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## An Analysis of Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples, and Proposals for Reform

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## STUDENT NOTE

# AN ANALYSIS OF ARTICLE 28 OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, AND PROPOSALS FOR REFORM

*David Fautsch\**

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*The important point is that this process of sovereign exclusion and inclusion was not a one-shot affair, occurring some time in the distant past when international law accepted the proposition that indigenous territory constituted terra nullius. It is an ongoing process of exclusion and inclusion to the extent that it continues to subsume indigenous populations under the sovereign power of States not of their making.*

—Patrick Macklem<sup>1</sup>

## INTRODUCTION

In September of 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration).<sup>2</sup> The Declaration is the product of more than twenty years of negotiation, and passed overwhelmingly with just four nations dissenting.<sup>3</sup>

The Declaration affirms the legal existence of indigenous communities and sets minimum standards for their recognition, participation, and

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1. Patrick Macklem, Essay, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177, 186 (2008). *Terra nullius* is Latin for "territory which belongs to no one." MALCOLM N. SHAW, INTERNATIONAL LAW 342 (4th ed. 1997); see also MICHAEL CONNOR, THE INVENTION OF TERRA NULLIUS: HISTORICAL AND LEGAL FICCTIONS ON THE FOUNDATION OF AUSTRALIA (2005).

*Terra nullius* is a concept that is also central to American property law. See, e.g., United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) ("[T]he whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land . . ."); Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 409 (1842) ("For according to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practised towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants."); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 596 (1823) ("So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians.").

2. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter Declaration].

3. "The Declaration was adopted by an overwhelming majority of the General Assembly, with 143 countries voting in support, 4 voting against (Australia, Canada, New Zealand and the United States) and 11 abstaining (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine)." Press Release, U.N. Permanent Forum on Indigenous Issues, Historic Milestone for Indigenous Peoples Worldwide as United Nations Adopts Rights Declaration (Sept. 13, 2007), available at [http://www.un.org/esa/socdev/unpfii/documents/Declaration\\_ip\\_pressrelease.pdf](http://www.un.org/esa/socdev/unpfii/documents/Declaration_ip_pressrelease.pdf) (last visited Jan. 28, 2010).

due process rights in domestic and international law.<sup>4</sup> The Declaration, however, is not binding.<sup>5</sup> Its effect is limited to its ability to create “diffuse legal consequences for the development of both international and domestic law.”<sup>6</sup> The Declaration’s efficacy is further limited by its failure to specify concrete standards for states and other international actors.<sup>7</sup>

Article 28 of the Declaration<sup>8</sup> addresses perhaps the most contentious and persistent problem facing indigenous communities—land rights.<sup>9</sup> Article 28 provides guidance on remedies for governments that create a functional process for recognizing indigenous communities and remedying land disputes.<sup>10</sup> It reads:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, *just, fair and equitable compensation*, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

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4. See Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 543 (2009); Macklem, *supra* note 1, at 179. See generally Declaration, *supra* note 2.

5. Macklem, *supra* note 1, at 179; Coulter, *supra* note 4, at 546.

6. Macklem, *supra* note 1, at 179.

7. See, e.g., *id.* (“[T]he U.N. Declaration on the Rights of Indigenous Peoples [] specif[ies] no criteria for determining whether a community constitutes an indigenous people in international law.”).

8. Declaration, *supra* note 2, art. 28.

9. John Bern & Susan Dodds, *On the Plurality of Interests: Aboriginal Self-Government and Land Rights*, in POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES, 163 (2008).

10. Article 27, by contrast, establishes how governments and indigenous communities should settle land disputes. Article 27 declares:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving *due recognition* to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Declaration, *supra* note 2, art. 27 (emphasis added).

Whether a government complies with Article 27 depends entirely on the definition of due recognition. Due recognition presents complex questions. Macklem, *supra* note 1, at 177. What are the requirements of due recognition? Who decides when a government has provided an indigenous community with enough recognition? Has any government, in the view of the General Assembly, ever provided due recognition to an indigenous community? Until these questions are answered, even well meaning governments will struggle to provide due recognition to indigenous communities that seek to return to their traditional lands.

2. 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 or of monetary compensation or other appropriate redress.<sup>11</sup>

Just, fair and equitable compensation is an appropriate and laudable goal, but it is also an extraordinarily flexible and vague standard that leaves plenty of room for interpretation. Thus, while Article 28 is an essential starting point for improving the land rights of indigenous peoples,<sup>12</sup> it is only a starting point. For indigenous peoples to realize their land rights under international law, it is essential that the international community clarify and strengthen Article 28 of the Declaration.

The purpose of this Note is two-fold: first, to demonstrate why the standards set out in Article 28 require further clarification, and second, to propose reforms (both inside and outside of the United Nations framework) that might benefit indigenous peoples claiming land rights.

Part I explains, from a theoretical perspective, why Article 28 may not fully benefit indigenous peoples during the litigation process. Drawing on an analogy to Professor Marc Galanter's influential analysis of long-run litigation outcomes,<sup>13</sup> Part I argues that land disputes between governments and indigenous peoples are likely to be similar to disputes between "repeat players" and "one-shotters."<sup>14</sup> The government plays the role of a repeat player, and the indigenous peoples play the role of a one-shotter. In other words, governments tend to hold a systematic advantage over indigenous communities because governments "can anticipate legal problems and can often structure transactions and compile a record to justify their actions."<sup>15</sup> Thus, simply allowing courts to decide the meaning of just, fair, and equitable compensation is likely to advantage the government and to disadvantage indigenous peoples.

Part II explains the practical obstacles indigenous peoples confront when seeking to obtain a just, fair, and equitable remedy—even if they are successful in litigation. Part II reviews two cases where indigenous peoples have successfully litigated their rights to their native lands. In particular, Part II discusses the experiences of the Richtersveld community in the South African courts and the Awas Tingni community in the Inter-American Court of Human Rights (IACtHR). The South African

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11. Declaration, *supra* note 2, art. 28 (emphasis added).

12. See Coulter, *supra* note 4, at 539–40 (noting that the Declaration brought about the first change in the international law governing indigenous minorities).

13. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

14. *Id.* at 97.

15. Joel B. Grossman et al., *Do the "Haves" Still Come Out Ahead?*, 33 LAW & SOC'Y REV. 803, 803 (1999) (discussing the Galanter framework).

experience is discussed with particular attention to the South African Constitution,<sup>16</sup> the Restitution of Land Rights Act 22 of 1994,<sup>17</sup> and the *Richtersveld Community* case.<sup>18</sup> The experience of the Awas Tingni community is discussed through reference to the IACtHR's decision in *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*<sup>19</sup> and the American Convention on Human Rights.<sup>20</sup> *Richtersveld* and *Awas Tingni* are landmark cases that serve as models for courts called on to decide land claims brought by indigenous peoples. Part II illustrates, however, that even the most laudable decisions can be difficult to implement. Thus, even when indigenous communities are successful in the courts, they require substantial assistance to actually obtain a just, fair, and equitable remedy.

Part III proposes several ways to help indigenous peoples break through the repeat player/one-shooter paradigm in order to obtain a meaningful remedy. First, The United Nations Permanent Forum on Indigenous Issues (Permanent Forum)<sup>21</sup> or a similar body should be given

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16. See generally Constitution of the Republic of South Africa, Act 108 of 1996, § 25(7) ("A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.").

17. Restitution of Land Rights Act, 22 of 1994 (S. Afr.).

18. *Alexkor Ltd. v. Richtersveld Cmty.*, 2003 (12) BCLR 1301 (CC) (S. Afr.) [hereinafter *Richtersveld III*]. This paper primarily discusses the ruling of the Constitutional Court of South Africa (cited above) and will refer to the lower court rulings to provide context. The lower court decisions provide an interesting study of the difficulties indigenous peoples often face when attempting to present sufficient evidence and comply with procedural rules that limit access to courts. See generally *Richtersveld Cmty. v. Alexkor Ltd.*, 1999 (3) SA 1293 (LCC) (S. Afr.) (decision of the Land Claims Court) [hereinafter *Richtersveld I*], *rev'd Richtersveld Cmty. v. Alexkor Ltd.*, 2003 (6) BCLR 583 (SCA) [hereinafter *Richtersveld II*] (S. Afr.).

19. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

For an excellent discussion of the *Awas Tingni* decision, see Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua*, 24 ARIZ. J. INT'L & COMP. L. 609 (2007); Jennifer A. Amriott, *Environment, Equality, and Indigenous Peoples' Land Rights in the Inter-American Human Rights System: Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, 32 ENVTL. L. 873 (2002); S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1 (2002).

20. Organization of American States [OAS], American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144, U.N.T.S. 123. For an excellent discussion of the Inter-American Court of Human Rights (IACtHR), and Inter-American system in general, see Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439 (1990).

21. "The UN Permanent Forum on Indigenous Issues is an advisory body to the Economic and Social Council [ECOSOC], with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human

responsibility for researching and analyzing whether various nations are living up to the letter and intent of the Declaration.<sup>22</sup> The Permanent Forum should publish its findings in a form that allows governments and indigenous peoples to compare the legitimacy and efficacy of their nation's land dispute settlement process.<sup>23</sup> Over time, the Permanent Forum's opinions on the application of the Declaration can shed light on the ambiguous terms of Article 28. Second, legal assistance from organizations such as Human Rights First or law school human rights clinics can provide resources that help indigenous peoples overcome the disadvantages discussed in Parts I and II. Finally, domestic and international courts should be encouraged to relax procedural hurdles that often bar indigenous peoples from fully litigating their claims.

### I. ARTICLE 28 IN THE COURTS: A THEORETICAL ANALYSIS

Before delving into recommendations for improving the efficacy of Article 28, it is helpful to discuss, from a theoretical perspective, how the Article's command for just, fair, and equitable compensation might play out in courts. This Part argues that indigenous peoples are likely to fall into the role of one-shotters and that governments are likely to play the role of repeat players. This paradigm increases the likelihood that indigenous peoples will not prevail in their claims for land rights or that courts may begin to interpret Article 28 in a way that does not truly benefit indigenous peoples.

#### A. Repeat Players and One-Shotters

To understand the disadvantages faced by indigenous peoples in the litigation process it is helpful to make a few generalizations. First, indigenous peoples lost their land a relatively long time ago. Under the typical situation, a colonizing nation moved in and took over.<sup>24</sup> History is replete with examples: the displacement of indigenous tribes in the

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rights." U.N. Permanent Forum on Indigenous Issues, <http://www.un.org/esa/socdev/unpfii/> (last visited Jan. 28, 2010).

22. For the Permanent Forum to actually take on this new role, ECOSOC might need to amend the Permanent Forum's mandate. *See infra* Part III.A.

23. There are ways besides using case studies that might allow the Permanent Forum to diminish the effect of the repeat player/one-shooter paradigm. For instance, the Permanent Forum could actually assist indigenous peoples in litigation through filing the equivalent of an amicus brief. *See infra* Part III.

24. *See* Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 *TEX. INT'L L.J.* 155, 167 (2007) (noting that colonizing nations justified their occupation on the legal fiction of *terra nullius*—a concept now debunked in international law); *see also* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 29–31 (2d ed. 2004).

Americas during the 18th and 19th centuries, the colonization of Africa by various European countries, and the conquest of the Aborigines in Australia to name a few.<sup>25</sup> Thus, indigenous minorities often bring claims after statutes of limitations have expired,<sup>26</sup> and evidence of dispossession either does not exist or is poorly preserved.<sup>27</sup> Moreover, the current possessors have developed the land without anticipating that dispossessed indigenous peoples will someday seek to reclaim the land.<sup>28</sup>

Second, the conflicting parties are the indigenous peoples and the government.<sup>29</sup> Any group of indigenous people is likely to have a single claim to a single tract of land and is thus unlikely to appear frequently before a court or tribunal.<sup>30</sup> In contrast, a government is likely to confront numerous claimants. For instance, the United States is likely to defend land claims against a panoply of Native American groups, whereas individual, autonomous Native American groups are likely to litigate far fewer claims for land against the United States.<sup>31</sup>

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25. See generally LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* 21 (1999) ("For many communities there were waves of different sorts of Europeans; Dutch, Portuguese, British, French, whoever had political ascendancy over a region. And, in each place, after figures such as Columbus and Cook had long departed, there came a vast array of military personnel, imperial administrators, priests, explorers, missionaries, colonial officials, artists, entrepreneurs and settlers, who cut a devastating swathe, and left a permanent wound, on the societies and communities who occupied the lands named and claimed under imperialism.").

26. See, e.g., Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948–1967*, 33 N.Y.U. J. INT'L L. & POL. 923, 938 (2001) (discussing problems related to "claim limitations" in the context of old land disputes).

27. For instance, in the case of the Bedouins in Israel, evidence of their presence in the Negev can be traced to surveys and documentation from Ottoman and British sources. Nonetheless, courts remain wary to give such evidence substantial weight. See generally Kedar, *supra* note 26, at 939; Ronen Shamir, *Suspended in Space: Bedouins Under the Law of Israel*, 30 LAW & SOC'Y REV. 231, 239–40 (1996).

28. The relatively long time between dispossession and redemption is often used to buttress the current possessor's argument that the land has been adversely possessed. See Kedar, *supra* note 26, at 938.

29. See Lenzerini, *supra* note 24, at 167–74 (discussing the relationship between states and indigenous peoples). There are, of course, exceptions to this paradigm. This Note, however, is limited to examining cases to which the government is a party. The *Richtersveld* case, for example, involved an indigenous community and a state-held corporation. See *Richtersveld I*, 1999 (3) SA 1293 (LCC) (S. Afr.), *rev'd Richtersveld II*, 2003 (6) BCLR 583 (SCA) (S. Afr.); *Richtersveld III*, 2003 (12) BCLR 1301 (CC) (S. Afr.). Whether the party opposing the indigenous peoples is the government or a corporation, the party currently in possession of the land is likely well-funded and holds large quantities of land, which arguably fits the role of the repeat player.

30. See, e.g., Anaya & Grossman, *supra* note 19, at 1 (noting that the Awas Tingni people did not intend to litigate for the purpose of setting precedent, but rather to protect their own land rights).

31. See, e.g., *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005) (holding that the plaintiff Native American tribe was not entitled to damages for dispossession of land); *Shinnecock Indian Nation v. New York*, No. 05-CV-2887 (TCP), 2006 WL 3501099



Thus, to use Professor Galanter's terminology, indigenous peoples play the role of one-shotters, and governments play the role of repeat players. Professor Galanter used the repeat player/one-shooter analysis to explain why frequently litigious groups with substantial resources, such as governments, regularly win in the litigation context.<sup>32</sup> When a one-shooter sues a repeat player, the one-shooter is generally in dire need of an expedient, positive outcome.<sup>33</sup> Repeat players, however, enjoy the luxury of time and resources, which allows them to seek precedent that favors their long-term interests.<sup>34</sup> A repeat player can use its economic and informational advantages to settle claims that are likely to result in unfavorable precedent, seek procedural changes from courts,<sup>35</sup> or seek substantive changes from legislative bodies.<sup>36</sup>

Indigenous peoples, on the other hand, often find themselves with the same disadvantages as one-shotters: they face an opponent with considerable resources and a substantial incentive to seek favorable long-term precedent.<sup>37</sup> As Professor Patrick Macklem points out, "[t]he impor-

(E.D.N.Y. Nov. 28, 2006) (dismissing a range of claims by a Native American tribe); *cf.* *Oneida Indian Nation v. New York*, 500 F. Supp. 2d 128 (N.D.N.Y. 2007) (denying claims for possessory land rights because of inconvenience to current owners but allowing claims for compensation to be considered).

