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Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights: Towards Enforcement in U.S. and Australian Domestic Courts

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USING INTERNATIONAL LAW MORE EFFECTIVELY TO SECURE AND ADVANCE INDIGENOUS PEOPLES' RIGHTS: TOWARDS ENFORCEMENT IN U.S. AND AUSTRALIAN DOMESTIC COURTS

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Abstract: Over the past three decades, indigenous peoples have effected a remarkable redefinition of their status and rights under international law, giving rise to an emerging distinct customary international law of indigenous peoples' rights. Though that process is ongoing, the next critical step is enforcing these congealing rights "at home" in the domestic courts of indigenous peoples' surrounding nations. Australia and the United States provide the most difficult and most revealing contexts in which to explore the possibilities and limitations of this necessary next step. The direct enforcement of the emerging customary international law of indigenous peoples' rights is not yet possible in either context, and may never be. However, the strategic use of this new customary international law as strongly persuasive authority within Australian and U.S. federal courts in domestic causes of action is a promising approach. This is because Australian and U.S. courts have generally become more open to internationally based arguments, and because international law has a special place in Australian and U.S. federal indigenous peoples' jurisprudence. This Comment argues that because this jurisprudence was itself founded upon principles of international law, newly emergent principles of international indigenous peoples' rights law should be received into Australian and U.S. domestic courts as strongly persuasive authority: they may not provide a cause of action but they can provide a rule of decision. This process of giving interpretive force to international indigenous rights law within domestic federal law might be termed "soft" enforcement of international law. Perhaps the arena in which these principles can most clearly be seen and implemented is in the protection of indigenous "cultural sovereignty." This Comment continues by highlighting the promising movements on this front in both Australian and U.S. federal courts and how indigenous peoples might utilize principles of "soft" enforcement to best secure and advance their "cultural sovereignty" rights. These general recommendations are tested and applied in the final section by revisiting the High Court of Australia's recent *Kartinyeri v. The Commonwealth* decision and the U.S. Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*.

I. INTRODUCTION

Over the past three decades, indigenous peoples have effected a remarkable redefinition of their status and rights under international law, giving rise to a collection of international norms that are highly favorable to their aspirations.[1] But as S. James Anaya has powerfully argued, "[i]t is one

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[1] *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 5.06[2]-[3] (2005); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 56-58, 61-72 (2d ed. 2004); Russell Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM.

thing . . . for international law to incorporate norms concerning indigenous peoples; it is quite another thing for the norms to take effect in the actual lives of people."[2] Indeed, meaningful enforcement of these highly favorable norms at the local level has been elusive.[3] International law has proved to be rather Janus-faced for indigenous peoples: on the one hand international law's concern for human rights and the right of all peoples to determine their own political destinies has been the central underpinning to the assertion of indigenous peoples' rights on the international level; on the other hand, international law's traditional structure built upon the twin precepts of state sovereignty and consent—with the resulting corollaries of territorial integrity, exclusive jurisdiction, and non-intervention in domestic affairs—has impeded attempts to translate success at the international level to the domestic and local level.[4] As a result, indigenous peoples wishing to secure and advance their rights are faced with an uninviting choice: they can take their claims before often hostile domestic courts that do not recognize favorable existing international law, or they can advance their claims before more sympathetic but largely toothless international bodies without hope for resulting enforcement of whatever decree they might win. Put simply, the important gains achieved at the international level by indigenous peoples and their advocates must find their way to the local level in order "to take effect in the actual lives of people."[5] The challenge is to find the most effective means to make this transition.

This Comment takes up this challenge in the specific contexts of Australia and the United States, arguing that indigenous peoples in these two countries should employ the emerging international indigenous rights jurisprudence as persuasive authority in asserting their claims in domestic courts. Such "soft" enforcement of international law in the domestic courts of Australia and the United States is the most promising avenue available for securing and advancing indigenous peoples' rights through the international law principles of both countries. Direct enforcement in the U.S. and

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RTS. J. 33, 33-34 (1994). For a careful identification of core aspirations of the international indigenous peoples' movement, see ANAYA, *supra*.

[2] ANAYA, *supra* note 1, at 185.

[3] *See* Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1751 (2003); COHEN, *supra* note 1, § 5.06[4][a][ii]-[iii]. *See also* Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 2 (1992) (describing American courts' responses to international human rights claims as "largely, though not uniformly, disappointing").

[4] S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 HARV. INDIAN L. SYMP. 191, 191 (1990), *reprinted in* AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM – CASES AND MATERIALS 1451 (Robert N. Clinton et al. eds., 2003).

[5] ANAYA, *supra* note 1, at 185.

Australia is generally unavailable in the absence of a fully crystallized customary international law or a binding international treaty schema. However, because U.S. and Australian indigenous rights jurisprudence was itself founded upon principles of international law, this jurisprudence should receive international law as highly persuasive authority.

Part II of this Comment examines the emerging customary international law of indigenous peoples' rights, clarifying what has "crystallized" and what is still in the process of formation. In addition, Part II identifies and focuses on the "firmest edge" of this emerging jurisprudence: the right to "cultural sovereignty." Part III explores the best methods for enforcing this generally favorable customary international law for indigenous peoples in the domestic courts of Australia and the United States. Part III argues that direct enforcement is currently largely unavailable but that international law should be used as persuasive authority with interpretive force in domestic courts. In other words, emerging customary law of indigenous rights may not provide a cause of action in Australian or U.S. courts, but it can provide a rule of decision. Part IV then applies these general recommendations to the specific context of cultural sovereignty, revisiting the High Court of Australia's recent *Kartinyeri v. The Commonwealth*[6] decision and the U.S. Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*.[7]

II. EMERGING INTERNATIONAL NORMS ADVANCE INDIGENOUS PEOPLES' RIGHTS

The last three decades have seen the creation of a powerful new force in international law: an emerging collection of norms favorable to the advancement of indigenous peoples' rights.[8] While these new norms have found expression in both new and already existing international agreements and declarations, to date there has not been an enactment of a comprehensive treaty or convention detailing the content and governance of this new collection of norms.[9] In the absence of such an overarching treaty regime, indigenous persons have had to look to principles of customary international law to give additional content and binding force to these emerging norms.[10]

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6 Kartinyeri v. The Commonwealth (1998) 195 C.L.R. 337.

7 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

8 *See* COHEN, *supra* note 1, § 5.06[2]-[3]; ANAYA, *supra* note 1, at 61-72; Barsh, *supra* note 1.

9 *See* ANAYA, *supra* note 1.

10 *See* COHEN, *supra* note 1, § 5.06[4][a][ii]; ANAYA, *supra* note 1, at 194-200.

The following part of this Comment examines these processes and identifies and examines two principle aspects of the emerging indigenous rights norms that have fully crystallized into binding customary international law.

A. Customary International Law and International Legal Process Can Provide Binding Norms upon Nations

There are two primary sources of contemporary international law: international agreements and customary international law.[11] Each has the potential to render international norms binding upon nations. International agreements consist of various international instruments (treaties, conventions, etc.) that expressly define standards of behavior between signatory parties to the instrument.[12] Primary examples include the United Nations Charter[13] and the Vienna Convention on the Law of Treaties.[14]

Customary international law, though often given reduced attention because of its less tangible nature, plays an equally vital role in international law and legal processes.[15] International customary law consists of the general practices or rules of behavior that states observe and follow out of a sense of self-perceived legal obligation.[16] An example is the prohibition against torture.[17] Customary international law is to be distinguished from mere comity and courtesy in that nations do not undertake the courtesies that they extend to other nations out of a sense of legal obligation.[18] Unlike international agreements, customary international law may bind states even though they have not formally agreed to be bound, unless they clearly and persistently object to the emerging custom as it develops.[19] Customary international law is thus not necessarily written down, and therefore states may still be bound by a treaty or convention even though they have not become signatories to that treaty if the content of the treaty has achieved

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[11] *See* Statute of the International Court of Justice Art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT].

[12] *See* COHEN, *supra* note 1, § 5.06[1].

[13] U.N. Charter.

[14] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 23 U.S.T. 3227, 1155 U.N.T.S. 331.

[15] INTERNATIONAL LAW: NORMS, ACTORS, PROCESS—A PROBLEM-ORIENTED APPROACH 70 (Jeffrey L. Dunoff et al. eds., 2002).

[16] *See* RESTATEMENT, *supra* note 11, § 102(2); Bayefsky & Fitzpatrick, *supra* note 3, at 3.

[17] *See* RESTATEMENT, *supra* note 11, § 702.

[18] *See* COHEN, *supra* note 1, § 5.06[1].

