

ARTICLE

CUSTOMARY INTERNATIONAL LAW AND THE *DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*

By Sarah Nykolaishen*

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INTRODUCTION

The status of indigenous peoples in international law is a topic of growing interest.¹ One area of debate concerns whether there is an international custom that protects the rights of indigenous peoples to their ancestral territories.² This paper seeks to add to this literature by examining the effect of the *Declaration on the Rights of Indigenous Peoples*³ (the “*Declaration*”), adopted in 2007 by the United Nations General Assembly (UNGA), on customary international law. As a whole, the *Declaration* reflects the view that indigenous rights should be protected under a specific regime, or that indigenous rights cannot be subsumed under general human rights law.⁴ The *Declaration* reflects a number of significant principles, including the right to self-determination, the importance of consultation and cooperation between states and indigenous peoples, and recognition of the unique relationship between indigenous peoples and their lands and territories.⁵ Specifically, this paper asks, does the *Declaration* provide evidence of an existing

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1. See Russel Lawrence Barsh, “Indigenous Peoples: An Emerging Object of International Law” (1986) 80 AJIL 369; Chidi Oguamanam, “Indigenous Peoples and International Law: The Making of a Regime” (2004) 30 Queen’s LJ 348; Nigel Bankes, “International Human Rights Law and Natural Resources Projects Within the Traditional Territories of Indigenous Peoples” (2010) 47 Alta L Rev 457 [Bankes].
2. Two authors look specifically at this question: S. James Anaya, *Indigenous Peoples in International Law*, 2d ed (Oxford: Oxford University Press, 2004) [Anaya], and Seth Korman, “Indigenous Ancestral Lands and Customary International Law” (2010) 32 U Haw L Rev 391 [Korman].
3. GA Res 61/295, UNGAOR, 2008, Supp No 49, UN Doc A/61/49, 15 [Declaration].
4. For an overview of the debate on whether indigenous claims are adequately protected under general human rights law see Jérémie Gilbert, “Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples” (2007) 14 Int’l J on Minority & Group Rts 207.
5. The right of self-determination is recognized in Article 3 of the *Declaration*, *supra* note 3, which reads: “Indigenous 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.” Article 19 reflects the principles of consultation and cooperation and reads: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Indigenous rights to land and resources are protected under Articles 25 through 27, as well Article 32. These articles are discussed in more detail below.

international custom that requires states to recognize the right of indigenous peoples to occupy and benefit from their ancestral territories, and which in turn places limits on how states can deal with lands claimed by indigenous peoples as ancestral territories?

The paper begins by introducing the concept of international custom. It then examines the basis for the existence of an international custom that obliges states to recognize indigenous rights to ancestral territories, particularly in the context of decisions about resource development. A key matter in this debate is the extent to which the *Declaration* should be taken as evidence of customary international law. The case of *Texaco v. Libya*⁶ (“*Texaco*”), as well as scholarly commentary, establishes useful criteria to evaluate the strength of UNGA declarations as evidence of customary international law. These criteria include: how representative the signatory states are of the international community as a whole, the novelty of the declaration’s contents, and publicly expressed intentions of the states that voted on the declaration in question. Using these criteria, this paper concludes that the *Declaration* itself does not provide strong evidence of an existing international custom respecting the duty of states to recognize indigenous claims to ancestral territories and to limit resource development accordingly. There are, however, signs that the *Declaration* is advancing the development of such an international custom. In particular, jurisprudence from the Inter-American Court of Human Rights, the Supreme Court of Belize, and the Third Section of the European Court of Human Rights refers to specific provisions of the *Declaration* as informing state obligations.

I. INTERNATIONAL CUSTOM

International custom is a formal source of international law.⁷ States are bound to comply with custom regardless of whether they are a party to a treaty or other international instrument codifying the rule.⁸ In general, writers and jurists agree that establishing customary obligations on states involves demonstrating two elements: general state practice (widespread norm-conforming behaviour) and *opinio juris* (the belief by states that the practice is undertaken as an obligation of international law).⁹ Ian Brownlie notes that in many cases, the International Court of Justice (“ICJ”) will “assume the existence of an *opinio juris* on the bases of evidence of general practice”; however, the ICJ has also taken a rigorous approach to the element of *opinio juris*, and called for positive evidence showing that states regard certain conduct as a requirement of international law.¹⁰ For example, in the *North Sea Continental Shelf Cases*,¹¹ the ICJ considered whether a method for delimitating or fixing the boundaries of the continental shelf – “the equidistance principle” – had attained the status of customary international law since the coming into force of the 1958 *Convention on the Continental Shelf* (the “*Convention*”), which

6. (1978) 17 ILM 1 (International Arbitral Tribunal).

7. Article 38 (1) of the *Statute of the International Court of Justice*, permits the Court to apply the following to determine the outcome of a dispute in accordance with international law: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states, (b) international custom, as evidence of a general practice accepted as law, and (c) the general principles of law recognized by civilized nations. See also Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford: Clarendon Press, 2008) at 5 [Brownlie] where Brownlie notes that, “Article 38 is generally regarded as a complete statement of the sources of international law.”

8. Unless the state can show that it has persistently objected to the rule.

9. Richard Price, “Emerging Customary Norms and Anti-Personnel Landmines” in Christian Reus-Smit, ed, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 106 at 107. See also *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] ICJ Rep 226 at para 64 [*Nuclear Weapons Case*].