Adverse results for Native American plaintiffs is not a new phenomenon. Unfavorable precedent was set early in United States history. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 569 (1823) ("[S]tatutes . . . treat [Native Americans] as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government."); *see also infra* Part II.A.2 (describing the current administrative process for claiming land rights in South Africa).

32. Galanter, *supra* note 13, at 97–104. Professor Galanter's model assumes a litigation process, which is not necessarily a perfect fit for land disputes involving indigenous peoples because not all disputes are settled by litigation: land disputes can be resolved by contract or indigenous peoples might find no forum in which to voice their claims. *See id.* For the purposes of this Note, the analysis is limited to how indigenous peoples fare in the context of litigation.

33. *Id.* at 97–98.

34. *Id.* at 98–104.

35. Procedural changes are generally in the best interest of repeat players because procedural rules are "technical, hard to fathom, and difficult to counter." *See Grossman et al., supra* note 15, at 808.

36. *Id.* at 807.

37. Governments have an incentive to avoid settlements because they want to deter future litigants. *See id.* at 804. By showing that they will litigate vigorously, governments are able to increase the expected costs of potential claimants. *See id.*

Scholars have argued that repeat player status does not accurately describe the advantages held by governments or large corporations. Richard Lempert, *A Classic at 25: Reflections on Galanter's "Haves" Article and Work It Has Inspired*, 33 *LAW & SOC'Y REV.* 1099, 1103 (1999) ("Repeat player status, as characterized by Galanter and as operationalized by . . . empirical studies . . . [ ] is highly correlated with advantages of wealth and power and, in the case of governments, moral status and control of judicial appointments. This situation makes it difficult if not impossible to identify empirically systematic advantages in litigation enjoyed by repeat players because they are repeat players rather than because of their wealth

tant point is that this process of sovereign exclusion and inclusion was not a one-shot affair . . . .”<sup>38</sup>

### B. Article 28 Is Susceptible to Abuse

Article 28 tells courts, nations, and international institutions that the validity of the land restitution process depends on whether a nation provides a just, fair, and equitable remedy.<sup>39</sup> With no additional guidance, courts are left to their own devices to give meaning to these terms. Courts, especially in nations where the parties fit into the repeat player/one-shotter paradigm, are unlikely to fashion rules that allow indigenous peoples to return to their traditional lands.<sup>40</sup>

Again, the experience of indigenous peoples living within the borders of the United States is illustrative. Courts in the United States routinely deny claims for land rights because of time bars (for example, statutes of limitations or laches), the difficulty of fashioning a remedy, or the effect of *stare decisis*.<sup>41</sup> In international fora, indigenous peoples are likely to face the same sorts of procedural and technical hurdles.<sup>42</sup> Thus, in some cases, courts will not even directly confront the language of Article 28.

Even if courts directly confront the language of Article 28, it is possible that they will label a remedy just, fair, and equitable even when the end results are not beneficial for the indigenous plaintiffs.<sup>43</sup> For example, imagine a situation in which a court holds that a just, fair, and equitable

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or power or special status as a government litigant.”). Regardless of how systemic advantages are obtained (by repeat player status, wealth, social status, etc.), it is virtually undeniable that such systemic advantages exist and can be difficult to overcome.

38. Macklem, *supra* note 1, at 186.

39. See Declaration, *supra* note 2, art. 28.

40. Even if courts recognize that indigenous peoples have a legitimate claim to the land, courts are not likely to fashion rules that lead to a complete remedy. See, e.g., *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 39–49 (Oct. 16). As Professor W. Michael Reisman writes, “in the *Western Sahara* case, the Court formally acknowledged the existence of a theory of international land tenure based on a non-European conception of title as generative of ‘legal ties’ (whatever that means). But such ‘legal ties’ were not enough to defeat title deriving from a European colonial claim.” W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT’L L. 350, 354 (1995) (citation omitted). For a similar analysis, see also *Cayuga Indians (Gr. Brit.) v. United States*, 6 R. Int’l Arb. Awards 173, 189 (U.S.-Gr. Brit. 1926) (recognizing legitimacy of indigenous land title, but not considering whether land should be returned to the indigenous community).

41. See, e.g., sources cited *supra* note 1.

42. See Reisman, *supra* note 40, at 354–62 (providing an excellent discussion of the ways in which procedural rules hamper the ability of indigenous groups to litigate in international fora).

43. Giving lip service to an indigenous plaintiff’s claim for land rights is a realistic possibility since the Declaration is non-binding and does not provide for an oversight mechanism. Coulter, *supra* note 4, at 546; Macklem, *supra* note 1, at 179.

remedy is relocation to land that is nearly uninhabitable or monetary compensation in a currency that is of virtually no value.<sup>44</sup> In such a situation, the Declaration does not provide any criteria by which to assess the validity of the court's remedy.<sup>45</sup> Recent empirical research indicates that indigenous peoples face an uphill battle throughout the entire litigation process—from initiation of a suit to final adjudication in appellate courts.<sup>46</sup> Two factors support this conclusion:

First, the government makes the rules, which the courts in turn enforce. . . . Second, despite norms of judicial independence, courts and judges are not independent of government; they are part of government. Courts are agencies of the state. One possible impact of this is that judges feel some loyalty toward the government or regime of which they are a part.<sup>47</sup>

Breaking the repeat player/one-shotter cycle, however, is a realistic possibility. In the litigation context, one-shotters can match many of the advantages that repeat players possess by any method that tends to overcome the repeat player's economic or information advantage. Examples include securing the backing of well-funded interest groups or hiring an attorney who specializes in a particular kind of litigation.<sup>48</sup> In the United States, groups like the American Civil Liberties Union or the National Association for the Advancement of Colored People are classic examples of groups that help one-shotters break the cycle.<sup>49</sup> In the United States,

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44. See, e.g., Kedar, *supra* note 26 (describing the proceedings that deprived the Bedouins land in Israel); Reisman, *supra* note 40 (discussing how international courts have sidestepped recognition of indigenous peoples).

45. See Kedar, *supra* note 26; Reisman, *supra* note 40. This is markedly different from other international human rights instruments. For example, the Human Rights Committee, the oversight body responsible for monitoring the implementation of the International Covenant on Civil and Political Rights, publicly provides through General Comments specific standards for interpreting the Convention's provisions. See Colette Connor, *Recent Development: The United States' Second and Third Periodic Report to the United Nations Human Rights Committee*, 49 HARV. INT'L L.J. 509, 521 (2008). The Committee frequently cites to its General Comments when reviewing state reports and individual complaints. *Id.* at 512 n.13.

46. See generally Herbert M. Kritzer & Susan S. Silbey, *The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?*, in *IN LITIGATION: DO THE 'HAVES' STILL COME OUT AHEAD?* 342 (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (gathering and analyzing data from U.S. federal and state appellate courts, and the highest courts in Australia, Canada, England, India, the Philippines, South Africa, and Tanzania). This study finds that governments have an even greater advantage than corporations. *Id.* at 348–49.

47. *Id.* at 343 (internal citations omitted).

48. See Grossman et al., *supra* note 15, at 806.

49. See Anne Bloom, *Practice Style and Successful Legal Mobilization*, 71 LAW & CONTEMP. PROBS. 1, 5–6 (2008) (“When cause lawyers work for nonprofit organizations like the ACLU and the NAACP, their style of practice tends to more closely resemble the megala-  
lawyering style of lawyers in corporate practice. Perhaps because of this, Galanter describes

and on an international scale, groups like the Indian Law Resource Center provide invaluable information-sharing and legal resources to indigenous peoples.<sup>50</sup>

Many indigenous peoples, however, do not have ready access to interest groups or institutions that are capable of helping them break the economic and information advantages that governments typically enjoy.<sup>51</sup> Therefore, for indigenous peoples unable to overcome the repeat player/one-shotter paradigm, Article 28's efficacy is severely limited. As discussed above, this imbalance of power could lead courts either to (1) fashion procedural rules that limit the indigenous peoples' access to justice or (2) interpret Article 28 in a manner contrary to its plain language and intent.<sup>52</sup>

Part II discusses two cases in which indigenous communities have successfully broken through the repeat player/one-shotter paradigm. Even for indigenous peoples fortunate enough to successfully litigate their claims before domestic or international tribunals, indigenous peoples still suffer serious impediments to enforcing court judgments.