[19] RESTATEMENT, *supra* note 11, § 102 cmt. c.

customary international law status.[20] This is a crucial gap-filling function of international customary law given that international agreements cannot hope to cover all necessary relations between nations and other subjects of international law.[21] But customary international law is only binding once it has fully emerged, or "crystallized," a hard-to-define status achieved only when a majority of states recognize it as law.[22]

Evidence of norms that have ripened into fully crystallized rules of customary international law derives from a number of sources. Fundamental to proving the existence of a customary international law principle is proof of state practice and accompanying proof that this state practice was undertaken out of a sense of legal obligation.[23] Examples include official state documents, submissions to international negotiation or policy bodies, or other indications of governmental action.[24] Additional sources of evidence for determining what constitutes customary international law include the judgments and opinions of international judicial and arbitral tribunals; judgments and opinions of national judicial tribunals; diplomatic statements; national legislation; treaties between other parties; declarations, resolutions, or statements of principle; and the writings of scholars documenting proof of customary international law.[25]

Although determining what norms have crystallized and achieved the status of customary international law is often difficult, rules of customary international law are binding against nations and other subjects of

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[20] INTERNATIONAL LAW: NORMS, ACTORS, PROCESS—A PROBLEM-ORIENTED APPROACH, *supra* note 15, at 80.

[21] *See* INTERNATIONAL BUSINESS AND ECONOMICS LAW AND POLICY 56 (Paul B. Stephan et al. eds., 3d ed. 2004).

[22] INTERNATIONAL LAW: NORMS, ACTORS, PROCESS—A PROBLEM-ORIENTED APPROACH, *supra* note 15. For an example of a domestic court finding a principle of customary international law to be fully crystallized and therefore dispositive of the matter before it, see the foundational U.S. case, *The Paquete Habana*, 175 U.S. 677, 700, 708 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . . This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prizes of war.").

[23] *See* RESTATEMENT, *supra* note 11, § 103 cmt. a.

[24] *See id*.

[25] *See* RESTATEMENT, *supra* note 11, § 103(2); Craig Allen, Lecture to International Law Class at the University of Washington School of Law (Oct. 4, 2004) (copy on file with the *Pacific Rim Law & Pol'y Journal*).

international law both at the international level and frequently in the domestic courts of the many nations themselves.[26] This is true of the United States and Australia where rules of customary international law are applicable to certain actions before their respective national courts.[27] Thus, even though Australia and the United States may not be signatories to certain international agreements governing a particular standard, or even if there are no international agreements in relation to this standard in the first place, this does not mean that the domestic courts of Australia and the United States will ignore this standard.[28] Indeed, these courts may, in particular situations, deem these standards to be persuasive, or perhaps even fully enforceable,[29] as rules of customary international law.[30]

B. The Emergence of a Distinct Customary International Law Gives Favorable Content to Indigenous Peoples' Rights

Emerging international indigenous rights norms have been promulgated and articulated through three interrelated and mutually reinforcing processes: (1) interpretation of existing international law in a way favorable to indigenous peoples' aspirations; (2) promulgation of new international instruments specifically focused on indigenous peoples' rights; and (3) successful litigation before international bodies resulting in decisions that have given further favorable content to indigenous peoples' rights.[31] Indigenous peoples themselves have been at the forefront of these processes, which explains in large part the relative success obtained.[32] In addition, numerous jurists and commentators have given further content to the body of emerging indigenous rights norms.[33]

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[26] *See* COHEN, *supra* note 1, § 5.06[1].

[27] *See e.g.*, Bayefsky & Fitzpatrick, *supra* note 3, at 3-41 (evaluating when customary international human rights law may achieve persuasive and direct enforceability in U.S. courts); Michael Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 BERKELEY J. INT'L L. 387, 392-93 (2002).

[28] *See* COHEN, *supra* note 1, § 5.06[1].

[29] *See id.*

[30] The full impact of this reality for the enforceability of indigenous rights norms is explored in greater detail *infra* and represents the point of departure for the policy recommendations of this Comment. But first we turn to an examination of which of these indigenous rights norms have crystallized into customary international law.

[31] *See* ANAYA, *supra* note 1, at 61-72.

[32] *See* Note, *supra* note 3, at 1756.

[33] *See* ANAYA, *supra* note 1, at 61-72.

1. Primary Existing International Law Instruments Are Favorably Interpreted to Support Indigenous Peoples' Rights

The primary existing international law instruments that have been favorably reinterpreted to support indigenous peoples' rights include the U.N. Charter,[34] the Universal Declaration of Human Rights ("Universal Declaration"),[35] the International Covenant on Civil and Political Rights ("ICCPR"),[36] the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"),[37] and the American Declaration of the Rights and Duties of Man ("American Declaration").[38] The U.N. Charter established two underlying general principles that serve as the foundation for much of the content of contemporary indigenous rights discourse:[39] the right of self-determination for all peoples and the duty of all states to promote human rights, including the right to be free of discrimination on the basis of race, sex, language, or religion.[40] The Universal Declaration and the American Declaration build on these concepts. Though they are not legally binding documents,[41] they are clear statements of an international consensus on human rights norms, and as such have been effectively used by indigenous rights advocates as evidence of customary international law favorable to indigenous rights claims.[42]

Indigenous rights advocates have been particularly effective in employing the ICCPR and the ICERD.[43] Article 27 of the ICCPR guarantees that persons belonging to "ethnic, religious or linguistic minorities" within a nation "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and

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[34] U.N. Charter, *supra* note 13.

[35] Universal Declaration of Human Rights, December 10, 1948, G.A. Res. 217, *reprinted in* INTERNATIONAL LAW SELECTED DOCUMENTS 409 (Barry E. Carter et al. eds., 2003).

[36] International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171 (adopted by the U.N. General Assembly at New York on December 16, 1966; entered into force on March 23, 1976; ratified by the U.S. on June 8, 1992) [hereinafter ICCPR], *reprinted in* INTERNATIONAL LAW SELECTED DOCUMENTS 415 (Barry E. Carter et al. eds., 2003).

[37] International Convention on the Elimination of All Forms of Racial Discrimination, 5 I.L.M. 352 (1966) (done at New York on January 7, 1966; entered into force on January 4, 1969), *reprinted in* INTERNATIONAL LAW SELECTED DOCUMENTS 452 (Barry E. Carter et al. eds., 2003).

[38] The American Declaration of the Rights and Duties of Man, *reprinted in* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 3 (2001).

[39] *See* COHEN, *supra* note 1, § 5.06[2][a].

[40] U.N. Charter, *supra* note 13.

[41] *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[42] *See* Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980). Several decisions in which indigenous rights' advocates have effectively utilized these international documents in advancing their claims are examined in detail *infra*, Part II.C.

[43] *See* COHEN, *supra* note 1, § 5.06[2][c]-[d].

practice their own religion, or to use their own language."[44] Article 27 has been successfully employed by indigenous peoples in various international fora to limit the intrusions of national government into areas of indigenous sovereignty.[45] Likewise, ICERD's prohibition on racially detrimental governmental policies has been used by indigenous rights advocates to substantially alter offending national government policies.[46]

2. Three International Law Instruments Specifically Address Indigenous Rights

Three central documents that specifically address the rights and place of indigenous peoples in the world and within their surrounding nation states have emerged in the last two decades, giving the most specific content to the emerging body of indigenous rights norms. These are the U.N. Working Group on Indigenous Population's ("Working Group") Draft Declaration of the Rights of Indigenous Peoples ("DDRIP"),[47] the International Labour Organization's Convention No. 169 of 1989 ("ILO Convention No. 169"),[48] and the Organization of American State's ("OAS") American Declaration on the Rights of Indigenous Peoples ("ADRIP").[49]

Only the ILO Convention No. 169 has actually achieved the status of enforceable law, and is therefore the single binding international treaty specifically focused on indigenous rights currently in place in international

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[44] ICCPR, *supra* note 36, Art. 27, *reprinted in* INTERNATIONAL LAW SELECTED DOCUMENTS 415 (Barry E. Carter et al. eds., 2003).

[45] *See* COHEN, *supra* note 1, § 5.06[2][c] (citing *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Report of the Human Rights Committee, U.N. Doc. A/45/40, vol. II, annex IX (A) (1990) (concluding that Canada violated Art. 27 of the ICCPR by allowing the government of Alberta to grant leases for oil and gas exploration within the aboriginal territory of the Lubicon Lake Band); Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin*, O.A.S. Doc. OEA/Ser.L/V/II.62, doc. 10, rev. 3 (1983), OEA/Ser.L/V/II.62, doc. 26 (1984) (Case No. 7964 (Nicaragua) (concluding that the special legal protection accorded indigenous peoples as a result of Art. 27 extends to the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands)).