10. Brownlie, *supra* note 7 at 8-9.

11. [1969] ICJ Rep 3 [*North Sea Cases*].

codified the equidistance principle. The ICJ noted that states that were not parties to the *Convention* had applied the equidistance principle on several occasions since the *Convention* came into force. Nevertheless, “there was no evidence that [the states] had acted because they had felt legally compelled to draw [boundaries] in that way by reason of customary international law.”¹² Hence, the ICJ was unwilling to infer *opinio juris* from state practice in this case.¹³

In some instances, state practice can be inferred from the *opinio juris* embodied in multilateral treaties and declarations by international organs such as the UNGA. The decision of the ICJ in *Military and Paramilitary Activities in and against Nicaragua*¹⁴ (“*Nicaragua*”) exemplifies this way of establishing custom. According to Anthea Elizabeth Roberts, in *Nicaragua* the ICJ focused on UNGA resolutions as evidence of state belief or *opinio juris* respecting the norms of non-use of force and non-intervention.¹⁵ This identification of *opinio juris* was not accompanied by a serious inquiry into state practice. Rather, the ICJ held that it was sufficient for state practice to be generally consistent with statements of rules, “provided that instances of inconsistent practice were treated as breaches of the particular rule rather than as generating a new rule.”¹⁶

A wide variety of material sources can be used to argue the existence of an international custom, including the following items listed by Brownlie:

... diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, executive decisions and practices, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.¹⁷

The argument that a particular norm represents an international custom that is binding on all states is strengthened when that norm is reflected or codified in several of the above-listed sources, as opposed to when the norm appears in just one source. Similarly, when a norm is contained in a convention that is binding on a large number of states, it is more likely to be identified as an international custom, as opposed to when the norm exists in a convention to which only a few states are signatories.¹⁸

12. *Ibid* at para 78.

13. In this case there may also have been some question as to whether the state practice (i.e. application of the equidistance principle) was widespread enough to give rise to an international custom.

14. [1986] ICJ Rep 14 [*Nicaragua*].

15. Anthea Elizabeth Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation” (2001) 95 *American Journal of International Law* 757 at 758 [Roberts]. For instance, the ICJ relied on the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), UNGAOR, 25th Sess, Supp No 28, UN Doc. A/8028 (1970) 121 [*Friendly Relations and Co-operation among States*].

16. Roberts, *supra* note 15 at 758-759.

17. Brownlie, *supra* note 7 at 6-7.

18. *Ibid* at 13.

II. THE CASE FOR A CUSTOM PROTECTING INDIGENOUS RIGHTS TO ANCESTRAL LANDS

This section reviews material sources, including conventions and international judicial decisions, which form a body of evidence to support the existence of an international custom protecting indigenous rights to ancestral lands.¹⁹ After outlining material sources, this paper considers the significance of the *Declaration* with respect to the existence of a custom that the sources collectively support.

In principle, a convention is only binding on its parties. However, conventions can also provide evidence of customary international law that would apply to all states. As mentioned above, a convention may provide strong evidence of an international custom if it has widespread support and if it can be demonstrated that the parties to the convention accept its provisions as rules of law. Similarly, the existence of several bilateral or regional conventions that embody the same norm can provide strong evidence of a custom.

A. ILO Convention No. 169

The *International Labour Organization Convention on Indigenous and Tribal Peoples, Convention No. 169*²⁰ of 1989 (“*ILO Convention No. 169*”) is an important material source of an international custom respecting indigenous rights to ancestral lands. Key provisions include Article 14(1), which obliges signatories to recognize indigenous peoples’ rights of ownership and possession over traditionally occupied lands and to take measures to secure indigenous access to those lands. Article 6(1)(a) requires governments to consult indigenous peoples before implementing legislative or administrative measures that may affect indigenous peoples directly. Article 15 requires consultation with affected indigenous peoples when development projects are proposed that may have an impact on ancestral lands, even when indigenous peoples do not own the resources on those lands.

ILO Convention No. 169 has only been ratified by 20 countries. This may suggest that it carries little weight as a material source of international custom. However, many Latin American countries with large indigenous populations have ratified *ILO Convention No. 169*. Moreover, *ILO Convention No. 169* has, arguably, had a significant impact in some of the signatory countries. For example, in Norway, ratification of *ILO Convention No. 169* led to the creation of domestic laws expanding rights for the Sami people, an indigenous group in the north of the country.²¹

19. It is beyond the scope of this paper to review the practices of individual states with respect to indigenous property rights, however, it has been argued that state practice also supports such a custom. Korman, *supra* note 2 at 410-442 reviews in some detail the state practice and *opinio juris* of several individual states with large indigenous populations. Korman concludes on page 441: “Unlike the relatively unanimous blanket prohibitions on slavery or genocide that have led to the establishment of international custom or *jus cogens*, each of the aforementioned countries has taken a relatively unique approach in their treatment of indigenous nationals, and each has granted different types and levels of property recognition.” Nevertheless, “[T]here is, however, a set of common denominators, certain principles on which most of the aforementioned nations seem to agree. For example, the concept that indigenous peoples have some inherent right to live on their ancestral land may appear overly simple, yet such action is practiced almost uniformly, and many nations... have expressed validation of such a norm in both domestic law and in the international arena.”

20. 27 June 1989, 1650 UNTS 383 (entered into force September 5 1991).

21. Korman, *supra* note 2 at 445. For more on the impact of *ILO Convention No. 169* on Norway’s domestic regime see Hans Petter Graver & Geif Ulfstein, “The Sami People’s Right to Land in Norway” (2004) 11 Int’l J on Minority & Group Rts 337.

The *UN International Covenant on Civil and Political Rights* (“ICCPR”)²² and the *American Convention on Human Rights* (“ACHR”)²³ are also significant material sources of an international custom protecting indigenous rights to ancestral lands. These conventions differ from *ILO Convention No. 169* in that they protect human rights in general. Neither the ICCPR nor the ACHR explicitly refer to indigenous peoples, although provisions in both documents have been interpreted (respectively, by the UN Human Rights Committee and the Inter-American Court of Human Rights) as applying protections to indigenous peoples, including their rights to ancestral property.

B. ICCPR

Article 27 of the ICCPR deals with minority rights and makes no specific mention of the rights of indigenous peoples. It states that, “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 practice their own religion, or to use their own language.” Article 27 is significant with respect to the case for the customary status of a norm protecting indigenous property rights for two reasons: the UN Human Rights Committee (the “Committee”) has adopted a General Comment on the implementation of Article 27 and the Committee has also indicated that resource development on indigenous lands may be in violation of Article 27.