## II. PROBLEMS WITH IMPLEMENTATION AND ENFORCEMENT OF JUDGMENTS: EXAMPLES FROM SOUTH AFRICA AND NICARAGUA

*Richtersveld* and *Awes Tingni* were celebrated decisions<sup>53</sup> that cannot be said to have run afoul of the Declaration.<sup>54</sup> In each case, the

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the legal style of cause lawyers as 'an approximation of mega-law[ying] with less ample funding.'").

50. See Indian Law Res. Ctr., Project for a New Framework of Law, <http://www.indianlaw.org/en/projects/landrights/landlaw> (last visited Jan. 28, 2010).

51. See generally Robyn Eversole, *Overview—Patterns of Indigenous Disadvantage Worldwide*, in *INDIGENOUS PEOPLES AND POVERTY* 29 (Robyn Eversole et al. eds., 2005). Part III of this Note, *infra*, will discuss ways that the United Nations and other international organizations can limit the government's inherent advantage by mitigating the effects of economic and information asymmetries.

52. In an effort to counter this, Part III proposes that the U.N. Permanent Forum on Indigenous Issues or a similar U.N. body take on an oversight role to help clarify the meaning of just, fair, and equitable compensation.

53. See, e.g., Anaya & Grossman, *supra* note 19, at 1 (describing the *Awes Tingni* case as a major step forward in international law); Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 *STAN. J. INT'L L.* 47, 92 (2004) (listing *Richtersveld* as a landmark property rights case from a transitional justice perspective).

54. The discussion that follows is incredibly brief compared to the wealth of literature discussing each of these cases. The purpose of this Part is to demonstrate that even expertly litigated and persuasively written decisions do not always lead to the full vindication of the land rights of indigenous peoples. Thus, nothing in this Part should be read as detracting from these cases in any way.

For further reading, consult the Spring 2002 issue of the *Arizona Journal of International and Comparative Law*, which discusses the *Awes Tingni* case and provides the complaint, the

indigenous peoples asserting their right to land were victorious in the courts.<sup>55</sup> In neither case, however, was the court's decision widely or swiftly implemented. After *Awas Tingni*, the plaintiffs struggled to get their judgment enforced and after *Richtersveld*, other similarly situated plaintiffs failed to achieve the same success.

This Part illustrates the need for strategic guidance and assistance to nations and international institutions attempting to implement Article 28's call for just, fair, and equitable compensation.

### A. South Africa

After the fall of the apartheid state, South Africa undertook an ambitious agenda to undo the complex and firmly established legal framework that oppressed the black majority.<sup>56</sup> Land rights were central to South Africa's rebuilding process,<sup>57</sup> and those rights were first tested in the *Richtersveld* case.

#### 1. The *Richtersveld* Case

The people of *Richtersveld* occupied the northwestern corner of what is now the Northern Cape Province of South Africa.<sup>58</sup> Despite the annexation of their land by the British in 1847, the people of the *Richtersveld* Community (Community) were the exclusive occupiers of their land until diamonds were discovered in the mid-1920s.<sup>59</sup> The South African government then moved quickly to secure rights to the diamonds.<sup>60</sup> First, the Community was told that it could not mine the diamonds;<sup>61</sup> then a commission was established to relocate the Community.<sup>62</sup> The commission recommended that the Community receive 2,000 British Pounds for their land.<sup>63</sup> This compensation, however, was insignificant in

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reply, the transcript, the written arguments, the judgment, and the opinions. For further discussion of the *Richtersveld* case, see JOAN G. FAIRWEATHER, A COMMON HUNGER: LAND RIGHTS IN CANADA AND SOUTH AFRICA 107 (2006); Yvette Trahan, *Recent Developments, The Richtersveld Community & Others v. Alexkor Ltd.: Declaration of a "Right in Land" Through a "Customary Law Interest" Sets Stage for Introduction of Aboriginal Title into South African Legal System*, 12 TUL. J. INT'L & COMP. L. 565, 565-85 (2004).

55. See *infra* Parts II.A.2, II.B.2.

56. See generally ROBERT ROSS, A CONCISE HISTORY OF SOUTH AFRICA 154-213 (2d ed. 2008).

57. See generally Richard Levin & Daniel Weiner, *The Politics of Land Reform in South Africa After Apartheid: Perspectives, Problems, Prospects*, 23 J. PEASANT STUD. 93 (1996).

58. *Richtersveld II*, 2003 (6) BCLR 583 (SCA) § 2 (S. Afr.).

59. *Id.* ¶¶ 2, 67.

60. *Id.* ¶¶ 78-79.

61. FAIRWEATHER, *supra* note 54, at 107.

62. *Id.*

63. *Id.*

light of the Community's treatment. Many members of the Community were forced to work in the diamond mines performing menial jobs at wages well below those of white workers.<sup>64</sup> Through the rise of the apartheid state, the Community lost more and more of their land until it was entirely dispossessed in 1993.<sup>65</sup>

After the fall of the apartheid state,<sup>66</sup> the Community brought suit in the Land Claims Court under the 1994 Restitution of Land Rights Act and under the common law doctrine of aboriginal title.<sup>67</sup> Under the Act, the Community was required to prove that dispossession (1) took place after June 19, 1913, and (2) was the result of racial discrimination.<sup>68</sup> Furthermore, if claims had not made before December 31, 1998, they would have been completely extinguished.<sup>69</sup>

The Land Claims Court dismissed the Community's claim.<sup>70</sup> The court recognized that the claim was lodged within the statute of limitations and that the Richtersveld people formed a distinct ethnic group because they "shared the same culture, including the same language, religion, social and political structures, customs and lifestyle."<sup>71</sup> Nonetheless, it denied the Community relief because it found that the land was initially dispossessed by the British via annexation in 1847<sup>72</sup>—that is, the Community failed to establish that its dispossession was the result of racial discrimination perpetrated by the apartheid state after 1913.<sup>73</sup>

64. *Id.* at 107–08.

65. *Id.* at 108 (noting that the Coloured Rural Areas Act of 1963 began the process of dispossession); *Richtersveld II*, 2003 (6) BCLR 583 (SCA) ¶¶ 94–95 (S. Afr.) (finding that the land was given to Alexkor Limited, a corporation with the government as sole shareholder).

66. The South African approach to land redistribution was developed principally as a response to apartheid. FAIRWEATHER, *supra* note 54, at 118. Therefore, the drafters of the South African Constitution and the Restitution Act focused on alleviating the vestiges of racist policies, as opposed to colonial policies. *See id.* *Richtersveld* demonstrates considerable respect for the traditions of the Richtersveld Community (Community). At trial, the court heard testimony about the Community's spiritual cohesiveness and connection to the land. *See id.* at 110. This testimony, allowed over the government's objection, came from historians, scholars, and individuals from the Community. *Id.* This approach is probably of the sort that the drafters had in mind when they drafted Article 27, which provides for "due recognition to indigenous peoples' laws, traditions, customs and land tenure systems." Declaration, *supra* note 2, art. 27.

67. *Richtersveld I*, 1999 (3) SA 1293 (LCC) ¶ 4 (S. Afr.), *rev'd Richtersveld II*, 2003 (6) BCLR 583 (SCA) (S. Afr.); FAIRWEATHER, *supra* note 54, at 109.