[46] *See* COHEN, *supra* note 1, § 5.06[2][c] (citing *Mabo v. Queensland* (1988) 166 C.L.R. 186, 214-19 (*Mabo I*) (concluding that a state statute which attempted to eliminate, without compensation, aboriginal title to lands in the state is inconsistent with provisions of the Racial Discrimination Act of 1975, which implemented Art. 5 of the ICERD)).

[47] Draft United Nations Declaration on the Rights of Indigenous Peoples, E.S.C. Res. 1994/45, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

[48] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, Int'l Labour Conference, 28 I.L.M. 1382 (entered into force Sept. 5, 1991).

[49] *See* Inter-American Commission on Human Rights, Annual Report of the Commission 1995, OEA/Ser.L./V./II.91, Doc. 7, Feb. 28, 1996; Osvaldo Kreimer, *The Beginnings of the Inter-American Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 271, 272 & 274 n.7 (1996).

law.[50] ILO Convention No. 169 abandons the ILO's former assimilationist posture toward indigenous peoples, and instead affirms indigenous peoples' aspirations to land and natural resource rights, rights to be free from discrimination in national social policies, and, most importantly, the right to cultural integrity.[51] The OAS's ADRIP, which has yet to be fully ratified, articulates a similar vision for indigenous rights.[52] The most aspirational document, but the one with the most potential to work a fundamental redefinition of indigenous people's place in the world, is the U.N. Working Group's DDRIP, which goes well beyond Convention No. 169 in its conception of and solicitude for indigenous rights.[53] Taken together, these documents provide the clearest documentary evidence of the emerging customary international law of indigenous peoples' rights.

3. Decisions from International Fora Bolster Indigenous Peoples' Rights

Several cases before international fora have provided substantial content to the emerging collection of international norms regarding indigenous peoples' rights. Cases before the Inter-American Commission on Human Rights and U.N Human Rights Committee have been of particular significance.[54] In general, these cases have probed the central indigenous rights norms of self-determination, cultural integrity and land ownership and use issues.[55]

4. Academic and Practitioner Delineation of Emerging International Indigenous Rights Provides Further Recognition

Finally, there have been numerous commentators whose works have chronicled the emerging international indigenous rights body of norms. Perhaps the most thorough and poignant commentator has been Professor S. James Anaya. Professor Anaya's seminal work, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, not only chronicles and analyzes these new trends, but also claims that much of this unruly but quickly growing body of indigenous

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[50] *See* COHEN, *supra* note 1, § 5.06[2][a].

[51] *See* ANAYA, *supra* note 1, at 58-60.

[52] *See* Kreimer, *supra* note 49, at 272, 274 n.7.

[53] *See* ANAYA, *supra* note 1, at 64-65 (discussing how the DDRIP goes further than the ILO Convention No. 169).

[54] *See* COHEN, *supra* note 1, § 5.06[3][a]-[b].

[55] *See* ANAYA, *supra* note 1, at 110-15, 131-41, 141-48 (examining cases pertaining to each of these subject areas before both courts). Many of these decisions are examined in detail *infra*, Part II.C.

rights norms has largely achieved the status of customary international law.[56] Professor Anaya's conclusion may be too sanguine when viewed from the perspective of national courts.[57] Nevertheless, it is clear that even if "the specific contours of these norms are still evolving and remain somewhat ambiguous," customary international law is taking "shape around a certain consensus of what counts as legitimate in relation to indigenous peoples."[58]

C. The Twin Norms Underlying Cultural Sovereignty: "Internal" Self-Determination and Cultural Integrity as Customary International Law

Two central, foundational norms underlie the burgeoning body of international indigenous rights to cultural sovereignty: the right of indigenous peoples to "internal" self-determination and cultural integrity.[59] Arguably these two norms have achieved customary international law status and represent the firmest edge of this new area of the law.[60]

1. "Internal" Self-Determination Is a Means for Indigenous Peoples to Achieve Greater Self-Management and Autonomy

The generally recognized right of "peoples" to self-determination must be distinguished from the emerging right of indigenous peoples to "internal" self-determination. The right of all "peoples" to self-determination is proclaimed in the U.N. Charter[61] and other treaties,[62] and most international jurists consider it to be a strong customary norm.[63] However, the extent to which this full conception of self-determination applies to indigenous peoples is still very much in flux.[64] Full self-determination involves both political freedom and the right of peoples to

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[56] ANAYA, *supra* note 1, at 72 (undertaking an exhaustive review of international treaties, tribunal decisions and submissions of national delegations to international fora before drawing the conclusion that much of the emerging body of indigenous rights norms has achieved the status of binding customary international law).

[57] *See id.* For example, his heavy reliance on the developments of international courts will likely cause domestic courts to view his conclusions with skepticism: after all, international fora often reach results decidedly divergent from domestic determinations.

[58] *Id.*

[59] *See id.* at 97-128, 131-41.

[60] *Id.* at 112, 137.

[61] U.N. Charter, *supra* note 13, Art. 1.

[62] *See, e.g.*, ICCPR, *supra* note 36, Art. 27, *reprinted in* INTERNATIONAL LAW SELECTED DOCUMENTS 415 (Barry E. Carter et al. eds., 2003).

[63] *See* Note, *supra* note 3, at 1757-58.

[64] *See* COHEN, *supra* note 1, § 5.06[3][a].

preserve their cultural, ethnic, historical, and territorial identity.[65] As such, full self-determination often brings independent statehood.[66] Indeed, the worry that the right to self-determination allows a people to secede from the nation-state in which they reside has been the principle road-block to the extension of self-determination status to indigenous peoples.[67] The U.N. Working Group's DDRIP is currently stalled on precisely this issue.[68]

In contrast, a more limited idea of self-determination—a concept that may be termed "internal" self-determination—has the potential to resolve this tension.[69] The content and nature of "internal" self-determination was succinctly described by the Australian contribution to the DDRIP formulation debate: "[Indigenous] peoples are seeking to assert their identities, to preserve their languages, cultures, and traditions and to achieve greater self-management and autonomy, free from undue interference from central governments."[70] In addition, "internal" self-determination should be seen as a collective or group right as opposed to an individual right.[71] And, as Professor Anaya has persuasively argued, "internal" self-determination should be seen as *sui generis*[72] to indigenous peoples, as it is remedial in nature given that it is in some sense a compensation for the specific colonial encounter experienced by indigenous peoples, an encounter which stripped them of their most cherished rights wholesale.[73]

In fact, this seems to be the direction in which negotiations around DDRIP are headed.[74] Both Australia and the United States have signaled

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[65] *See id.*; Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century: Symposium on the Future of International Human Rights*, 55 WASH. & LEE L. REV. 773, 773-775 (1998).

[66] *See* ANAYA, *supra* note 1, at 102.

[67] *See* Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 116-20 (1999).

[68] *See* ANAYA, *supra* note 1, at 110.

[69] *See id*. at 111-12.

[70] Australian Government Delegation, Speaking Notes on Self-Determination, at 2 (July 24, 1991).

[71] *See* Kitok v. Sweden, Communication No. 197/1985, *Report of the Human Rights Committee*, U.N. GOAR, 43rd Sess., Supp. No. 40, at 207, U.N. Doc. A/43/40, annex 7 (G) (July 27, 1988) (holding that the group cultural rights of the Sami indigenous peoples in Sweden take precedence over the individual claim of one of its members when the viability and the welfare of Sami culture was threatened); *cf.* Lovelace v. Canada, Communication No. 24/1977, *Report of the Human Rights Committee*, U.N. GOAR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40, annex 18 (July 30, 1981) (upholding the right of the *individual* to access their indigenous culture: "the right of Sandra Lovelace to have access to her native culture and language 'in community with the other members' of her group, has in fact been, and continues to be interfered with . . . .").

[72] "*Sui generis*" is defined as: "Of its own kind, peculiar, for example, a statutory proceeding for declaratory judgment, neither legal nor equitable." BALLENTINE'S LAW DICTIONARY (1969).

[73] *See* ANAYA, *supra* note 1, at 110. Importantly, Professor Anaya is clear that "internal" self-determination should be seen as an inherent right held by indigenous peoples. It is the recognition of this right that is "compensatory" on the part of the former colonial powers, not the right itself.