The Committee (a monitoring body created by the ICCPR and given the task of reviewing potential violations of the ICCPR) has adopted a General Comment²⁴ on the implementation of Article 27 that emphasizes that the right to culture may entail a connection between a member or members of a minority and a particular territory.²⁵ It states that aspects of the rights protected under Article 27 “may consist in a way of life that is closely associated with territory and use of its resources” and adds “[t]his may particularly be true of members of indigenous communities constituting a minority.”²⁶ The Committee has also indicated that by conducting resource development within the traditional territories of indigenous peoples, states may risk breaching their duty under Article 27. The Committee considered this possibility in a series of decisions centered on the Finnish government’s authorization of resource development projects (quarrying and logging) on lands used by Sami reindeer herders.²⁷ In three separate decisions, the Committee found that there was no breach of Article 27. In the first case, the Committee’s decision was influenced by the fact that the development would have a limited impact on the Sami’s way of life, and also that the government had consulted the petitioners about the project, their concerns, and the potential impacts of the project.²⁸

22. 19 December 1966, 999 UNTS 171.

23. 22 November 1969, 1144 UNTS 143.

24. UN Human Rights Committee, *General Comment No. 23: The rights of minorities (Art.27)*, 50th Sess., UN Doc CCPR/C/21/Rev.1/Add.5 (1994) [GC No. 23].

25. Bankes, *supra* note 1 at 466.

26. GC No. 23, *supra* note 24 at para 3.2.

27. *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 511/1992, submitted by Ilmari Länsman et al.), UNHRCOR, 52d Sess., UN Doc CCPR/C/52/D/511/1992 (1994) [Länsman # 1]; *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 671/1995, submitted by Jouni E. Länsman et al.), UNHRCOR, 58th Sess., UN Doc CCPR/C/58/D/671/1995 [Länsman # 2]; *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 1023/2001, submitted by Jouni Länsman, Eimo Länsman and the Muotkatunturi Herdsmen’s Committee) UNHRCOR, 83d Sess., UN Doc CCPR/C/83/DR/1023/2001 (2005) [Länsman # 3].

28. *Länsman #1*, *supra* note 27 at paras 9.4 and 9.6.

In the second case, the Committee found that the activities in question did not pose a significant threat to material aspects of Sami culture. In the third case, the Committee again found that there had been no breach of Article 27, but it noted that the cumulative impacts of resource development projects must be considered in deciding whether such a breach has occurred.²⁹

C. ACHR

Article 21 of the *ACHR* protects property rights in general. Like Article 27 of the *ICCPR*, it does not refer specifically to indigenous peoples. However, the Inter-American Court (a creation of the *ACHR*) has interpreted Article 21 as protecting the rights of indigenous peoples to their ancestral lands. The leading case on this point is the *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (“*Awas Tingni*”).³⁰

For a case to appear before the Inter-American Court it must involve a party or parties to the *ACHR* and can be brought by a state or by the Inter-American Commission on Human Rights (the “Commission”). The Commission brought forward the case in *Awas Tingni* and argued that Nicaragua had violated the property rights of the Awas Tingni community by permitting a foreign company to log on land claimed as ancestral territories by the Awas Tingni. As indicated above, the Inter-American Court of Human Rights interpreted Article 21 as protecting the communal property of indigenous people. The Court found that customary practices and possession of land could serve as evidence that an indigenous community is entitled to certain lands.³¹ Further, the Court ruled that Nicaragua was obliged to demarcate the territory of the Awas Tingni, grant the community title to that territory, and in the meantime, abstain from actions that could affect the land.³² According to Nigel Bankes, the Court’s interpretation of the *ACHR* effectively “limit[ed] the power of the state to deal with natural resources within the traditional territories of indigenous peoples without first recognizing, delimiting, and demarcating the land and resource interests of indigenous peoples.”³³

In summary, multilateral and regional conventions and their associated jurisprudence provide important evidence in the case for establishing the existence of an international custom requiring states to recognize indigenous rights to ancestral territories in the context of decisions about resource development. Before considering the effects of the *Declaration* on such a custom, this paper discusses the relationship between international custom and UNGA declarations in general.

29. *Länsman #3*, *supra* note 27 at para 10. 2. For an overview of the three decisions see Bankes, *supra* note 1 at 469 – 473. At page 473 Bankes describes the effect of Article 27 as demonstrated in the three *Länsman* decisions: “The article does not protect a minority from any interference with a connection with a particular territory, but it does protect the minority from serious interference (whether singly or cumulatively) that amounts to the denial of the opportunity to maintain a connection with a particular territory and therefore the denial of the right to culture.”

30. (2001), Inter-Am Ct HR (Ser C) No 79.

31. *Ibid* at para 151.

32. *Ibid* at para 153.

33. Bankes, *supra* note 1 at 479. The Inter-American Court of Human Rights has interpreted the *ACHR* as providing protection to indigenous land rights in two additional cases: *Case of the Yakye Axa Indigenous Community v Paraguay* (2005), Inter-Am Ct HR (Ser C) No 125, and *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (2006), Inter-Am Ct HR (Ser C) No 146.

III. UN GENERAL ASSEMBLY DECLARATIONS AND CUSTOMARY INTERNATIONAL LAW

The UNGA has the power to make binding resolutions with respect to budgetary and administrative matters of the United Nations.³⁴ In general, however, UNGA resolutions consist of recommendations or statements of the international community's views on a subject.³⁵ These statements often take the form of declarations. Declarations, when they are initially passed by the General Assembly, are not a formal source of international law.³⁶ Nevertheless, declarations play a part in the development of international customary law.

The most significant way that a declaration can influence the development of customary international law is by providing evidence or confirmation that a particular norm has attained the status of a custom. As discussed above, in *Nicaragua*, the ICJ inferred state practice with respect to the non-intervention and non-use of force from a few sources, including a UN declaration – *Friendly Relations and Co-operation among States*.³⁷ In that case, the declaration served not only as the basis for an inference about state practice, but was also used to deduce custom itself.³⁸ A declaration can also serve as evidence of *opinio juris* when accompanied by positive evidence of state practice.³⁹ In either case, whether a tribunal is willing to infer state practice on the basis of a declaration, or to treat the declaration as evidence of *opinio juris* in combination with evidence of state practice, declarations can assist in proving the existence of an international custom.

A. Factors

A consideration of certain factors can help to determine whether a declaration provides strong evidence of an existing custom. These factors include: voting conditions, the content of the declaration, and the intentions of both the declaration's framers and the states voting on it.

i. Voting Conditions and Content

In *Texaco*, a tribunal (consisting of a sole arbitrator appointed by the President of the ICJ) considered voting conditions and content.⁴⁰ Libya had previously granted certain rights, interests, and property under fourteen Deeds of Concession to two international oil companies, Texaco and California Asiatic. The companies claimed that the Libyan government's act of nationalizing their rights, interests, and property violated the terms and conditions of their Deeds of Concession.

