Diet enacted a law designed to protect and preserve Ainu culture and to disseminate knowledge about Ainu tradition.

Malaysia’s Federal Constitution of 1957 gives the federal government responsibility for the welfare of the indigenous peoples of that country and, in Section 8(5)(c), protects their land rights, which have also been protected in judicial decisions. Similarly, Article 12(5) of the Philippines’ Constitution protects the “ancestral lands” and “ancestral domain” of the country’s “indigenous cultural communities.” Additional Article 10, which was added to the Constitution of Taiwan (Republic of China) in 1992, specifically recognizes the separate and distinct rights of the indigenous peoples to land, water, culture, economic development, and political participation.

Brazil’s Constitution guarantees to indigenous peoples permanent possession and exclusive use of their traditional lands, and as of February 1999 Brazil had registered 315 indigenous areas covering 738,344 square kilometers.

Colombia’s 1991 Constitution recognizes and protects the ethnic and cultural diversity of the nation, affords indigenous communities a high degree of political and administrative autonomy, and respects their institutions of self-government, including indigenous courts applying traditional customary standards.

Venezuela’s Constitution, in Article 77, provides special protection for indigenous peoples, and the Venezuelan Supreme Court in 1997 ordered the State of Amazonas to include indigenous peoples in decisionmaking regarding restructuring of its local government.

Peru’s Constitution protects the communal lands of its indigenous peoples and allows them to use their own languages and protect their cultural identities. Article 84 of Ecuador’s 1998 Constitution recognizes the collective rights of the indigenous peoples including the right to preserve their community lands from seizure or taxation. Constitutional reform in Bolivia recognized the rights of its indigenous peoples to assume the ownership of their traditional lands.
Chile enacted a Ley Indigena in October 1993 that recognized the rights of indigenous peoples under law to their culture and to the lands they have historically occupied.

Nicaragua’s Constitution recognizes the communal and cultural rights of the indigenous peoples of the Atlantic Coast and legislation has created autonomous regions for these peoples.

In the internationally-mediated settlement of its civil war, the government of Guatemala agreed with the opposition to recognize the special status of indigenous peoples and their rights to the lands that have historically belonged to them.


Mexico’s legislature enacted a law recognizing native rights in April 2001 that did not provide everything the indigenous groups wanted, but nonetheless recognized their separate status and autonomous rights.

A prominent scholar of indigenous rights, after surveying pertinent domestic laws on a global scale and analyzing recent treaty law and international legal practice, has concluded that customary international law now recognizes the following rights of indigenous peoples:

First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language and their traditional ways of life.
Second, they hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice. Third, indigenous peoples have a right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.


The rights of native or indigenous peoples to their lands and resources are property rights that are protected under international law, just like any other form of property rights.


The rights of indigenous peoples to exercise their cultural practices are recognized and protected in Article 27 of the International Covenant on Civil and Political Rights, as explained above.

The rights of indigenous peoples to a degree of political autonomy to control their own affairs is recognized in ILO Convention No. 169, the Draft Declaration on the Rights of Indigenous Peoples, and in the numerous actions undertaken by nations around the globe to recognize the separate status of the native peoples within their borders described above.
These actions are mandated by international law and are not any form of “racial discrimination.” This result is clear from the action taken by the Committee on the Elimination of Racial Discrimination, described above, which has explicitly called upon contracting parties to take special measures to protect the cultural practices and land rights of indigenous peoples.

As one group of commentators has explained, the Convention prohibits “unlawful discriminations,” but not those “differences” or “differentiations” that result from programs or actions that “establish a demonstrable, rational relation to individual potentialities for self-development and contribution to the aggregate common interest.”

When it ratified the International Covenant on Civil and Political Rights, the United States adopted a formal “understanding” that permits certain forms of special measures. The understanding states in pertinent part:
The United States understands distinctions based upon race, colour, ... national or social origin, ... birth or any other status—as those terms are used in Article 2, paragraph 1 and Article 26—to be permitted when such distinctions are, at a minimum, rationally related to a legitimate governmental objective.

In the Report of the Senate Committee on Foreign Relations addressing the Covenant, it was noted that the Committee created by the Covenant had interpreted the Covenant to allow certain forms of “differentiation”:

In interpreting the relevant Covenant provisions, the Human Rights Committee has observed that not all differentiation in treatment constitutes discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. In its General Comment on nondiscrimination, for example, the Committee noted that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.

This “understanding” may be viewed as a reservation to the Covenant, which is compatible with the object and purpose of the treaty as well as its authoritative interpretation by the Human Rights Committee.

As such, it affirms that certain special measures are permitted as a matter of U.S. treaty law (i.e., they are “permitted” whenever such distinctions are rationally related to a legitimate governmental objective). At a minimum, the U.S. understanding contains a formal expression of federal policy relevant to the propriety of special measures, the interpretation of other federal laws, and the operation of federal preemption.

Thus, both the International Covenant on Civil and Political Rights and the Racial Discrimination Convention recognize that not all forms of differentiation are impermissible. In the case of the rights of indigenous peoples, governments are, in fact, required by international law to take steps to recognize and protect these rights, as explained above, and such steps do not constitute racial discrimination.