68. Restitution of Land Rights Act 22 of 1994, §§ 2–3 (S. Afr.).

69. *Id.* § 2(e).

70. *Richtersveld II*, 2003 (6) BCLR 583 ¶ 18 (SCA) (S. Afr.).

71. *Id.*

72. *Id.* ¶ 7.

73. The Land Restitution Act specifies the year 1913 as the cutoff date because that is the date that the Natives Land Act 27 of 1913 was passed. T.W. Bennett & C.H. Powell, *Aboriginal Title in South Africa Revisited*, 15 S. AFR. J. HUM. RTS. 449, 450 (1999). The Native

The Supreme Court of Appeals reversed and held that the Community was actually dispossessed of its land in the 1920s when diamonds were discovered.<sup>74</sup> The Supreme Court of Appeals further held that the Community could recover under the South African Constitution, which provides that “[a] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”<sup>75</sup>

Nearly five years after the Community initiated the case, the Constitutional Court rendered its judgment.<sup>76</sup> The Constitutional Court rejected the government’s claims and found that the Community’s land rights in fact survived the annexation by the British, that the Community had a right to land in 1913, and that the Community was dispossessed of its land as a result of racial discrimination.<sup>77</sup> Thus the Community achieved a complete victory. Nevertheless, as discussed below, the implementation of the judgment was less successful.

## 2. Land Rights in the Wake of *Richtersveld*

While many lawyers and scholars recognized the *Richtersveld* decision as a watershed decision for indigenous communities,<sup>78</sup> many people and communities in South Africa have not received the same sort of adjudicatory process.<sup>79</sup> Many South Africans who were dispossessed of their land during apartheid never had their land rights restored.<sup>80</sup> In a typical example, a rural, usually subsistence, farmer was evicted on paper but remained on the land due to an oral agreement with the white owner.<sup>81</sup> The Restitution Act did not protect his rights because his land was not physically taken from him<sup>82</sup> and thus he and many similarly situated plaintiffs could not take advantage of *Richtersveld*’s groundbreaking precedent. This sort of procedural hurdle is a classic example of how a

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Lands Act 27 of 1913 is generally considered the beginning of racial discrimination in land rights. *See id.*

74. *Richtersveld II*, 2003 (6) BCLR 583 ¶ 8.

75. Constitution of the Republic of South Africa, Act 108 of 1996, § 25(7).

76. FAIRWEATHER, *supra* note 54, at 113–14.

77. *See generally Richtersveld III*, 2003 (12) BCLR (CC) 1301 (S. Afr.).

78. *See, e.g.*, Gross, *supra* note 53, at 92 (listing the *Richtersveld* case as a landmark property rights case from a transitional justice perspective); *Tears of Joy as Richtersveld Land Claim Is Settled*, MAIL & GUARDIAN ONLINE, <http://www.mg.co.za/article/2007-10-09-tears-of-joy-as-richtersveld-land-claim-is-settled> (last visited Jan. 28, 2010).

79. FAIRWEATHER, *supra* note 54, at 119–20.

80. *Id.*

81. *Id.*

82. *Id.*

procedural or jurisdictional element favors a repeat player over a one-shotter.

Since 1995, with the introduction of the Land Reform Pilot Programme, redistribution has accounted for the transfer of just under 0.6% of the country's agricultural land.<sup>83</sup> Due primarily to a lack of capacity at the Land Claims Court, most claims for restitution were not resolved by the 1998 filing deadline and still more claims were never brought.<sup>84</sup> The Land Claims Court's inability to deal with the onslaught of claims eventually caused the South African government to abandon the judicial process in favor of administrative proceedings.<sup>85</sup> The administrative process dramatically increased the number of resolved claims.<sup>86</sup> Furthermore, pursuant to recommendations from the World Bank, the South African government offered a "willing seller and willing buyer" model as an alternative to the adjudicatory process.<sup>87</sup> Scholars recognize that South Africa's land restitution process has drastically changed since *Richtersveld*<sup>88</sup> and that South Africa's current practices seem divorced from the constitutional vision.<sup>89</sup>

The outcome of *Richtersveld* has been a cause célèbre throughout South Africa and the world.<sup>90</sup> The rarity of cases like *Richtersveld*,

83. Michael Aliber, *Chronic Poverty in South Africa: Incidence, Causes and Policies*, 31 *WORLD DEV.* 473, 480 (2003). Of course, land ownership is not the same as restitution, and large scale restitution is not necessarily economically viable or desirable. *See generally Who Owns the Land?*, BBC NEWS, Aug. 8, 2002, <http://news.bbc.co.uk/2/hi/africa/594522.stm> (last visited Jan. 28, 2010).

84. FAIRWEATHER, *supra* note 54, at 119 (noting that by 2001, nearly three years after the filing date had passed, only about 12,500 of the 67,000 filed claims had been settled).

85. *See id.*

86. *See* Edward Lahiff, *Land Reform in South Africa: A Status Report*, 38 *RES. REP. PROGRAMME LAND & AGRARIAN STUD.* 13 (2008) (finding that only 5279 outstanding claims remained after 2007).

87. *Id.* at 33 ("The 'willing buyer, willing seller' model, based on the World Bank's recommendations for a market-led reform, emphasised the voluntary nature of the process, payment of full market-related prices, up-front and in cash, a reduced role for the state (relative to previous 'state-led' reforms elsewhere in the world) and the removal of various 'distortions' within the land market.").

88. *See id.* ("The 'willing buyer, willing seller' approach has remained at the centre of the South African land reform policy, despite widespread opposition and recurring promises of change from government leaders.").

89. FAIRWEATHER, *supra* note 54, at 118–19 (noting that some scholars consider the current land restitution practices to be "lip service" to the goals enunciated in the South African Constitution); *see also* Andries du Toit, *The End of Restitution: Getting Real About Land Claims*, in *AT THE CROSSROADS: LAND AND AGRARIAN REFORM IN SOUTH AFRICA INTO THE 21ST CENTURY* 75, 75–76 (Ben Cousins ed., 2000) (discussing the slow progress of land restitution and the constitutional underpinnings on land restitution).

90. *See, e.g.,* Marcia Barry, *Now Another Thing Must Happen: Richtersveld and the Dilemmas of Land Reform in Post-Apartheid South Africa*, 20 *S. AFR. J. HUM. RTS.* 355, 355 (2004); *see also* Lisa Strelein, *From Mabo to Yorta Yorta: Native Title Law in Australia*, 19



however, demonstrates the difficulty of maintaining a system that provides a fair way for indigenous minorities to attain just, fair, and equitable compensation. Thus, despite *Richtersveld*, South Africa's current land restitution process may not live up to the standards set forth in the Declaration and, as this experience demonstrates, even once a nation establishes a just, fair, and equitable system, nations may struggle to widely implement that system.

### B. Nicaragua

The *Awes Tingni* case was another major victory for indigenous peoples. Unlike in *Richtersveld*, an international court—the Inter-American Court of Human Rights—decided the case.<sup>91</sup> Nicaragua, however, struggled to comply with the standards articulated by the IACtHR.<sup>92</sup>

#### 1. The *Awes Tingni* Case

Like many indigenous communities, the *Awes Tingni* lived on lands that were not legally recognized by the government as their own.<sup>93</sup> Thus, while they lived in the same place for many years, they lived on government land.<sup>94</sup> Not having legal title became a problem for the *Awes Tingni* when the government of Nicaragua began to allow logging on the land they had traditionally occupied.<sup>95</sup> Despite assistance from international non-governmental organizations and pro bono legal counsel,<sup>96</sup> the *Awes Tingni* were unsuccessful in their attempts to compromise with the Nicaraguan government.<sup>97</sup> In 1998, they brought their case to the IACtHR.<sup>98</sup>

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WASH. U. J.L. & POL'Y 225, 247 (2005) (discussing the landmark status of *Richtersveld* among cases involving indigenous peoples rights).