34. Hugh M. Kindred and Phillip M. Saunders, eds, *International Law Chiefly as Interpreted and Applied in Canada*, 7th ed (Toronto: Emond Montgomery Publications Ltd, 2006) at 176.

35. Brownlie, *supra* note 7 at 15. See also Obed Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (The Hague: Martinus Nijhoff, 1966) at 6 [Asamoah].

36. *Ibid* at 14. Asamoah notes that Article 38 of the *Statute of the International Court of Justice*, *supra* note 7, which lists the formal sources of international law, makes no reference to the practices of international organizations.

37. *Nicaragua*, *supra* note 14.

38. Roberts, *supra* note 15.

39. See *Nuclear Weapons Case*, *supra* note 9 at paras 65-69. States that argued in support of an international custom banning the threat or use of nuclear weapons pointed to the consistent practice of non-utilization of nuclear weapons since 1945, and to a series of UNGA resolutions dealing with nuclear weapons as confirmation of customary rule. Asamoah, *supra* note 35 at 46, also discusses the possibility of a declaration supplying the *opinio juris* of existing practice.

40. *Texaco*, *supra* note 6.

To resolve the dispute, the tribunal considered the state of international law with respect to nationalization, and in particular, whether any of a number of relevant UNGA resolutions reflected customary international law. For its part, Libya relied on resolutions that recognized nationalization as a legitimate method of ensuring every state's sovereignty over its natural resources, particularly Resolution 3171 (XXVIII) and Resolution 3201 (S-VI).⁴¹ According to Libya, these resolutions ruled out an injured state's recourse to international law and conferred exclusive and unlimited competence upon the legislation and courts of the nationalizing state.⁴² In addition to the resolutions relied on by Libya, the tribunal also considered an earlier UNGA resolution, *Permanent Sovereignty over Natural Resources*⁴³ ("Permanent Sovereignty"), which holds that international law may play a role in determining the compensation to be paid to an owner whose rights are affected by nationalization.⁴⁴

The tribunal found that *Permanent Sovereignty* reflected customary international law and that the two resolutions relied upon by Libya did not. First, the tribunal looked to the voting conditions surrounding the adoption of each resolution. A majority of the General Assembly voted in favour of *Permanent Sovereignty* (87 votes to 2, with 12 abstentions). Just as importantly, this majority was representative in both geographical and economic terms. The tribunal also noted that several of the Western countries that voted in favour of *Permanent Sovereignty* would not have done so if the resolution did not refer to international law, especially in the field of nationalization.⁴⁵ As for Resolution 3171 (XXVIII), the General Assembly held a separate vote on one of its paragraphs that stated that any dispute arising in connection with a state's act of nationalization should be settled in conformity with the nationalizing state's own laws. A majority of states accepted the paragraph (86 to 11 with 28 abstentions); however, many Western states voted against the paragraph, including the United States, the United Kingdom, and the Federal Republic of Germany. The tribunal noted, "This specific paragraph concerning nationalizations, disregarding the role of international law, not only was not consented

41. *Ibid* at para 80. *Permanent sovereignty over natural resources*, GA Res 3171 (XXVIII), UNGAOR, 28th Sess, Supp No 30, UN Doc A/9030 (1973) 52, and *Declaration on the Establishment of a New International Economic Order*, GA Res 3201 (S-VI), UN Doc A/RES/3201 (S-VI) (1974). Resolution 3171 (XXVIII) reaffirms the right of every state to adopt the economic and social system which it deems most favourable to its development, as well as the inalienable right of all states to permanent sovereignty over their natural resources. It recalls Resolution 1803 (XVII) (discussed below), but differs from 1803 (XVII) in terms of how to deal with compensation following a nationalization. Resolution 3171 (XXVIII) holds (at Article 3) that the right to nationalization "implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures." Resolution 3201 (S-VI) acknowledges a widening gap between developed and developing countries, and the need to work towards a new international economic order founded on full respect for a number of principles, including "[r]egulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries" (Article 4(g)).

42. *Texaco*, *supra* note 6 at para 82.

43. GA Res 1803 (XVII), UNGAOR, 17th Sess, Supp No 17, UN Doc A/5217, (1962) 15 [*Permanent Sovereignty*].

44. *Ibid* at Article 4. It reads: "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication."

45. *Texaco*, *supra* note 6 at para 84.

to by the most important Western countries, but caused a number of the developing countries to abstain.⁴⁶ The General Assembly adopted Resolution 3201 (S-VI) without a vote, although many Western countries expressed opposition to it.

The tribunal then looked to the content of the resolutions under consideration. The tribunal found that *Permanent Sovereignty* contained “rules recognized by the community of nations.”⁴⁷ The tribunal went on to note that the rules contained in *Permanent Sovereignty* did not create a custom, “but confirm one by formulating it and specifying its scope, thereby making it possible to determine whether or not one is confronted with a legal rule.”⁴⁸ On the other hand, the resolutions relied on by Libya contained new principles not reflective of an existing custom. The tribunal noted that the supporters of these resolutions would have understood their contents as “having nothing more than a *de lege ferenda* value.”⁴⁹ In other words, the states that adopted the resolutions were not affirming existing laws, but rather, expressing hope with respect to the development of future law.

Texaco provides a basic framework for determining whether a UNGA declaration is strong evidence of an existing custom. First, the voting conditions must be examined. Majority support for a declaration is important but does not, on its own, provide sufficient grounds to treat a declaration as ‘custom-confirming.’ The majority’s support must indicate that a consensus has been reached among states that have different perspectives on the subject matter of the declaration under consideration. Second, the contents of the declaration must be examined. A declaration that reflects traditional principles is more likely to be evidence of an existing custom. Conversely, a declaration that introduces new principles will rarely be evidence of an existing custom.⁵⁰

ii. Intention

Intention also plays a role in determining whether a declaration is evidence of an existing custom. There are two relevant sets of intentions: the intentions expressed by state representatives during voting, and declarations of intention embedded in the declaration itself. Obed Y. Asamoah uses the factor of intention to explain why the *Universal Declaration of Human Rights*⁵¹ (“UDHR”) did not evidence international customary law at the time of its adoption. First, Asamoah notes that delegates expressly repudiated the idea of the UDHR being imposed on them as a legal obligation. Second, the UDHR itself

46. *Ibid* at para 85.