[74] *See id*. at 111-12.

their approval of self-determination language in the DDRIP, but only if it is to be understood in its more limited "internal" self-determination sense.[75]

A brief examination of the *Miskito Case*[76] demonstrates the concrete application and interaction of these principles. In the *Miskito Case*, the peoples of the Atlantic coast region of Nicaragua took their longstanding claim to independence from the central Nicaraguan government to the Inter-American Commission on Human Rights.[77] This case, the sole international case to directly address whether indigenous peoples qualify for full self-determination status, clearly held that they did not.[78] However, the second holding in the *Miskito Case* can arguably be seen as an endorsement of "internal" self-determination for the Miskito coast indigenous peoples, resolving that these peoples deserved autonomy in ruling their own affairs and demanding a new political order reflecting this principle.[79] In short, the *Miskito Case* rejected full self-determination for indigenous peoples but extended to them the right to "internal" self-determination in its place.[80]

As the foregoing demonstrates, the concept of full self-determination for indigenous peoples is fraught with irresolvable conflicts of interest and unlikely to ever materialize as an enforceable right in international law. Nation-states are simply unwilling to relinquish overall sovereignty within their existing borders (and most indigenous peoples have not expressed a strong desire for control over a fully independent nation).[81] However, the concept of "internal" self-determination seems to address concerns on all sides of the issue: it maintains the territorial integrity and underlying sovereignty of existing nation states while at the same time ensuring that indigenous peoples have a palatable measure of control over their own affairs, natural resources, and culture. In essence, it enables a workable consensus, and a workable consensus is often the underlying core that achieves the status of fully binding customary international law. Indeed, as

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[75] *See id*.

[76] The Miskito Case, Case 7964, Inter-Am. C.H.R., OEA/Ser.L/V/II.62, doc. 10 rev. 3 (1983); OEA/Ser.L/V/II.62, doc 26 (1984).

[77] *See* ANAYA, *supra* note 1, at 114.

[78] *The Miskito Case*, Inter-Am. C.H.R. at 78-81.

[79] *Id.* at 81-82.

[80] In a case similar to the *Miskito Case*, the Inter-American Commission on Human Rights, in considering the plight of the Awas Tingni indigenous peoples, further advocated for the extension of "internal" self-determination to indigenous peoples when it ordered Nicaragua to "create an effective mechanism for official delimitation, demarcation, and titling of the indigenous communities' properties, in accordance with the customary law, values, usage, and customs of these communities." Case of the Mayagna (Sumo) Awas Tingni Com'ty v. Nicaragua, Case 11.555, Inter-Amer. C.H.R. (ser. C) no. 79 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/seriecpdf_ing/seriec_79_ing.pdf (last visited Apr. 13, 2005).

[81] *See* ANAYA, *supra* note 1, at 110-111.

the *Miskito Case* demonstrates, "internal" self-determination for indigenous peoples may have already achieved customary international law status.[82]

2. Cultural Integrity Has Achieved the Status of Binding Customary International Law

The right to cultural integrity is fundamentally the right of indigenous people to assert their identity through the unimpeded use of their own language, religion, and other distinctive cultural practices.[83] A corollary right is the right of protection for their culturally sacred sites within the surrounding nation state.[84] There is also a remedial flavor to the protection of indigenous cultural integrity: given the attempts by many nation states to obliterate indigenous culture through the colonial encounter and continuing assimilationist policies, they are now under an obligation to protect these same indigenous cultures.[85] This implies that there is an affirmative duty on the part of nation states to protect indigenous cultural integrity.[86] As Professor Anaya has argued: "[T]he cultural integrity norm has developed to entitle indigenous groups to affirmative measures to remedy the past undermining of their cultural survival and to guard against continuing threats in this regard . . . ."[87]

Two cases before international fora reinforce these points. In the *Ominayak Case*,[88] the U.N. Human Rights Committee found that, in light of "historical inequities," Canada had violated the Lubicon Lake Band's right to cultural integrity under Article 27 of the ICCPR when it allowed the Province of Alberta to expropriate the tribe's land for private oil, gas, and timber exploration.[89] In the *Yanomami Case*,[90] the Inter-American Commission on Human Rights also relied on Article 27 of the ICCPR and held that "international law in its present state . . . recognizes the right of

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[82] *See id*. at 112.

[83] However, at the same time, the Human Rights Committee has also instructed that rights of cultural integrity are not absolute when confronted with the interests of society as a whole. *See* Lansman v. Finland, Communication No. 511/1992, Human Rights Committee, 52nd Sess., U.N. Doc. CCPR/C/52/D/511/1992 (Oct. 26, 1994).

[84] *See* Note, *supra* note 3, at 1760.

[85] *See* ANAYA, *supra* note 1, at 139.

[86] *See id*.

[87] *See id*.

[88] Lubicon Lake Band v. Canada, Report of the Human Rights Committee, U.N. Doc. A/45/40, vol. II, annex IX (A) (Mar. 26, 1990).

[89] *Id.* at ¶ 2.3.

[90] Yanomami Case, Case No. 7615 (Brazil), Inter-Am. C.H.R., Res. No. 12/85 (Mar. 5, 1985), *Annual Report of the Inter-American Commission on Human Rights, 1984-1985*, O.A.S. Doc. OEA/Ser.L/V/II.66, doc. 10 rev. 1, at 24 (1985).

ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity."[91] The Commission held that the numerous incursions, sanctioned by the Brazilian government, into the Yanomami ancestral lands threatened the Yanomami's Article 27-protected culture and traditions.[92] These two cases underline the affirmative duty of nations to protect indigenous peoples' right to cultural integrity and the role that respect for land rights plays in protecting that right.

The *Yanomami* decision is of particular significance because Brazil was not a signatory to the ICCPR at the time of the decision, indicating that the case's holding, and the general principle of the right to cultural integrity for indigenous peoples on which it rests, has achieved the status of customary international law.[93] Supporting this argument is the fact that the cultural integrity norm is perhaps the norm that has been most consistently applied to indigenous peoples.[94] The cultural rights provisions of the ICCPR (Art. 27) and ILO Convention No. 169 have both been continuously referenced and relied upon in international fora to protect indigenous cultural integrity.[95] In addition, the U.N. Working Group's DDRIP has the protection of indigenous people's cultural integrity as one of its central underlying principles for prospective application.[96] Finally, numerous statements by national governments before various international fora demonstrate state acceptance of this norm and state recognition of the obligation to enforce it.[97] Taken all together, there is persuasive evidence that the right of indigenous people to the protection of their cultural integrity has fully crystallized and achieved the status of binding customary international law.

As the preceding sections have demonstrated, the twin norms of cultural integrity and "internal" self-determination have arguably achieved the status of full customary law in the guise of a right to "cultural sovereignty." The enforcement of this crystallizing norm, however, is decidedly unsettled.[98]

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[91] *Id.* at 24, 31.
[92] *Id*. at 24.
[93] *See* ANAYA, *supra* note 1, at 134.
[94] *See id*. at 131-41.
[95] *See id*. at 132-37.
[96] *See* Heather S. Archer, *Effect of United Nations Draft Declaration on Indigenous Rights on Current Policies of Member States*, 5 J. INTL LEGAL STUD. 205, 206 (1999).
[97] *See* ANAYA, *supra* note 1, at 137-39.
[98] *See id*. at 185.

III. ENFORCING THE CUSTOMARY INTERNATIONAL LAW OF INDIGENOUS PEOPLES' RIGHTS

Indigenous peoples have achieved remarkable success at the international level in creating a body of international norms highly favorable to the assertion of their rights. At least two of these norms – the right to "internal" self-determination and the right to cultural integrity – have arguably crystallized into binding customary international law. And yet, indigenous peoples have struggled to enforce this customary law at the local level where it can have the greatest impact in their actual daily lives. This is particularly true of Australia and the United States, where the recent cases of *Kartinyeri v. The Commonwealth*[99] and *Lyng v. Northwest Indian Cemetery Protective Ass'n*[100] demonstrate the resistance of these countries' domestic courts to enforcing internationally derived customary law favorable to indigenous rights when that customary law collides with contrary domestic law principles. A strategy for effective enforcement at the domestic level of the hard-won gains achieved by indigenous peoples at the international level is required. Given the lack of an overarching binding treaty schema governing indigenous peoples' rights in international law,[101] and given the large body of highly favorable customary law discussed in Part II, this section focuses on developing a strategy for the enforcement of customary, as opposed to treaty-based, international law.

A. Domestic Enforcement of Indigenous Rights Is Superior to International Enforcement of Indigenous Rights

The current international legal structure built upon the twin precepts of state sovereignty and non-intervention in internal state affairs is inherently resistant to supranational interference within national boundaries.[102] A strategy for enforcing customary international laws of indigenous peoples' rights in domestic courts must overcome this inherently resistant structure.[103] There are two choices available to overcome these

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[99] Kartinyeri v. The Commonwealth (1998) 195 C.L.R. 337.