91. Anaya & Grossman, *supra* note 19, at 1.

92. See discussion *infra* Part II.B.2.

93. Mayagna (Sumo) *Awes Tingni* Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at ¶ 103 (Aug. 31, 2001); Anaya & Grossman, *supra* note 19, at 2.

94. *Awes Tingni*, 2001 Inter-Am. Ct. H.R. ¶ 103. This is a common problem for indigenous peoples, especially those who live in rural areas. See, e.g., Shamir, *supra* note 27, at 238–42 (discussing the property rights of Bedouins in the Negev).

95. Anaya & Grossman, *supra* note 19, at 2.

96. The talent and experience of legal counsel and consultants who came to the aid of the *Awes Tingni* was remarkable. The legal team included James Anaya and John Allen from the University of Iowa College of Law, S. Todd Crider of Simpson, Thacher & Bartlett LLP, and María Luisa Acosta (local counsel from Nicaragua), with the Indian Law Resource Center also assisting. *Id.* at 3 n.4.

The *Awes Tingni* also received assistance with “historical, ethnographical, and geographical data relevant to its land claim” from Harvard University’s Weatherhead Center for International Affairs. *Id.* at 5. This sort of international cooperation is essential to overcoming the repeat player/one-shotter paradigm.

97. *Id.* at 6.

98. *Awes Tingni*, 2001 Inter-Am. Ct. H.R. ¶¶ 1–74 (discussing procedural history).

The Awas Tingni asked the IACtHR to require Nicaragua “to establish and implement a procedure that would result in the prompt demarcation and specific recognition of Awas Tingni communal lands . . . and to provide monetary compensation to Awas Tingni for the infringement of its territorial rights.”<sup>99</sup> The Awas Tingni built their case through testimony from nearby communities, ethnographic research, and mapping.<sup>100</sup> The ethnographic research and mapping were provided on a pro bono basis.<sup>101</sup> The government of Nicaragua argued that the Awas Tingni had not been on the land for a sufficiently long period of time and that the community was claiming more land than it could possibly be entitled to.<sup>102</sup>

Ultimately, the IACtHR found that the Awas Tingni were entitled to land, and held that the American Convention on Human Rights protects the right of indigenous peoples to occupy and use their customary lands.<sup>103</sup> The IACtHR further held that the Awas Tingni’s property rights were violated by Nicaragua because the government permitted deliberate encroachments on Awas Tingni territory.<sup>104</sup> The IACtHR’s holding, however, did not create any specific guidance on how the land rights of the Awas Tingni should be implemented or how other claims for land by indigenous communities should proceed.<sup>105</sup>

## 2. Land Rights in the Wake of *Awas Tingni*

Implementation of the IACtHR’s decision presented substantial difficulties.<sup>106</sup> Leonardo J. Alvarado, an attorney who assisted the Awas Tingni wrote that “[t]he most important element of the Court’s ruling—the actual demarcation of Awas Tingni territory—entailed a process plagued with unacceptable delays, dilatory practices by the government,

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99. Anaya & Grossman, *supra* note 19, at 9; *Awas Tingni*, 2001 Inter-Am. Ct. H.R. ¶ 167.

100. Anaya & Grossman, *supra* note 19, at 5–6.

101. *Id.* at 5.

102. *Id.* at 9.

103. *Awas Tingni*, 2001 Inter-Am. Ct. H.R. ¶¶ 167–73.

104. *Id.*

105. *See id.*; Anaya & Grossman, *supra* note 19, at 15.

106. The IACtHR’s decisions are binding on countries that have ratified the American Convention on Human Rights. American Convention on Human Rights art. 68(1), Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (“The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.”) [hereinafter American Convention]. However, like many international agreements, enforcement mechanisms under the American Convention are weak. *See* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 217 (2005) (arguing that the lack of enforcement mechanisms “make international collective action problems difficult to overcome even when there is a plausible argument that the international regime, if successful, would enhance the welfare of every participating state.”).

and an overall lack of political will to recognize the full extent of the Awas Tingni's territorial claim."<sup>107</sup>

Nicaragua began the process of demarcation by establishing a commission to comply with the IACtHR's decision and negotiate implementation with the Awas Tingni.<sup>108</sup> Negotiations, however, broke down, and the Awas Tingni continued to suffer third party encroachment on their land.<sup>109</sup> Eventually, the Awas Tingni returned to the IACtHR to ask for an extraordinary form of relief known as a Provisional Measures Resolution that would require "Nicaragua to immediately adopt any measures necessary to protect the community's right to the use and enjoyment of its lands and natural resources in order to avoid the 'immediate and irreparable damage resulting from activities of third parties who have established themselves inside the territory . . . .'"<sup>110</sup> The court affirmed the Awas Tingni's rights, but, once again, the Nicaraguan government was slow to comply.<sup>111</sup> The Awas Tingni filed an action in Nicaraguan court seeking to enforce the judgment, but more than four years passed before the Regional Council ratified a resolution demarcating Awas Tingni land.<sup>112</sup> Once land was demarcated, the IACtHR moved swiftly to approve the resolution, and title was awarded to the Awas Tingni in December of 2008.<sup>113</sup>

Over the seven years that elapsed between the IACtHR's judgment and demarcation, the Awas Tingni suffered continual encroachment on

107. Alvarado, *supra* note 19, at 618–19. Nevertheless, the government of Nicaragua has paid at least \$30,000 in monetary reparations. *Id.* at 619. Nicaragua has also implemented a procedure to settle land disputes with indigenous minorities. *Id.* at 624. Nicaragua's process for settling land disputes was established after the World Bank conditioned a loan on compliance with that aspect of the IACtHR's decision. *Id.*; see also Press Release, World Bank, Nicaragua: World Bank, Government of Nicaragua Sign US\$32.6 Million Credit to Support Land Administration (June 24, 2002), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20051334~menuPK:64282138~pagePK:41367~piPK:279616~theSitePK:40941,00.html> (last visited Jan. 28, 2010).

108. Alvarado, *supra* note 19, at 619–20.

109. *Id.*

110. *Id.* at 620–21 (quoting Order of the Inter-Am. Ct. H.R. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, at 6, ¶ 1 (Sept. 6, 2002)).

111. *Id.* at 621.

112. Indigenous Peoples Law & Policy Program, Univ. of Ariz. James E. Rogers Coll. of Law, Awas Tingni v. Nicaragua, <http://www.law.arizona.edu/depts/jplp/advocacy/awastingni/index.cfm?page=advoc> (last visited Jan. 28, 2010); see also Alvarado, *supra* note 19, at 621 (positing that "[t]he lack of response to this latest legal action can be attributed to the politicization and corruption that has plagued the Nicaraguan judicial system to the detriment of indigenous communities and other non-powerful sectors of society that have attempted to obtain justice through the courts"). The Indigenous Peoples Law & Policy Program assisted the Awas Tingni in their effort to secure land rights.

113. Indigenous Peoples Law & Policy Program, *supra* note 112 (providing copies of the IACtHR resolution and the agreement between the government of Nicaragua and the Awas Tingni).

their land.<sup>114</sup> In particular, the Awas Tingni struggled to prevent local logging companies from entering their land.<sup>115</sup> Furthermore, the Awas Tingni struggled to clearly define their land rights in relation to neighboring communities, which also sought title to land allocated to the Awas Tingni.<sup>116</sup> Not only did this create a delicate situation between the Awas Tingni and their neighbors, but the Nicaraguan government also used this as evidence against the Awas Tingni at both the IACtHR and the regional demarcation proceedings.<sup>117</sup>

*Awas Tingni* is undoubtedly a landmark case for indigenous land rights. The indigenous community was successful against a government that had a substantial incentive to litigate vigorously. The case also represented how international assistance can help overcome the one-shotter/repeat player paradigm.<sup>118</sup> From the long process endured by the Awas Tingni and their legal team, the international community can learn a great deal about litigating land claims brought by indigenous peoples. Nonetheless, international law and policy still has a long way to go if this sort of success is to be replicated.