47. *Ibid* at para 87.

48. *Ibid*.

49. *Ibid*.

50. *Nuclear Weapons Case*, *supra* note 9, also considers when the contents of a declaration may be understood as evidence of an existing custom. At para 70, the ICJ notes that to establish whether a resolution is evidence of customary international law: “it is necessary to look at its contents and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character.” Looking to the *Declaration on the Prohibition of the use of Nuclear and Thermo-nuclear Weapons*, GA Res 1653 (XVI), UNGAOR, 16th Sess, Supp No 17, UN Doc A/5100 (1962) 4, the ICJ notes that it expressly proclaims that the use nuclear weapons is contrary to international law, but applies general rules of customary international law to explain why this is so. For instance, Article 1(b) states that illegality is based on the fact that nuclear weapons would exceed the scope of war and cause indiscriminate suffering. The ICJ goes on to explain that the *Declaration on the Prohibition of the use of Nuclear and Thermo-Nuclear Weapons* is not evidence of a custom prohibiting the use of nuclear weapons because: “That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons” (at para 72).

51. GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71 [UDHR].

states that it is intended as a “common standard of achievement.”⁵² Thus, the intentions of the states adopting a UN declaration and of the framers of the declaration itself can have the effect of preventing the declaration from being taken as evidence of customary legal obligations.

However, even UNGA declarations that do not provide evidence of existing customs (i.e. that do not meet the test outlined above in terms of voting conditions, content, and intention) can nonetheless affect the development of customary international law by influencing future state practice, such that norms take shape (or are strengthened) around their provisions. In the *North Sea Continental Shelf Cases*, the ICJ discussed the possibility that a provision in a binding convention, rather than a declaration, could give rise to custom.⁵³ The Federal Republic of Germany was not a party to the *Convention on the Continental Shelf* and thus it was not required to apply the equidistance principle as a matter of treaty obligation. However, the ICJ considered the possibility that subsequent state practice had taken shape around Article 6 (which refers to the equidistance principle) such that the Federal Republic of Germany was bound to apply the principle as a matter of customary international law. The ICJ noted that a custom can come into existence even a short time after the creation of an international instrument.⁵⁴

More importantly than the passage of time, the ICJ stated, is that state practice subsequent to the arrival of the instrument “should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”⁵⁵ Clearly, UNGA declarations affect state practice when states choose to apply their provisions.

Alternatively, judicial bodies may rely upon declarations in the adjudication of disputes and require states to implement certain provisions. The latter case, in which a provision is implemented as a result of national or international judicial proceedings, may provide stronger evidence of international custom (than states choosing to implement provisions) because the decision itself may evidence *opinio juris* (the idea that a state is bound to implement the provision as a matter of international law). Thus, UN declarations may come to affect international customary law indirectly by shaping state practice after the declaration is made.

IV. THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

A. Background

The UN Working Group on Indigenous Populations (the “Working Group”) was established in 1982 as an organ of the Sub-Commission on the Promotion and Protection of Human Rights (the “Sub-Commission”). The Working Group’s original mandate was to review developments concerning indigenous peoples and work towards the development of corresponding international standards.⁵⁶ In 1985, the Sub-Commission approved the Working Group’s decision to draft a declaration on the rights of indigenous peoples for adoption by the UNGA. The Working Group agreed on a final text for the

52. *Ibid* at Preamble. Asamoah, *supra* note 35 at 68-69.

53. *North Sea Cases*, *supra* note 11.

54. *Ibid* at para 74.

55. *Ibid*.

56. Anaya, *supra* note 2 at 63.

draft declaration in July 1993. The Sub-Commission adopted the text a year later and submitted it to the United Nations Commission on Human Rights (“UNCHR”) for consideration.

In 1995, the UNCHR appointed a new working group to achieve a consensus on the terms of a draft declaration. Throughout the next decade, the working group accepted submissions from indigenous peoples as well as governments. There was active participation by states with large indigenous populations, including Canada, Australia, New Zealand, and the United States – the four countries that would later oppose the *Declaration*.⁵⁷

In September 2007, the UNGA passed the *Declaration*. A large majority of states voted in favour of the *Declaration* (144), although many qualified their votes. Eleven states abstained from voting (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and Ukraine). Four states voted against the *Declaration* in 2007 (Australia, Canada, New Zealand, and the United States). All four have subsequently adopted the *Declaration*, but on qualified terms.

B. Contents

The preamble of the *Declaration* proclaims that the document is a “standard of achievement to be pursued in a spirit of partnership and mutual respect.”⁵⁸ As a whole, the *Declaration* recognizes the rights of indigenous peoples in many areas – self-determination, political autonomy, cultural integrity, and land and resource rights. Key provisions with respect to land and resource rights include Article 25, which recognizes the right of indigenous peoples to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.”⁵⁹ Article 26(1) affirms the right of indigenous peoples “to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”⁶⁰ Subsection (3) of Article 26 requires states to “give legal recognition and protection to these lands, territories and resources... [w]ith due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”⁶¹ Article 27 calls on states to implement processes for recognizing indigenous peoples’ laws and land tenure systems. Article 32(1) recognizes the right of indigenous peoples to “determine and develop priorities and strategies for the development or use of their land or territories or other resources.”⁶² Subsection (2) of Article 32 requires states to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”⁶³ The above-mentioned provisions demonstrate respect for indigenous perspectives on property ownership. They also recognize the unique connection between indigenous peoples and their ancestral

57. For more on Canada’s role in the negotiations, see “Canada’s Position: United Nations Draft Declaration on the Rights of Indigenous People”, online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/>>. The document discusses Canada’s efforts to “reinvigorate negotiations” in 2000 by chairing informal consultations between states. Canadian representatives also participated in discussions in 2003 with representatives from the United States and Australia on alternate language on lands and resources.

58. *Declaration*, *supra* note 3.

59. *Ibid* at Article 25.

60. *Ibid* at Article 26(1).

61. *Ibid* at Article 26(3).

62. *Ibid* at Article 32(1).