The Protection of Indigenous Rights Under U.S. Law

The United States Constitution and the early decisions of the U.S. Supreme Court
recognized the separate and distinct status of the native peoples living within its borders. Article I, Section 8, Clause 3 of the U.S. Constitution granted power to Congress to regulate commerce with “Indian tribes.” At the time our Constitution was drafted, Indian tribes were viewed as separate nations — truly “nations within a nation” — and the relationship between the federal government and the tribes was formal in nature. Indians were not permitted to be citizens during the early years of our nation, even if they left their tribe or their tribal lands.

The early decisions of the U.S. Supreme Court confirmed this formal relationship, and stated that state governments could not regulate activities on tribal lands and that state officials could not even enter such lands without invitation.

During the nineteenth century, however, the U.S. government engaged in many acts of mistreatment toward the Indians, moving them from one area to another and seeking to suppress their unique cultures. For almost a century after the U.S. Civil War, the official U.S. policy was one of “assimilation,” and the U.S. government sought to reduce the number of tribes and refused to recognize new ones. In the twentieth century, efforts began to protect the rights of native groups, and on July 8, 1970, President Richard M. Nixon sent a Special Message to Congress announcing a clear policy that the natives within the country were entitled to autonomy and the right to manage their lands and resources. The following year, a statute was passed to transfer lands to Alaska’s native peoples.

Since then, many native groups have recovered lost lands and resources. Today, more than 550 native groups have formal recognition by the United States government.

The U.S. Supreme Court ruled in Morton v. Mancari and its progeny that preferences for native peoples are viewed as "political" rather than "racial" classifications, and are to be evaluated under a "rational-basis" rather than a "compelling-state-interest" or "strict-scrutiny" test. The Mancari case upheld a hiring preference for Indians in federally-recognized tribes for positions in the Bureau of Indian Affairs (BIA), which had been legislatively mandated in 25 U.S.C. sec. 472. In an opinion written by Justice Harry Blackmun, the Court viewed this hiring preference not as a "racial" preference but as "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency."

The one major indigenous group in the United States that has been left out of the efforts to address past injustices has been the Native Hawaiian People. They are one of the largest groups of indigenous peoples in the United States, but they stand alone in never having been granted a settlement or access to a claims commission by the United States government. The deprivations and injustices they have suffered have been well-documented. Congress acknowledged in the 1993 Apology Resolution that the United States violated international law when it provided the crucial support to the overthrow that allowed it to succeed, and Congress called for a “reconciliation”
between the United States and the Native Hawaiian People. Although some steps have been taken in that direction, the return of land and resources to the Native Hawaiian People remains as unfinished business, and the failure of the United States to address and resolve the claims of the Native Hawaiians remains as a significant blemish on our national character.


Article 1 of the International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171, states that “All peoples have the right of self-determination. By
virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The Covenant was ratified by the United States on June 8, 1992.

In a report commissioned by the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Special Rapporteur Jose Martinez Cobo described the right of indigenous peoples to self-determination as follows: Self-determination, in its many forms, must be recognized as a basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future. ... Self-determination constitutes the exercise of free choice by indigenous peoples, who must to a large extent create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they may live and to set themselves up as sovereign entities. The right may in fact be expressed in various forms of autonomy within the State.


See also Torres, supra note 1, at 142: “Self-determination can take a variety of forms along a spectrum from autonomy in particular subject matters such as cultural concerns, to full political autonomy, in which indigenous populations establish their own governments, design their own political systems, and enforce their own laws.”

S. James Anaya, Indigenous Peoples in International Law 3 (1996). See also Henry J. Steiner and Philip Alston, International Human Rights in Context 1006-07 (1996) (defining “indigenous people” as “communities or nations having an important historical continuity with societies that inhabited the same general territory and that predated colonization or invasion by other peoples” and who “seek to preserve their ethnic and cultural identity...to continue as distinctive communities with their own social and legal institutions”); International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), art 1, June 27, 1989, 28 I.L.M. 1382 (1989) (defining “indigenous peoples” as those “who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”); Siegfried Wiessner, Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis, 12 Harv. Hum. Rts. J. 57, 57 n.3 (1999) (defining “indigenous peoples” as “groups traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond. These peoples are, and desire to be, culturally, socially and/or economically distinct from the dominate groups in society, at the hands of which they have, in past or present, suffered a pervasive pattern of subjugation, marginalization, dispossession, exclusion and/or discrimination.”).

ICCPR, supra note 2.