[100] Lyng v. NW Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

[101] Although the ILO Convention No. 169 is technically a treaty, it does not comprehensively govern national treatment of indigenous peoples. It is also bears emphasis that however comprehensive and progressive DDRIP may turn out to be, it will not be a binding treaty schema but rather a non-enforceable declaration under international law.

[102] *See* Anaya, *supra* note 4, at 191.

[103] *Id*. at 1460. The Dann sisters, Mary and Carrie Dann, unable to adequately prosecute their land claims in United States' courts, took their claims to the Inter-American Commission on Human Rights

systemic barriers to enforcement. One seeks to invade state sovereignty "from above" by seeking judgments in international fora and then attempting to enforce these judgments against nation states in domestic courts.[104] The contemporary human rights regime often utilizes this method.[105] The second attempts to gain judgment and enforcement in the domestic courts of the nation-state itself.[106]

The first "international option" is plagued by difficulties in gaining actual enforcement of the judgment[107] and sets up an adversarial regime pitting international bodies against domestic constituencies and institutions.[108] In the absence of a binding treaty schema, such as the World Trade Organization ("WTO") structure, domestic pressures are likely to consistently overwhelm international pressures because domestic branches of government are more closely accountable to domestic constituencies.[109] In addition, few things inspire fiercer resistance to outside pressure in domestic affairs than the perceived loss of sovereignty that attaches to the domestic enforcement of international rulings.[110] The volatile domestic reactions to WTO rulings impinging on national sovereignty are powerful demonstrations of this fact.[111] These negative aspects of the "international option" are especially pronounced when it comes to enforcing indigenous peoples' rights, as such enforcement often entails perceived losses by competing domestic constituencies. The *Dann Sisters Case* clearly demonstrates the failings of the "international option" on this front.[112]

The second "domestic option," though not without its problems, presents a much better avenue for indigenous peoples wishing to enforce favorable international custom at the local level. Though it is often harder

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where they received a judgment in their favor. To date, they have been unable to enforce this judgment in U.S. courts.

[104] *See* ANAYA, *supra* note 1, at 194-200.

[105] *See id*. at 109-10.

[106] *See* Kathleen M. Kedian, Note, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana*, 40 WM. & MARY L. REV. 1395, 1400 (1999); s*ee also* Mary Ellen O'Connell, *Enforcement and the Success of International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 47 (1995) (arguing, among other things, that the future of successful environmental law enforcement resides in enforcing internationally derived principles in domestic courts).

[107] *See* O'Connell, *supra* note 106, at 59-62.

[108] *See* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991).

[109] *See* THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (2000).

[110] *See Steel Supporters Warn of Backlash if WTO Upholds Ruling*, NATIONAL JOURNAL'S CONGRESS DAILY, Oct. 14, 2003.

[111] *See* Helene Cooper, *Waves of Protest Disrupt WTO Meeting*, WALL ST. J., Dec. 1, 1999, at A2.

[112] *See* Mary Dann and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/ser. L/V/II.106, doc. 3 rev. at 286 (2002).

for indigenous peoples to win favorable judgments in domestic fora,[113] the benefits of using domestic courts over international fora are readily apparent. By choosing domestic courts to advance their claims, indigenous peoples involve the domestic court as a participant in resolving the dispute.[114] This, in turn, alleviates the perception that judgments are being imposed from the outside, significantly ameliorating possible domestic nationalist resistance to enforcement. In addition, the domestic option involves the domestic courts in the process of developing precepts of emerging international law.[115] This further reduces tension and contradicts the perception that international law is created by outsiders beyond the control of any domestic interests.[116] As well, the involvement of domestic courts in the resolution of indigenous rights claims accelerates the process of "norm internalization" whereby domestic actors begin to align their actions with prevailing international norms – in this case, indigenous rights norms – because they themselves have come to believe in them.[117] Full norm internalization represents total enforcement of a given norm and would represent the best possible outcome.[118] Notably, the process of norm internalization is advanced even when a party to a case loses that specific case. As long as that party asserts their desired norm, the process of norm internalization is advanced simply through exposure in the domestic courts. Finally, domestic courts have the direct power to enforce their own decrees, in contrast to the international fora available to indigenous peoples wishing to advance their rights.[119]

In sum, the "domestic option" is the best avenue for indigenous peoples wishing to secure and advance their claims *if* they are able to convince domestic courts to employ the highly favorable body of emerging customary law discussed in Part II. This is a big "if" and has dissuaded many indigenous peoples from choosing this option.[120] The most effective way to get domestic courts to apply this favorable indigenous rights customary law is the subject of the following two sections.

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[113] See Part III.B, *infra*.

[114] Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL'Y 501, 535 (2000).

[115] *Id*. at 535.

[116] *Id*. at 535.

[117] Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1407 (1999).

[118] *Id*. at 1407.

[119] *See generally* Bayefsky & Fitzpatrick, *supra* note 3, at 2-3 (1992).

[120] For example, the Dann sisters were forced to pursue their claims in international courts given their lack of success in domestic courts. *See* Case of Mary Dann and Carrie Dann v. United States, Case No. 11.140, Inter-Am. Comm. H.R., Report No. 75/02 (Dec. 27, 2002).

B. Direct Enforcement of Customary International Law in Australian and U.S. Courts Is Alluring, but Ultimately Frustrating

Direct enforcement of customary international law in the domestic courts of Australia and the United States appears on first glance to be quite alluring.[121] For instance, in U.S. courts customary international law is considered federal common law and is enforceable to the same extent as all other federal common law.[122] Subsequent acts of Congress must be construed so as not to conflict with customary law,[123] and, as federal common law, customary international law is meant to preempt any conflicting state law.[124]

A similar situation exists in Australia. Although there is much less case law on the subject than in the United States, the recent *Mabo v. Queensland*[125] and *Nulyarimma v. Thompson*[126] Australian High Court decisions establish in dicta that customary international law is part of the Australian common law with similar resulting implications.[127]

However, the potential negatives of directly enforcing customary law in Australian and U.S. courts overwhelm the potential positives of employing such a strategy and demonstrate that another method for enforcing indigenous rights customary law must be formulated. First of all, the threshold for what rules of customary international law may be directly enforced in domestic courts is strict: only norms that have achieved fully crystallized customary international law status will qualify.[128] This eliminates many indigenous rights norms that have yet to achieve this status.

This underlines a second major constraint in attempting to directly enforce international customary law in domestic courts: what has attained the status of a fully crystallized rule of customary law is decidedly difficult to determine.[129] Because U.S. and Australian domestic courts are already predisposed against recognizing indigenous peoples' claims, such

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[121] *See* Brilmayer, *supra* note 108, at 2277-79.

[122] *See* The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* RESTATEMENT, *supra* note 11, § 111 cmt. D, § 115 cmt. e.

[123] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[124] *See* Santovincenzo v. Egan, 284 U.S. 30, 40 (1931).

[125] Mabo v. Queensland (1992) 175 C.L.R. 1.

[126] Nulyarimma v. Thompson (1999) 95 F.C.R. 153.

[127] *See* Andrew D. Mitchell, *Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law:* Nulyarimma v. Thompson, 24 MELB. U.L.R. 15, 32 (2000); Legg, *supra* note 27, at 392-93.

[128] *See* INTERNATIONAL LAW: NORMS, ACTORS, PROCESS—A PROBLEM-ORIENTED APPROACH, *supra* note 15, at 80.

[129] *See* RESTATEMENT, *supra* note 11, § 102 reporter's note 2.

indeterminacy is too easily exploited to preclude application of "close" customary norms.

Thirdly, because of the persistent objector exception to the enforcement of customary international law, rules of customary law consistently disputed by the United States or Australia may not be applied by their respective courts.[130]

Finally, and perhaps most dispositive of this debate, even if there is a clear rule of binding customary international law, this rule may not provide a cause of action in U.S.[131] or Australian[132] domestic courts. Instead, international custom may only provide a rule of decision that U.S.[133] or Australian[134] courts can apply when a cause of action comes before the court from some other source.[135]

Direct enforcement of indigenous customary international law rights in the domestic courts of Australia and the U.S. is alluring, but ultimately likely to be a frustrating option. If such an option is available, indigenous peoples and their advocates should seize the opportunity, as it provides for robust enforcement and advancement of indigenous rights. However, as demonstrated above, such opportunities are likely to be minimal. That leaves a final method for the enforcement of highly favorable indigenous peoples' rights customary international law: "soft" enforcement of customary international law.