63. *Ibid* at Article 32(2).

lands and territories, as well as the principle that such connections ought not to be diminished or severed without the consent of the indigenous peoples affected.

C. Comments by State Representatives about the Declaration

State representatives made comments about the *Declaration* before and after voting.⁶⁴ Representatives from Australia, Canada, New Zealand, and the United States gave reasons as to why their countries could not support the *Declaration*.⁶⁵ They objected to the *Declaration* largely on the basis that the document frames indigenous rights to ancestral territories in broader terms than their domestic laws or in terms that were inconsistent with their domestic laws. For instance, the Australian representative stated, “It is important to stress that any rights to traditional lands must be subject to national laws, otherwise the provisions would be both arbitrary and impossible to implement, with no recognition being given to the fact that ownership of land may lawfully vest in others – for example, through grants of freehold or leasehold interests in land.”⁶⁶ Canada’s representative raised the concern that the *Declaration*’s broadly framed rights to ancestral lands could “pu[t] into question matters that have already been settled by treaty in Canada.”⁶⁷ Representatives from all four countries also criticized the right to “free, prior and informed consent” contained in Article 32(2), calling it a right of veto over legitimate democratic decisions regarding land use and resource development. For example, “free, prior and informed consent” is incompatible with Canada’s body of law concerning the Crown’s duty to consult with Aboriginal Peoples where Crown actions or decisions may adversely affect their interests.⁶⁸ New Zealand’s representative suggested that Article 32(2) “impl[ies] different classes of citizenship, where indigenous people have a right of veto that other groups or individuals do not have.”⁶⁹ The American statement held: “We strongly support the full participation of indigenous peoples in democratic decision-making processes, but cannot accept the notion of a sub-national group having a “veto” power over the legislative process.”⁷⁰ Hence, one reason why Australia, Canada, New Zealand, and the United States opposed the *Declaration* was its inconsistencies with their own domestic laws. The above-mentioned comments suggest that the four states were particularly concerned about having limits placed on their authority to develop land and resources claimed by indigenous peoples.

The *Declaration*’s approach to indigenous land and resource rights was also a major source of concern for some of the countries that abstained from voting. Russia’s representative stated simply, “[W]e cannot agree with the document’s provisions relating in particular to the rights of indigenous peoples to land and natural resources, and to the procedure for compensation and redress.”⁷¹ Columbia’s representative commented that the country’s own constitution and *ILO Convention No. 169* (to which Columbia is a party) require the free and informed participation of indigenous peoples in decisions respecting resource exploitation in their traditional territories. They expressed concern, however, that, “The Declaration’s approach to prior consent is different and could amount to a possible veto on the exploitation of natural resources in indigenous territories in the absence of an

64. UNGAOR, 61st Sess, 107th Plen Mtg, UN Doc A/61/PV.107 (2007) 11.

65. For the US statement see Robert Hagen, “Explanation of vote,” online: United States Mission to the UN Archive <http://www.archive.usun.state.gov> [Hagen].

66. *Supra* note 64 at 11.

67. *Ibid* at 13.

68. See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 48, [2004] 3 SCR 511.

69. *Supra* note 64 at 14.

70. Hagen, *supra* note 65.

71. *Supra* note 64 at 16.

agreement.”⁷² The provisions of the *Declaration* pertaining to land and resource rights thus concerned not only the countries that voted against the document, but also states that opted to abstain from voting.

Some states that voted in favour of the *Declaration* noted their interpretations of provisions dealing with indigenous land and resource rights. Sweden’s representative outlined how various articles of the *Declaration* would apply in Sweden; their effect would be to affirm rights already recognized under domestic law.⁷³ Mexico’s representative stated: “The provisions of articles 26, 27, and 28 relating to ownership, use, development, and control of territories and resources shall not be understood in a way that would undermine or diminish the forms and procedures relating to land ownership and tenancy established in our constitution and laws relating to third-party acquired rights.”⁷⁴ In other words, Mexico would interpret the provisions as lending support to existing legislation and practices. With respect to the *Declaration*’s consultation requirements, Norway referred to its participation in *ILO Convention No. 169* and the fact that it had already implemented the consultation requirements specified in that convention.⁷⁵ Thus, Norway implied that it would interpret the *Declaration*’s consultation requirements as being equivalent to those of *ILO Convention No. 169*.

Finally, a handful of representatives expressed the view that the *Declaration* is not legally binding. This included the United Kingdom and Guyana, both of which voted for the *Declaration*.⁷⁶ Australia and Columbia also commented that the *Declaration* is not legally binding and added that the *Declaration* does not reflect customary international law.⁷⁷ Australia went so far as to state that, “As this declaration does not describe current state practice or actions States consider themselves obliged to take as a matter of law, *it cannot be cited as evidence of the evolution of customary international law*.”⁷⁸ This comment suggests that Australia was deeply concerned that it may, in the future, be bound by the *Declaration* as a matter of customary international law.

V. THE SIGNIFICANCE OF THE *DECLARATION* IN TERMS OF AN INTERNATIONAL CUSTROM PROTECTING INDIGENOUS PROPERTY RIGHTS TO ANCESTRAL TERRITORIES

The final section of this paper considers two effects that the *Declaration* might have on international custom. First it considers whether the *Declaration* is evidence of an existing custom. It then looks to signs of state practice taking shape around provisions of the *Declaration*.

72. *Ibid* at 18.

73. *Ibid* at 24-25.

74. *Ibid* at 23. See also Japan’s statement (at 20), “We are also aware that, regarding property rights, the content of the rights of ownership and others relating to land and territory is firmly stipulated in the civil law and other laws of each state” and Thailand’s statement (at 25), “the Declaration does not create any new rights and that the benefits... shall be interpreted in accordance with the Constitution of the Kingdom of Thailand, the domestic laws of Thailand, and international human rights instruments that Thailand is party to.”

75. *Ibid* at 22.

76. *Ibid* at 22 and 26.

77. *Ibid* at 12 and 17.

78. *Ibid* at 12 [emphasis added]. See also the comments of New Zealand’s representative at 15: “[The *Declaration*] does not state propositions which are reflected in State practice or which are or will be recognized as general principles of law.”