International Convention on the Elimination of All Forms of Racial Discrimination,


This treaty, like all other treaties ratified by the United States, is part of the supreme law of the land under Article VI, clause 2 of the U.S. Constitution. Although the United States issued a declaration of partial non-self-execution when it ratified this Covenant in 1992, this declaration (as affirmed by the Executive Branch) means only that the treaty does not itself create a private right of action, but it does not limit the status of the treaty as the supreme law of the land nor does it limit the relevance, applicability, and force of the treaty through statutes such as 42 U.S. C. § 1983, 28 U.S.C. § 1331, and many others. See, e.g., United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992) (indicating that treaties have the force of law even if they are not self-executing). The declaration expressly does not apply to or limit the reach of Article 50, which requires that “[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.” See United States v. Duarte-Acero, 208 F.3d 1282, 1284 (11th Cir. 2000) (despite declaration, ICCPR is supreme law of the land); id., 132 F. Supp.2d 1036, 1040 n.8 (S.D. Fla. 2001) (declaration does not apply when raising “ICCPR claims defensively”); Jordan Paust, Customary International Law and Human Rights Treaties Are Law of the United States, 20 Mich. J. Int’l L. 301, 322-27 (1999); David Sloss, Ex Parte Young and Federal Remedies for Human Rights Treaty Violations, 75 Wash. L. Rev. 1103, 1108 & n.19, 1121 & n.79, 1123 & n.85, 1129-30, 1141-42, 1199 (2000); Jordan J. Paust, Joan Fitzpatrick, Jon M. Van Dyke, International Law and Litigation in the U.S. 75-76, 190, 193-94, 397-98 (West Group, 2000).


Maori Fisheries Settlement Case (New Zealand), Human Rights Committee, CCPR/C/70/D/547/1993 (Nov. 15, 2000).
Id., para. 9.2.


International Convention on the Elimination of All Forms of Racial Discrimination, supra note 5.

CERD/56/Misc.42/rev.3.


Inter-American Commission on Human Rights Press Communiqué No. 04/98 (March
Article 21(1) of the American Convention on Human Rights, supra note 25, states that: “Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interests of society.”


Awas Tingni Case, supra note 30, para. 149.


ILO Convention 169, supra note 3.


Anaya, Multicultural State, supra note 33, at 47; Anaya, Participatory Rights, supra note 31, at 15 (both citing Mary and Carrie Dann v. United States, Case No. 11.140, Report No. 75/02, Inter-Amer. C.H.R. para. 130, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2003)).

Dann Case, supra note 37, paras. 144-45.

Id., para. 131.

Case No. 12.053 (IACHR).

See Jordan J. Paust, International Law as Law of the United States 3-4 (1996), and references cited
See id. at 3, 19-21 n.17.
ILO Convention 169, supra note 3.


Anaya, Indigenous People in International Law, supra note 3, at 50.

Language in the current recent draft also states that “[i]ndigenous peoples have the collective right to live in freedom, peace and security as distinct peoples ...” and that they have the right to be protected against “any form of assimilation or integration by any other cultures ....” Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1993/29, Annex I, at 50, arts. 6 and 7(d)(1993). The Draft Declaration also states that indigenous peoples have the right to autonomy in internal and local matters such as education, information, media, culture, religion, health, housing, employment, social welfare, land and resource management, and internal taxation. Id. art. 31.

Id. at 447.


Anaya, Indigenous Peoples in International Law, supra note 3, at 53 (emphasis in original). Id. at 57-58.


Treaty of Waitangi Act 1975 (which created the Waitangi Tribunal), sec. 2 (defining “Maori” as “a person of the Maori race of New Zealand; and includes any descendant of such a person”).


Sparrow v. R., (1990) 2 S.C.R 1075, 1108 (Canada) (“The relationship between the government and the aboriginal peoples is trust like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.”).


See Kingsbury, “Indigenous Peoples” in International Law, supra note 50, at 431-32 (discussing recent developments in Taiwan regarding its aboriginal peoples).

Constitution of the Federal Republic of Brazil, Article 231; Wiessner, supra note 3, at 79.

1991 Constitution of Colombia, Article 330; Wiessner, supra note 3, at 79-80. Wiessner, supra note 3, at 81. Id. at 82-83.

Bolivian Constitution of 1965, as amended in 1994, Article 171; Wiessner, supra note 2, at 83.


Political Constitution of Nicaragua, Articles 5, 89, and 180; Wiessner, supra note 3, at 85-86.


Wiessner, supra note 3, at 127.

See, e.g., Article 17(1) of the Universal Declaration of Human Rights, which explicitly recognizes the right to own property communally with others in a group: “Everyone has the right to own property alone as well as in association with others.” (Emphasis added.)


Understanding No. 1, reprinted in Paust, Fitzpatrick, Van Dyke, supra note 7, at 192, and in 31 I.L.M. 645, 659 (May 1992) (earlier draft, adopted later by the Senate and President).


Among the many U.S. Supreme Court cases that follow Mancari and uphold preferential or separate programs for native peoples are Antoine v. Washington, 420 U.S. 194 (1975); Fisher v. District County Court, 424 U.S. 382 (1976); Moe v. Confederated Salish and Kootanai Tribes of Flathead Indian Reservation, 425 U.S. 463 (1976); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); United States v. Antelope, 430 U.S. 641 (1977); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979); Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); and Washington v. Washington State Commercial Fishing Vessel Association, 443 U.S. 658 (1979). In each of these decisions, the Court ruled unanimously that special treatment for native groups is permitted as long as the legislative program is rationally related to the government’s responsibility to promote or protect the self-governance, self-sufficiency, or culture of the native group concerned. See also County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 253 (1985) (citing Mancari favorably).