C. "Soft" Enforcement of Customary International Law Acts as an Interpretive Guide in Australian and U.S. Courts

Even when customary international law rules cannot be directly enforced in domestic courts, they can still have a powerful impact on the

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[130] *See* THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 24 (1985) (defining the "persistent objector exception" as the ability of countries that have consistently refused to apply an emerging principle of customary international law to subsequently refuse to enforce that rule when it has fully crystallized and is mandatorily enforceable against all other countries who have not themselves persistently objected to its enforcement in their territory).

[131] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 819 (D.C. Cir. 1984) (Bork, J., concurring); *see also Sosa*, 542 U.S. at 723 (2004) (holding that neither the Federal Tort Claims Act nor the Alien Tort Statute provided a remedy for a Mexican alien unlawfully abducted from Mexico and arrested in the United States).

[132] *See* Mitchell, *supra* note 127, at 32 (describing the international crime of genocide, and considering Australia's response to its international obligations regarding genocide in the context of its implementation of international human rights generally, and in light of *Nulyarimma v. Thompson* specifically).

[133] *See Tel-Oren*, 726 F.2d at 819 (Bork, J., concurring); *Sosa*, 542 U.S. at 723 (2004).

[134] *See* Mitchell, *supra* note 127, at 32.

[135] This will be further addressed in Part III.C, *infra*.

shape of domestic law and can achieve a degree of enforcement in the daily lives of indigenous peoples at the local level. This is because the emerging body of international indigenous rights customary rules can still be "softly" enforced in domestic courts; that is, they can be used as persuasive authority and as an interpretive guide in matters before these courts.[136] In other words, instead of providing a cause of action, indigenous rights norms can provide a rule of decision in Australian and U.S. courts.[137] Additionally, given that indigenous peoples' law in Australia and the United States was itself founded on principles of international law, Australian and U.S. domestic courts should be required to consider contemporary international law regarding indigenous peoples in reaching decisions affecting indigenous peoples within their borders.[138] Finally, given that Australian and U.S. domestic courts have recently demonstrated a willingness to consider international and comparative law principles in reaching their own domestic decisions[139] despite earlier reluctance, the time is right for indigenous peoples to advance their claims through "soft" enforcement of favorable international custom.

1. Australian and U.S. Courts Are Increasingly Open to International Precedent

The highest courts of both Australia and the United States have recently demonstrated a willingness to consider precedent from beyond their respective borders as persuasive authority and as a guide to interpreting their own domestic law.[140] For example, the *Mabo v. Queensland* decision in Australia cited decisions from the United States, Canada, and New Zealand, as well as principles of international law.[141] The U.S. Supreme Court's recent decision in *Roper v. Simmons* likewise cited both comparative and international law as persuasive authority in deciding that the execution of

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[136] *See* Bayefsky & Fitzpatrick, *supra* note 3, at 23-27; COHEN, *supra* note 1, § 5.06[4][a][iii].

[137] *See* Note, *supra* note 3, at 1762-64; COHEN, *supra* note 1, § 5.06[4][a][iii].

[138] *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 74-75 (1996); Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 432-33 (2002).

[139] *See* Mabo v. Queensland (1992) 175 C.L.R. 1; Roper v. Simmons, 125 S. Ct. 1183 (2005) (discussed *infra*).

[140] This is despite strident reluctance expressed by some members of particularly the U.S. Supreme Court. *See* Lawrence v. Texas, 539 U.S. 558, 598 (2002) (Scalia, J., dissenting) ("[T]he Court's discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since this Court . . . should not impose foreign moods, fads, or fashions on Americans.") (internal citations omitted).

[141] *See Mabo*, 175 C.L.R. at 46-47.

juveniles is unconstitutional.[142] This posture toward persuasive authority originating beyond the domestic borders of Australia and the United States opens the door to employing the "soft" enforcement strategy for internationally derived indigenous rights norms discussed in the next section.

2. Indigenous Rights Customary International Law Should Be Used as Persuasive Authority and as an Interpretive Guide in Australian and U.S. Domestic Courts

In common law systems such as Australia and the United States, international customary law can and should provide a logical framework of principles for indigenous rights. In both countries, the judiciary has been active in both interpreting statutory or constitutional law concerning indigenous peoples and in developing supplemental (if not foundational) legal doctrine in the common law tradition.[143] This is especially true where the issue of indigenous law before those courts is indeterminate.[144] In such cases, international customary law should be used as highly persuasive authority.[145]

In the United States, such a structure is enabled by the already established statutory interpretive rule that federal law should comport with international law norms wherever possible[146] and by the resulting reliance of U.S. courts upon international law norms in interpreting state and federal statutes and constitutional provisions.[147] In Australia, this approach to using international indigenous rights norms is more fully developed and exemplified by the recent *Mabo v. Queensland* decision.[148] Justice Brennan, in announcing the leading opinion of the court, stated: "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law

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[142] *See* Roper v. Simmons, 125 S. Ct. 1183, 1197-1200 (2005); *see also* Lawrence v. Texas, 539 U.S. 558 (2002) (referring to European Court of Human Rights decisions and laws of other nations regarding sodomy laws); Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988) (referring to the capital punishment laws of the United Kingdom, New Zealand, Australia, former West Germany, France, Portugal, the Netherlands, Italy, Spain, Switzerland, former Soviet Union, and Scandinavian countries).

[143] *See* ANAYA, *supra* note 1, at 197.

[144] *See* Note, *supra* note 3, at 1751.

[145] *See id*. at 1751; Frickey, *supra* note 138, at 74-75.

[146] *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[147] COHEN, *supra* note 1, § 5.06[4][a][ii].

[148] *See* Mabo v. Queensland (1992) 175 C.L.R. 1.

especially when international law declares the existence of universal human rights."[149]

In sum, emerging indigenous rights customary international law may not provide a cause of action for indigenous peoples' claims before domestic courts or prove to be binding authority in these courts' determinations. Nevertheless, it can provide interpretive guidance as persuasive authority thereby providing a rule of decision to domestic courts. This, in turn, can have a profound impact on domestic law, establishing key principles and adding content to domestic law based upon international principles favorable to indigenous peoples, and thereby translating these principles to the local level and to daily lives.

3. Consideration of Indigenous Rights Customary International Law by the Domestic Courts of Australia and the United States Is Not Merely Advisable, it Should Be Required Under Court Precedent

Despite the objections of some U.S. and Australian jurists, principles of international law should be particularly persuasive in these domestic courts because indigenous law in these countries originates from principles of international law.[150]

The Marshall trilogy[151] of cases establishing the guiding principles of American Indian law in the United States introduced twin foundational concepts to this jurisprudence: American Indian tribes were deemed to be "domestic dependent nations" with "inherent sovereignty."[152] In essence, this meant that tribes lacked most attributes of "external" sovereignty but retained the authority to govern their own internal affairs and territory.[153] It

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[149] *Id*. at 41-42 (Brennan, J.).

[150] *See* Frickey, *supra* note 138, at 74-75; Saito, *supra* note 138, at 432-33; ANAYA, *supra* note 1, at 195.

[151] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[152] *See Cherokee Nation*, 30 U.S. (5 Pet.) at 17; *Worcester*, 31 U.S. (6 Pet.) at 559-61.