A. Analyzing Evidence of Custom

As discussed above, and as set out in *Texaco*, the strength of a UN declaration as evidence of custom depends primarily on three factors - voting conditions, content, and intention.

i. Voting Conditions

With respect to voting conditions, as noted above, a large majority of states voted in favour of the *Declaration*. This majority was geographically representative as it included countries from most continents. However, there is some question as to whether the majority represents a consensus on the subject matter. The fact that Australia, Canada, New Zealand, and the United States voted against the *Declaration* is significant in this respect. A combination of factors set these countries apart in terms of the perspective that they represent: the fact that they are home to large indigenous populations; that the countries have, to varying extents, accepted and tried to reconcile the concept of indigenous title with common law understandings of property and the interests of other groups in their societies; the fact that indigenous peoples within these countries have connections (both historic and continuing) with large amounts of territory;⁷⁹ and the fact that their indigenous populations, relative to those of other countries, have the resources to assert their rights in legal and political arenas. This suggests that the representativeness of the *Declaration* is brought into question by the fact that these four countries voted against it.

Yet, even if the objections of these states imply that the *Declaration* was not representative at the time it was passed, it is possible that the *Declaration* has since become representative. This is because all four of the countries that voted against the *Declaration* – Australia, Canada, New Zealand, and the United States – have subsequently signaled their support for the *Declaration*, although with important qualifications. For example, Canada has stated that the *Declaration* will not change Canadian laws.⁸⁰ Presumably this means that Canada does not (for the time being) intend to give full effect to Article 32 of the *Declaration*, which requires states to obtain free and informed consent before approving projects that will affect indigenous lands or territories. Upon adopting the *Declaration*, Canada also expressed the view that the document is non-binding and does not reflect customary international law.⁸¹

ii. Content

The second factor to consider in determining whether a declaration is evidence of an existing international custom is its content. A declaration is more likely to reflect custom if it contains traditional principles as opposed to new principles. It is possible for a declaration to contain both traditional and new principles, in which case some of its provisions might be evidence of custom, while others may not. As for the *Declaration*, the comments of state representatives in the UNGA fall into two categories. There are comments that signal that the articles dealing with indigenous land and resources rights reflect familiar traditional principles, and there are comments that signal that the same articles contain new principles.

79. See New Zealand's comment with respect to Article 26: "For New Zealand, the entire country is potentially caught within the scope of the article." *Ibid* at 14.

80. "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/>>.

81. *Ibid*.

With respect to the first category, states such as Sweden and Norway interpreted the articles dealing with indigenous land and resource rights such that the articles do not impose new obligations on them; the principles embodied in those articles are familiar in the sense that they are already expressed in existing domestic law, which in Norway's case has been developed to comply with *ILO Convention No. 169*.

As to the second category, several states viewed the articles as incompatible with their domestic laws. To these states, namely Canada, New Zealand, and Australia, the principles embodied in Articles 26 and 32 (among others) appeared new, or rather, incompatible, in relation to domestic law and practice. Subsequent adoption of the *Declaration* has not necessarily altered these views regarding the incompatibility of some of the *Declaration's* articles and domestic law. For example, Canada has stated:

In 2007, at the time of the vote during the United Nations General Assembly, and since, Canada placed on record its concerns with various provisions of the *Declaration*, including provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations... *These concerns are well known and remain*. However, we have since listened to Aboriginal leaders who have urged Canada to endorse the *Declaration* and we have also learned from the experience of other countries. We are now confident that Canada can interpret the principles expressed in the *Declaration* in a manner that is consistent with our Constitution and legal framework.⁸²

Thus, the statements of some countries suggest that provisions of the *Declaration* dealing with indigenous rights to ancestral territories reflect familiar principles. However, it is important to note that while states such as Sweden stated that their domestic laws already accommodate principles in the *Declaration*, they did not say that the principles were familiar to them as requirements of international law. An argument that the contents of the *Declaration* reflects customary international law would be more persuasive if more countries had made statements similar to those of Norway, that the *Declaration* reflects principles enshrined in international law (i.e. *ILO Convention No. 169*).

iii. Intention

Intention is the final factor to consider in determining whether the *Declaration* is evidence of international custom. The preamble of the *Declaration* is significant in this respect because it refers to the *Declaration* as a “standard of achievement,” indicating that it is an aspirational document. The statement conveys the intention that states should work toward implementing the *Declaration* over time, not that they should recognize its provisions as being binding upon them.

Intention is also conveyed in statements made in the UNGA during voting. As discussed above, during voting a number of states made it clear that they do not regard the *Declaration* as a legally binding document. States that have subsequently declared their support for the *Declaration* have expressed the same view. For example, Canada's statement of support reads, “[T]he *Declaration* is a non-legally binding document that does not reflect customary international law nor change Canadian laws.”⁸³ Thus, the factor of intention militates strongly against treating the *Declaration* as evidence of custom.

82. *Ibid* [emphasis added].

83. *Ibid*.

iv. Summary

The above analysis suggests that the *Declaration* provides weak evidence of an existing international custom respecting indigenous rights to ancestral lands. The *Declaration* may have representative support (especially now that Australia, Canada, New Zealand, and the United States have signaled support for the document), however, the factors of both content and intention with respect to the *Declaration* indicate that the document should not, as of yet, be treated as evidence of existing customary international law. This is not to say that indigenous property rights are not protected by international customary law, but merely that the *Declaration* itself is not strong evidence of a custom or customs. Nor does this conclusion mean that state practice will not take shape around provisions of the *Declaration* and expedite the development of custom.