Both *Richtersveld* and *Awas Tingni* are pre-Declaration cases. The natural question, therefore, is whether the Declaration would have changed how these cases played out. Each of these cases, insofar as its holding is concerned, appears to be in line with the Declaration. In other words, the prescribed remedies in *Richtersveld* and *Awas Tingni* appear to each fall within the ambit of just, fair, and equitable. However, the lesson of *Richtersveld* and *Awas Tingni* is found in the subsequent practical, enforcement-related problems not specifically addressed by Article 28. Thus, with respect to the practical problems addressed in this Part, Article 28 would probably not have had a meaningful effect.

Part III draws on the theoretical analysis in Part I and the case studies discussed in Part II to make recommendations to improve Article 28's capacity to benefit indigenous peoples.

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114. *See id.*

115. Alvarado, *supra* note 19, at 621–22 (“[Foreign-based logging companies] have been replaced by illegal logging operations carried out by a diverse set of local actors including ex-combatants, members of neighboring communities, and even public officials.”).

116. *Id.* at 628–32.

117. *Id.* at 628–30.

118. *See supra* note 96 (discussing the legal team that assisted the Awas Tingni).

### III. HOW THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS CAN IMPROVE THE MEANING AND EFFICACY OF ARTICLE 28

#### A. Oversight, Monitoring, and Empowerment

The Declaration needs an oversight body with the capacity to declare the meaning of Article 28. The United Nations Permanent Forum on Indigenous Issues is one group that could serve such a function. The Permanent Forum should begin using case studies to analyze and critique the land restitution methods used by various nations.<sup>119</sup> By virtue of the Permanent Forum's clout and ability to connect and communicate with indigenous groups worldwide, the Permanent Forum could give indigenous communities a wealth of resources on which to draw.<sup>120</sup> The Permanent Forum, therefore, can help level the playing field by diminishing some of the economic and information advantages that governments retain.

The Permanent Forum should publish a series of case studies or comments that describe the processes and remedies used by nations that undertake the land restitution process.<sup>121</sup> In these case studies, the Permanent Forum should draw legal conclusions about whether each nation is living up to the standards set forth in Article 28—whether its land restitution process provides for due recognition<sup>122</sup> and just, fair, and

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119. See *supra* note 45 (discussing the Human Rights Committee and its ability to issue General Comments on the implementation and meaning of the ICCPR).

120. The Permanent Forum was established as a subsidiary organ of the United Nations Economic and Social Council. See ECOSOC Res. 2000/22, ¶ 2, U.N. Doc. E/2000/INF/2/Add.2 (July 28, 2000) (“[T]he Permanent Forum on Indigenous Issues shall serve as an advisory body to the Council with a mandate to discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights . . .”).

The Permanent Forum's mandate is sweeping but relatively mild. It includes: providing “expert advice and recommendations on indigenous issues to the Council,” raising awareness and promoting the indigenous issues within the U.N. system, and disseminating information on indigenous issues. John Carey & Siegfried Wiessner, *A New United Nations Subsidiary Organ: The Permanent Forum on Indigenous Issues*, AM. SOC'Y INT'L L., Apr. 2001, <http://www.asil.org/insigh67.cfm> (last visited Jan. 28, 2010). From the Permanent Forum's inception, its mandate to push for reform, particularly in the area of land rights, has been ambiguous. *Id.*

121. Writing authoritative opinions on the meaning of the Declaration would be analogous to the role played by the Human Rights Committee, in interpreting the ICCPR. Connor, *supra* note 45, at 511.

122. The concept of recognition is a classic subject in international law. See JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 43–45 (1987); THOMAS D. GRANT, *THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION* xx (1999) (recognizing a distinction between political and legal recognition). The scholarship on recognition typically analyzes whether the international community will choose to deal with a questionably elected government, a rebel group, or a secessionist state. See Robert D. Sloane, *The*

equitable compensation. Indigenous peoples seeking to secure land rights in other nations could then use the Permanent Forum's case studies to lobby for procedural and substantive changes that conform to the Declaration.<sup>123</sup> The case studies produced by the Permanent Forum could, over time, act as quasi-precedent that enable indigenous communities to hold states to account.<sup>124</sup>

Case studies or comments, however, need to recognize the complex political, cultural, historical, and economic environment in which indigenous peoples seek to obtain title to their native lands. In South Africa, for instance, the new government struggled to create a land restitution policy that addressed the country's diverse needs.<sup>125</sup> South Africa, like many developing nations, seeks to create a thriving and sustainable agricultural sector.<sup>126</sup> Land redistribution, especially on a large scale, can hamper sustainable and robust agricultural development.<sup>127</sup> In this regard, simply transferring title to land without considering the economic and development consequences can have troubling effects.<sup>128</sup> Therefore, the Permanent Forum or similar oversight body would be wise to consider the economic climate in which it interprets the Declaration.<sup>129</sup>

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*Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 109–10 (2002) (defining three forms of recognition: political, legal, and civil).

The canonical work on the subject of recognition does not appear to contemplate indigenous peoples. See generally PHILIP C. JESSUP, *THE BIRTH OF NATIONS* (1974); HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1947). The Permanent Forum might be able to draw upon the rich scholarly writings that deal with recognition of nations, states, and governments. However, whether and how the Permanent Forum, or legal scholars in general, should borrow from this literature is a fascinating question beyond the scope of this Note.

123. See Macklem, *supra* note 1, at 179 (discussing the value of the Declaration as providing for diffuse legal consequences).

124. *Id.*

125. Yves Van Leynseele & Paul Hebinck, *Through the Prism: Local Reworking of Land Restitution Settlements in South Africa*, in *THE RIGHTS AND WRONGS OF LAND RESTITUTION: 'RESTORING WHAT WAS OURS'* 163, 164–66 (Derick Fay & Deborah James eds., 2009).

126. See Hasani Claxton, *Land and Liberation: Lessons for the Creation of Effective Land Reform Policy in South Africa*, 8 MICH. J. RACE & L. 529 (2003).

127. For example, in Zimbabwe, land reform appears to be a failure in both political and economic terms. Karol Boudreaux, *A New Call of the Wild: Community-Based Natural Resource Management in Namibia*, 20 GEO. INT'L ENVTL. L. REV. 297, 320 (2008) (“Due to [Zimbabwean] government policies, land tenure in Zimbabwe for both whites and blacks is highly insecure, the economic situation has dramatically deteriorated and violence and censorship has increased.”).

128. See *id.*

129. The law and economics of land reform is a subject of a contentious debate that is well beyond the scope of this Note. See, e.g., *REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* (Federico Lenzerini ed., 2009) (collecting diverse and divergent viewpoints on reparations); Online NewsHour: Land Redistribution in Southern Africa, <http://www.pbs.org/newshour/bb/africa/land/index.html> (last visited Feb. 19, 2010). Nonetheless, it is an essential issue for any decision-making body to consider. See KLAUS DEININGER, WORLD BANK, *LAND POLICIES AND LAND*

While these case studies would have little, or perhaps no binding effect on many national courts,<sup>130</sup> they could at least provide some guidance. The benefits of case studies are probably more political than jurisprudential.<sup>131</sup> Therefore, indigenous peoples are more likely to use the Permanent Forum's case studies as a tool to lobby legislatures for procedural or substantive changes.<sup>132</sup>

Regardless of whether the Permanent Forum's case studies are used in courts or as leverage in the lobbying process, the case studies have the effect of mitigating the economic and information advantages held by repeat players. Economic and information advantages as understood in the repeat player/one-shotter paradigm typically include the ability simply to throw more resources at a problem.<sup>133</sup> For example, governments can hire more attorneys, who have more experience, more time to research, and who are litigating to set a precedent that might deter other claims.<sup>134</sup> The Permanent Forum's case studies could provide indigenous peoples with a readymade argument and set of alternative approaches for courts and legislatures to consider. Furthermore, the information gap would be diminished if indigenous peoples had the opportunity to learn from each other's tactics. Case studies can serve as a mechanism to connect indigenous land claimants, thus furthering the Permanent Forum's mandate, which includes "prepar[ing] and disseminat[ing] information on indigenous issues."<sup>135</sup> Using case studies to analyze whether nations are living up to the standards of the Declaration, therefore, is perhaps a politically palatable and feasible way for the Permanent Forum to create meaning out of the ambiguous wording of Article 28.<sup>136</sup>

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REFORM, available at [http://siteresources.worldbank.org/INTIS/SPMA/Resources/Training-Events-and-Materials/land\\_policies\\_reform.pdf](http://siteresources.worldbank.org/INTIS/SPMA/Resources/Training-Events-and-Materials/land_policies_reform.pdf) (last visited Feb. 8, 2010).