[153] *See*, *e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978) (clarifying and reaffirming that American Indian tribes retain the right to govern their own internal affairs even though Congress can limit this power); Talton v. Mayes, 163 U.S. 376, 384 (1896) (stipulating that the Cherokee Nation is a separate limited sovereign as it existed as a sovereign and government prior to the U.S. government). *But see* Montana v. United States, 450 U.S. 544 (1981) (holding that American Indian tribes lack inherent power to regulate hunting and fishing by non-Indians on non-Indian-owned land within their reservation, at least where there has been no showing that tribal interests were affected); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (reinforcing the *Montana* holding and further limiting the ways in which one may make a showing that tribal interests are affected); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (holding that an American Indian Tribe lacked regulatory authority to tax a non-Indian hotelier on non-Indian-owned land within their reservation and further limiting the scope of tribal interests being affected); Nevada v. Hicks, 533 U.S. 353 (2001) (holding that an American Indian Tribe lacked legislative and adjudicative

implied a relationship governed at least partially by principles of international law.[154] Indeed, "treaties" were employed and American Indians were consistently treated as different in kind to other peoples on the American continent, for better and for worse.[155] Accompanying less favorable doctrines also emerged to justify the displacement and subjugation of American Indians.[156] Indeed, these doctrines have largely gained ascendancy especially under recent Supreme Court rulings; but the international law-based principles remain a fundamental part of doctrinal American Indian law.[157]

Likewise, Australian Aboriginal law is also based in significant part on principles of international law.[158] The international law that existed at the time of the onset of colonialism in Australia recognized three effective ways for acquiring sovereignty over territory: (1) conquest, (2) cession, and (3) occupation of territory that was *terra nullius* (uninhabited territory belonging to no one).[159] In an amazing denial of reality, Australia was considered an occupation of *terra nullius* by its own government and courts.[160] Of course, this meant that for much of Australia's history, its indigenous peoples were *not* treated as limited sovereigns under Australian law, as was the case in the United States.[161] Therefore, principles of international law were not employed in deriving their relationship to the emerging Australian nation.[162] However, this all changed with *Mabo v. Queensland*,[163] a decision from Australia's highest court that signaled a seismic shift in Australia's approach to its indigenous peoples.[164] Among other things, the *Mabo* decision, in

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authority to reach a claim against the on-reservation actions of State law enforcement officers who entered the Indian reservation to investigate an off-reservation crime). *Cf.* United States v. Lara, 541 U.S. 193 (2004) (recognizing and reaffirming that American Indian tribes hold inherent sovereignty over their internal affairs: the American Indian tribe in this case was to be recognized as an independent though limited sovereign from the U.S. government for purposes of double jeopardy determinations).

[154] *See* AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM—CASES AND MATERIALS 1450 (Robert N. Clinton et al. eds., 2003).

[155] *See generally* ENDURING LEGACIES: NATIVE AMERICAN TREATIES AND CONTEMPORARY CONTROVERSIES (Bruce E. Johansen, ed., 2004) (examining and reevaluating the role and effect of treaties in the colonial encounter between American Indians and Euro-American settlers).

[156] Namely, the plenary power and the trust doctrines.

[157] *See* Note, *supra* note 3, at 1753-54; Frickey, *supra* note 138, at 74-75.

[158] Legg, *supra* note 27, at 402.

[159] *See id*.

[160] *See id*; Mabo v. Queensland (1992) 175 C.L.R. 1, 37-38.

[161] *See* Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 COLUM. J.L. & SOC. PROBS. 529, 549-50 (1997).

[162] *See id.* at 549-52.

[163] Mabo v. Queensland (1992) 175 C.L.R. 1.

[164] *See* Bravo, *supra* note 161, at 553 ("*Mabo v. Queensland* . . . created a seismic upheaval in the legal landscape of Australia.").

holding that Australian indigenous peoples did retain "native" title to their lands except where extinguished by the Crown, soundly rejected the *terra nullius* conceptualization.[165] By doing this the Australian High Court essentially opened the door to developing a new relationship between the Australian government and indigenous peoples, finally recognizing the sovereignty of these peoples.[166] Crucially, the *Mabo* opinion utilized international law to both open this door and to establish the first foundational principles that would govern this new conceptualization.[167] In sum, though Australia and the United States have taken different pathways, both countries have arrived at a formulation of domestic indigenous peoples' law that was created and is fundamentally based upon principles of international law.

Given that indigenous peoples' law in both Australia and the United States has its origins in international law, contemporary principles of international law should have particularly persuasive power in Australian and U.S. courts applying this jurisprudence today. As Philip P. Frickey argues in the context of U.S. law, "[i]f the only legitimate constitutional justification for an expansive federal power over Indian affairs lies in interpreting the Constitution against the backdrop of international law, then international law is an important framework for constitutional interpretation throughout the field of federal Indian law."[168]

This does not mean that international law should be binding authority in U.S. and Australian courts adjudicating indigenous rights' claims.[169] However, it does mean that international customary law of indigenous rights has a special place in U.S. and Australian domestic courts. Specifically it should be *mandatorily* considered in U.S. and Australian courts as persuasive authority and as an equally valid source of law even when international precedent would not be considered in other similarly postured

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[165] *See Mabo*, 175 C.L.R. at 41-42.

[166] *See* Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189, 195 (2001).

[167] Wiessner, *supra* note 67, at 72; *see also* Legg, *supra* note 27, at 402-03 (discussing Justice Brennan's reliance on the International Court of Justice's *Advisory Opinion on Western Sahara* as key precedent for reaching his holding).

[168] Frickey, *supra* note 138, at 74.

[169] Professor Frickey is clear on this: "My theory does not ask American courts to enforce international human rights norms directly as a matter of domestic law. Instead, at first glance it is similar to the theory, propounded by many scholars, that these norms should provide an interpretive backdrop for our understanding of domestic law, especially the potentially expansive constitutional clauses protecting human rights. The crucial difference is, however, that my theory expressly links one area of international human rights—that involving indigenous peoples—directly to the Constitution, rather than viewing it as merely a universal normative backdrop." Frickey, *supra* note 138, at 77-78.

non-indigenous rights contexts.[170] This conclusion is based on the quid pro quo that Professor Frickey argues is required: if Australian and U.S. domestic indigenous peoples' law is built upon principles of international law, then international law should continue to inform new developments in this jurisprudence.[171]

Australia and the United States present the toughest and most revealing contexts in which to probe the nature and limits of enforcing international customary law of indigenous peoples' rights. Direct enforcement of emerging international indigenous rights norms is highly unlikely in both contexts. This is true even of indigenous rights norms that have fully crystallized into binding rules of customary international law. However, even in these resistant jurisdictions, international law can be "softly" enforced at the domestic level by using emerging indigenous rights international customary law as persuasive authority, thereby providing not a cause of action, but a rule of decision for domestic courts. In this way, "soft" enforcement is able to realize most of the benefits of direct enforcement in the actual lives of indigenous peoples on-the-ground. It also allows for the use of indigenous rights norms before domestic courts that have not fully congealed into customary law, thereby expanding the amount of favorable precedent available to indigenous rights litigators. Finally, utilizing a soft-enforcement strategy helps to crystallize still emerging indigenous rights norms reinforcing and accelerating the growth of this highly favorable international precedent.[172]

IV. APPLYING THE PRINCIPLES OF "SOFT" ENFORCEMENT OF INTERNATIONAL CUSTOMARY INDIGENOUS RIGHTS ENABLES RECONSIDERATION OF *LYNG* AND *KARTINYERI*

Two recent judicial decisions from Australia and the United States, *Kartinyeri v. The Commonwealth*[173] and *Lyng v. Northwest Indian Cemetery Protective Association*,[174] provide an opportunity to evaluate the principle of "soft" enforcement as applied to the twin norms of cultural sovereignty: cultural integrity and "internal" self-determination.

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[170] *See id.* at 79 ("[e]ven if the courts will not look to those rights to inform every question of domestic law involving human rights, such as free speech or inhumane punishment, in federal Indian law cases the courts are compelled to consider international law.").

[171] *See id*.

[172] *See* Koh, *supra* note 117, at 1407.

[173] Kartinyeri v. The Commonwealth (1998) 195 C.L.R. 337.

[174] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

A. Kartinyeri v. The Commonwealth *Would Have Been Decided Differently If the Emerging International Customary Law of Indigenous Peoples' Rights Had Been Considered*

In *Kartinyeri*, a group of the indigenous Ngarrindjeri people sought to prevent the construction of a bridge—the Hindmarsh Island bridge—that they claimed would devastate a sacred area of cultural and spiritual importance to them.[175] The Ngarrindjeri invoked the Aboriginal and Torres Strait Island Heritage Protection Act of 1984 (Cth)[176] to protect this sacred site, which gave the relevant Minister power to make and enforce declarations meant to protect and preserve sensitive Aboriginal sites and objects.[177] The Heritage Protection Act was in conflict with another act, however, the Hindmarsh Island Bridge Act of 1997,[178] which prevented the Minister from declaring any Aboriginal areas surrounding the bridge construction site as sacred areas.[179] The question presented to the Australian High Court was which act would control, and specifically whether the Bridge Act was invalid because it was not supported by any constitutionally enumerated power.[180] The Court held that passage of the Bridge Act, and its resulting significant amendment of the Heritage Protection Act, was a valid exercise of power.[181] According to the lead opinion, because the Parliament had the power to enact the Heritage Protection Act, it also had the power to amend and diminish the act: "the power to make laws includes the power to unmake them . . . ."[182]

The central issue underpinning the dilemma before the Court was whether § 51(xxxvi) of the Australian Constitution[183]—colloquially referred to as the "race power"[184]—allowed race-based legislation that was disadvantageous to targeted groups or only provided for beneficial

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[175] *See Kartinyeri*, 195 C.L.R. at 349-50.