B. State Practice and Judicial Interpretation

i. Inter-American Court of Human Rights

There are already signs that state practice is beginning to mirror the articles of the *Declaration*. For example, in the Inter-American Court of Human Rights' November 2007 judgment in *Saramaka People v. Suriname*,⁸⁴ the Court affirmed that Article 21 of the *ACHR* requires states to respect the special relationship between indigenous peoples and their ancestral territories, and to do so in a way that guarantees their social, cultural, and economic survival.⁸⁵ The case concerned logging and mineral concessions awarded by Suriname on territory possessed by the Saramaka people. In the course of its judgment, the Court also recognized that Suriname has a right to grant concessions for the exploration and extraction of natural resources. To balance the competing rights of the Saramaka and Suriname, the Court ruled that prior to granting concessions, Suriname is required to consult the Saramaka and ensure they receive a benefit from any resource development. Further, in the case of large-scale resource development projects that would have a major impact on Saramaka territory, the state is required to obtain free, prior, and informed consent from the Saramaka.⁸⁶ Importantly, the Court cited Article 32 of the *Declaration* as a source of this duty.⁸⁷

ii. Supreme Court of Belize

The Supreme Court of Belize also invoked specific articles of the *Declaration* related to property rights in the consolidated cases of *Aurelio Cal et al. v. Attorney General of Belize*.⁸⁸ The claimants (Mayan members of the Village of Conejo) argued that the government issued leases, grants, and concessions to their traditional lands in violation of rights protected under the *Belize Constitution*. The Court held not only that the government acted in violation of the country's own constitution, but also in violation of customary international law. On this point, the Court referred to Article 26 of the *Declaration* as the source of a state obligation to provide legal recognition and protection

84. (2007), Inter-Am Ct HR (Ser C) No 172.

85. *Ibid* at para 91.

86. *Ibid* at paras 129 and 134.

87. *Ibid* at para 131.

88. (2007) Supreme Court of Belize, Claims Nos. 171 and 172, Judgment 18 October 2007, unreported. Online: Environmental Law Alliance Worldwide < <http://www.elaw.org/> >. For a more detailed discussion of the case see Maia S. Campbell and S. James Anaya, "The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land Rights" (2008) 8 Human Rights Law Review 377.

to indigenous rights to ancestral territories.⁸⁹ Upon noting that Belize voted for the *Declaration*, the Court stated, “I therefore venture to think that [the government of Belize] would be unwilling, or even loath to take any action that would detract from the provisions of this Declaration importing as it does, in my view, significant obligations for the State of Belize in so far as the indigenous Maya rights to their land and resources are concerned.”⁹⁰ The Supreme Court thus helped to advance the status of the *Declaration* in customary international law by stating that the instrument created an enforceable obligation on the state of Belize.

iii. Third Section of the European Court of Human Rights

Finally, provisions of the *Declaration* were referred to in the 2010 case of *Handölsdalen Sami Village and others v. Sweden*,⁹¹ which was heard before the Third Section of the European Court of Human Rights (“ECtHR”). The case originated in 1990 when landowners in the municipality of Härjedalen sought a declaratory judgment stating that, in the absence of a valid contract, several Sami villages had no right to use their privately held lands to graze reindeer.⁹² In response, the Sami villages argued that they had the right to use the lands in question based on prescription from time immemorial, the provisions of the applicable *Reindeer Husbandry Act*, custom, and public international law – specifically Article 27 of the *ICCPR*.⁹³ At the domestic level, Swedish courts rejected the arguments of the Sami villages and ruled that they were not free to graze on privately held lands without first contracting with the landowners.

In 2004, after Sweden’s Supreme Court refused leave to appeal, four Sami villages applied for a hearing before the ECtHR. The villages argued that the state infringed their property rights under Article 1 of Additional Protocol No. 1 of the *European Convention on Human Rights* (“ECHR”).⁹⁴ The villages also contended that the high legal costs of the proceedings resulted in denial of effective access to court, or a violation of Article 6 of the *ECHR*. Finally, they argued that the length of domestic proceedings – spanning from September 1990 to April 2004 – violated Article 6(1) of the *ECHR*, which requires matters to be dealt with in a reasonable period of time. In February of 2009, ECtHR determined that it could only deal with the latter two questions and was unable to deal with the substantive question of whether the Sami’s property rights were violated. On the first of these questions, a majority of the Court found that despite the high cost of legal proceedings, the Sami villages nonetheless had a reasonable opportunity to present their case effectively before the national courts.⁹⁵ On the second question, the Court found in favour of the Sami villages and determined that the proceedings were not sufficiently expeditious.

89. *Ibid* at para 131.

90. *Ibid* at para 133.

91. (2010), Application No. 39013/04, Judgment of 30 March 2010.

92. *Ibid* at para 8.

93. *Ibid* at para 10.

94. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5. Article 1 of Protocol 1 reads: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

95. *Supra* note 91 at para 59.

In her partly dissenting opinion, Judge Ziemele found that Sweden both denied the Sami villages effective access to court and that the length of domestic proceedings was unreasonable. In Judge Ziemele's view, the Sami villages incurred massive legal costs (and thus were denied effective access to court) because Sweden's entire approach to land disputes failed to "take account of the rights and particular circumstances of indigenous people."⁹⁶ In particular, the approach disadvantaged indigenous peoples by placing the burden of proving land rights exclusively on their shoulders and presuming at the outset of any dispute that landowners have valid title. Judge Ziemele referred to two articles of the *Declaration* as informing a duty on Sweden to modify its approach to indigenous land claims: Article 26, which requires parties to the *Declaration* to commit to recognizing the traditional territories of indigenous people, and Article 27, which requires parties to commit to using fair processes to adjudicate the rights of indigenous peoples pertaining to their lands, territories, and resources.⁹⁷

iv. Summary

Although it is likely the *Declaration* does not currently provide strong evidence of existing customary international law, courts have nevertheless treated its provisions as informing state obligations to indigenous peoples. These courts, in particular the Inter-American Court of Human Rights and the Supreme Court of Belize, have thus taken an important step towards shaping state practice in accordance with the terms of the *Declaration* provisions. These decisions signal that the *Declaration* may expedite the development or crystallization of international customs based on its principles. It will be interesting to see how courts in Canada will look to the *Declaration* and its principles for guidance in considering issues concerning Aboriginal peoples in Canada and how they may seek to reconcile its articles with the laws of Canada where they appear to be incompatible.

CONCLUSION

UNGA declarations can play a significant role in the development of customary international law. Three considerations help to shed light on the significance of a declaration with respect to customary international law: voting conditions, content, and intention. Applying an analysis of these factors to the *Declaration on the Rights of Indigenous Peoples* reveals that the *Declaration* currently provides weak evidence for the existence of international customs respecting the rights of indigenous peoples to their ancestral lands. However, subsequent practice, both at the inter-state and state level, indicates that the *Declaration* may come to play an important and emerging role in developing international custom and shaping state practices.

96. *Ibid*, Partly Dissenting Opinion of Judge Ziemele at para 10.

97. *Ibid* at para 3.