130. See generally SHAHEED FATIMA, USING INTERNATIONAL LAW IN DOMESTIC COURTS (2005) (recognizing that national courts vary widely in their treatment of international law in domestic cases).

131. As previously explained the Declaration is non-binding and to reach the level of hard law would need to be ratified as a treaty. See generally Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 9-16 (discussing compliance and enforcement of U.N. treaties and declarations). Even if that were to happen, the nations could still escape its force through reservations. *Id.*

132. See Coulter, *supra* note 4, at 546, 552. Nevertheless, the Declaration arguably may contribute to the development of customary international law. See, e.g., *id.* at 551-52.

133. See *supra* Part I.A.

134. See Galanter, *supra* note 13, at 135-39.

135. U.N. Permanent Forum on Indigenous Issues, Permanent Forum: Origin and Development, [http://www.un.org/esa/socdev/unpfii/en/about\\_us.html](http://www.un.org/esa/socdev/unpfii/en/about_us.html) (last visited Jan. 28, 2010).

136. Case studies would also be a powerful tool for international human rights organizations, which have been growing in scholarship and in practice. In scholarship, see, for example, AMNESTY INT'L, HUMAN RIGHTS VIOLATIONS AGAINST INDIGENOUS PEOPLES OF THE AMERICAS (1992); ANAYA, *supra* note 24; JULIAN BERGER, ABORIGINES TODAY: LAND AND JUSTICE (1988); SHELTON H. DAVIS, LAND RIGHTS AND INDIGENOUS PEOPLES: THE ROLE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (1988); JEREMIE GILBERT,

The principles underlying Article 28 could also be strengthened by the nascent Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.<sup>137</sup> The Optional Protocol would give the Committee on Economic, Social and Cultural Rights the ability to receive and consider communications related to the Covenant.<sup>138</sup> Many of the rights articulated in the Covenant are closely related to Article 28 of the Declaration. For example, the Covenant guarantees rights to cultural and scientific progress.<sup>139</sup> It is conceivable, albeit unlikely, that the principles of Article 28 could be included in the Committee's analysis of the Covenant if the ability to have and hold land, including native land, were considered part and parcel of cultural and scientific progress.

### B. Institutional Capability and Political Pressure

Once a nation (or the international community) makes a commitment of providing just, fair, and equitable compensation to indigenous peoples with legitimate claims, many administrative and political issues will remain. For example, in South Africa, the courts simply became overwhelmed with claimants and were unable to sustain the sort of fact-intensive process followed in *Richtersveld*.<sup>140</sup> In Nicaragua, on the other hand, the government lacked the political will and institutional capacity to follow the mandate of the IACtHR.<sup>141</sup> Therefore, in order to improve the implementation of judgments, the international community will need to improve the institutional capacity of nascent judicial systems and find ways to help states summon the political will to return land to indigenous peoples.<sup>142</sup>

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INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS (2006); INDIGENOUS PEOPLES AND PROTECTED AREAS: THE LAW OF THE MOTHER EARTH (Elizabeth Kemp ed., 1993). In practice, see for example, Indigenous Peoples Law and Policy Program, *supra* note 112 (noting that this Program was principally responsible for the success in the *Awes Tingni* case).

137. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, art. 2, U.N. Doc. A/RES/63/117 (Dec. 10, 2008) [hereinafter *Optional Protocol*]; see also Press Release, New Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. L/T/4418 (Sept. 30, 2009), available at <http://www.un.org/News/Press/docs/2009/Lt4418.doc.htm> (last visited Jan. 28, 2010).

138. Optional Protocol, *supra* note 137, art. 2.

139. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 15, U.N. Doc. A/RES/21/2200 (Dec. 16, 1966).

140. See *supra* Part II.A.2.

141. See *supra* Part II.B.2.

142. This section, of course, only begins to list the variety of public policy measures that might be used to assist the implementation of judgments.



One method of improving the implementation of judgments is through rule of law initiatives,<sup>143</sup> which are generally considered a form of soft power or diplomacy.<sup>144</sup> While there are many policies that might prove beneficial, one that can be successful is known as “reinforcement by reward.”<sup>145</sup> In short, such a policy requires that “[g]overnments that fail to respond to incentives to adopt and implement prescribed reforms are neither coerced nor rewarded, but are left to bear the costs of exclusion (from aid allocation, favorable trade and investment conditions, security guarantees, membership in organizations or other forms of linkages to benefit-granting international regimes) until such a time as they, or a successive government, decide to comply.”<sup>146</sup> While it is unlikely that the international community would garner the will to use “reinforcement by reward” to enforce the Declaration, the international community may be more likely to act in favor of policies aimed at strengthening judicial systems and improving access to justice.<sup>147</sup> Such policies, coupled with a more potent and clear understanding of the Declaration, might help create the necessary conditions for indigenous peoples to successfully obtain and implement a judgment.<sup>148</sup>

## CONCLUSION

This Note sought to (1) demonstrate why the standards set out in Article 28 require clarification, and (2) propose reforms (both in and outside of the U.N. framework) that might benefit indigenous peoples claiming land rights. Part I drew an analogy to Professor Galanter’s

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143. Rule of law initiatives are a matter of considerable debate. *See generally* Amichai Magen, *The Rule of Law and Its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. INT’L L. 51 (2009) (discussing the intellectual history of rule of law movements and various critiques that challenge the legitimacy of rule of law initiatives).

144. *See id.* at 101–14 (discussing different methods for promoting the rule of law, including: (1) coercive imposition and neo-trusteeship, (2) punitive and positive external incentives, (3) international democratic socialization, and (4) demonstration and emulation). These sorts of methods are generally directed toward developing nations at the behest of highly developed nations or their institutions (such as the World Bank or the International Monetary Fund).

145. *Id.* at 105–06; *see also supra* note 107 (noting that Nicaragua complied with the IACtHR’s judgment after compliance was conditioned upon the receipt of a World Bank loan).

146. Magen, *supra* note 143, at 105 (noting, however, that “the number of international actors able and willing to deploy this type of external pressure has been very small”).

147. *Id.*

148. In the end, however, implementing judgments might simply be a matter of national political will and social norms, which may be more difficult to change though incentive-based policies. *See, e.g., Stop that Hunting; Botswana’s Bushmen*, ECONOMIST, Aug. 8, 2009, at 44 (noting that political will to allow the Bushmen (or San) to live independently on their own land conflicts with political norms on inclusion and diversity).

analysis of repeat players and one-shotters to explain how Article 28's requirement of just, fair, and equitable compensation may not necessarily benefit indigenous peoples in the litigation process. Part II explained, by reference to the *Richtersveld* and *Awas Tingni* cases, that even successfully litigated claims can suffer from the difficulty of obtaining a just, fair, and equitable remedy. Part III proposed several ways to help indigenous peoples break through the repeat player/one-shotter paradigm to obtain this meaningful remedy.