[176] Aboriginal and Torres Strait Island Heritage Protection Act 1984, Cth (Austl.) [hereinafter Heritage Protection Act].

[177] *See Kartinyeri*, 195 C.L.R. at 349-50; Legg, *supra* note 27, at 395.

[178] Hindmarsh Island Bridge Act 1997 (Austl.) [hereinafter Bridge Act].

[179] *See Kartinyeri*, 195 C.L.R. at 349-50; Legg, *supra* note 27, at 395.

[180] *See id*. at 340.

[181] *See id*. at 355.

[182] *See id*.

[183] AUSTL. CONST., Ch. 1, § 51(xxxvi). The race power stipulates that Parliament has the power to pass laws with respect to: "The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws." In 1967, Australia passed a referendum voted on directly by its population which amended § 51(xxvi) by deleting the phrase: "other than the aboriginal race in any State." *See* Legg, *supra* note 27, at 393-94.

[184] Legg, *supra* note 27, at 393.

legislation towards those groups.[185] This issue had not been squarely considered by the court before.[186] A majority of the court found that the race power was broad enough to authorize laws that operate either to the advantage or disadvantage of people of the particular targeted race.[187] A slimmer majority went on to hold that this broad power controlled the issue before the court, and that the Bridge Act could constitutionally operate to the detriment of the Ngarrindjeri people.[188] One opinion agreed with the broad reading of the race power,[189] but argued that as applied to this situation, only a beneficial law would be "necessary" under the language of the race power clause.[190] Justice Kirby, in dissent, argued that a 1967 amendment to the race power clause effectively created a gloss on this amendment that allowed only beneficial race-based legislation.[191] Justice Kirby went on to state that, where the Constitution is ambiguous, the Court should adopt a meaning that conforms to principles of universal rights and that international law is a legitimate and persuasive source for determining these controlling universal principles.[192] Justice Kirby then looked to principles of international law that prohibit detrimental distinctions on the basis of race to support his constitutional interpretation.[193]

Kartinyeri could have been decided differently by utilizing international customary law regarding indigenous peoples as persuasive authority in resolving the constitutional indeterminacy at the core of the case. As Justice Kirby recognized, using principles of international law to resolve indeterminacy is a valid and effective approach to constitutional interpretation.[194] Thus, the emerging customary international law of indigenous peoples' rights can be brought to bear in resolving this indeterminacy. And, as this Comment has argued, not only *can* it be brought to bear, it *should* be brought to bear given the unique foundational role that international law has played in formulating the law of indigenous peoples in both Australia and the United States. Unfortunately, no Justice in *Kartinyeri* looked to the customary international law of indigenous peoples rights.[195]

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[185] *See Kartinyeri*, 195 C.L.R. at 340.
[186] Legg, *supra* note 27, at 395.
[187] *See Kartinyeri*, 195 C.L.R. at 363 (Brennan, C.J., McHugh, J., Gummow, J., & Hayne, J.).
[188] *See id.* at 340 (Gummow, J. & Hayne, J.)
[189] *See id.* at 366 (Gaudron, J.).
[190] *See id.* at 367 (Gaudron, J.).
[191] *See id.* at 413 (Kirby, J.).
[192] *See id.* at 417-19 (Kirby, J.).
[193] *See id.* (Kirby, J.); Legg, *supra* note 27, at 397; *see also* Amelia Simpson & George Williams, *International Law and Constitutional Interpretation*, 11 PUB. L. REV. 205 (2000) (drawing the same conclusion).
[194] *See Kartinyeri*, 195 C.L.R. at 417-19 (Kirby, J.); Legg, *supra* note 27, at 397.
[195] *See* Legg, *supra* note 27, at 397.

If the *Kartinyeri* Justices had considered this emerging customary law, *Kartinyeri* would have been decided differently. First, the congealing customary law of "internal" self-determination for indigenous peoples would have prohibited the Bridge Act from curtailing certain provisions of the Heritage Protection Act that extended such internal self-determination to the Ngarrindjeri people. Such a provision was at the heart of this case: the right to aboriginal control over land that is considered to be a sacred site by the Ngarrindjeri. In other words, at the most general level of analysis the "internal" self-determination would have resolved the indeterminacy of which act controlled in favor of the Heritage Protection Act because this act supported the "internal" self-determination norm, whereas the Bridge Act undermined it. As well, the constitutional indeterminacy of whether the race power could be applied only in an advantageous way would have been resolved in favor of an exclusively advantageous reading, because such a reading would have been consistent with the emerging international custom of maintaining "internal" self-determination for the Ngarrindjeri people. A contrary reading would have directly undermined this "internal" self-determination. Second, the norm of cultural integrity for indigenous peoples would have counseled for a constitutional reading of the race power forbidding legislation which disadvantaged aboriginal people by removing their access to territory considered sacred by them. Though no justice took this approach to deciding the case, it is encouraging that at least one justice—Justice Kirby—recognized the validity of using principles of international law to resolve indeterminacy in local law.[196] This is a positive sign that at least some members of the Australian High Court are open to "soft" enforcement of internationally derived indigenous rights.

B. Lyng v. Northwest Indian Cemetery Protective Association *Would Have Been Decided Differently If the Emerging Customary International Law of Indigenous Peoples' Rights Had Been Considered*

In *Lyng*, American Indian plaintiffs challenged a proposal by the U.S. Forest Service to build a road on public land in the Chimney Rock area of Northern California on the grounds that this road would destroy a sacred area essential to the practice of their religion, and one that the Indians had been using for generations.[197] The district court held that the road-building

[196] *See Kartinyeri*, 195 C.L.R. at 417-19 (Kirby, J.); Legg, *supra* note 27, at 397.

[197] *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 442-44 (1988); Frickey, *supra* note 138, at 87-88; Kingsbury, *supra* note 166, at 196; Note, *supra* note 3, at 1763.

and the timbering that the road was being built for "would seriously damage the salient visual, aural, and environmental qualities of the high country" necessary for the practice of the Indian's religion and therefore would violate the Free Exercise Clause of the U.S. Constitution.[198] The Ninth Circuit agreed.[199] Justice O'Connor, writing for the majority of the Supreme Court, rejected the argument that the Indians' right to religious freedom under the First Amendment was infringed by the road construction.[200] Justice O'Connor argued that American Indians have exactly the same First Amendment Free Exercise rights as everyone else,[201] and that these rights do not include the ability to exert control over federal public lands.[202]

As in the *Kartinyeri* case, principles of customary international law of indigenous peoples' rights, utilized as highly persuasive authority, would have counseled for a different outcome in *Lyng*. "Soft" enforcement of these indigenous peoples' rights would have entailed the application of this customary law as a highly persuasive interpretive guide in determining the content of the Free Exercise Clause in relation to American Indians. First, the internationally derived "internal" self determination principle would have attacked the idea that American Indians' religious rights are on equal footing with other religions in the United States. The specific history giving content to the uniqueness of "internal" self determination would have itself pointed to a conclusion that recognized that American Indians should be accorded an extra measure of deference in determining what constitutes their religious practices and what is needed to sustain these practices. This deference is due because of the unique limited sovereignty—termed "internal" self determination—accorded to indigenous peoples under international law, and indeed under U.S. law.

Secondly, the internationally derived principle of cultural integrity would have reinforced this deference and would have attacked the Supreme Court's conclusion that the Indian's religious practice in this case wasn't specifically burdened by the proposed road construction. Application of the cultural integrity norm would compel the recognition that American Indian religious beliefs and practices cannot be divorced from the land on which they are practiced.[203] Unlike a Christian church which may be physically moved or rebuilt without irreparably damaging the core beliefs of the

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[198] *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. at 443-44 (1988) (quoting Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 594-95 (N.D. Cal. 1983).

[199] *Id.* at 444-45.

[200] *Id.* at 458.

[201] *Id.* at 447-49.

[202] *Id.* at 449.

[203] *See* Frickey, *supra* note 138, at 89-90.

churchgoers, destruction of American Indian sacred land itself destroys the underlying spirit and core of American Indian religion.[204] Taken together, the "internal" self determination and cultural integrity principles would have strongly supported a different outcome to the *Lyng* decision—one that would have recognized that the Indian's First Amendment religious expression rights were violated by the road construction through their sacred lands.

Lyng and *Kartinyeri* demonstrate the potential for "soft" enforcement. Such "soft" enforcement of the emerging customary international law of indigenous peoples' rights can lead to the overturning of previously adverse court decisions and instead, secure and advance indigenous peoples' rights.

V. CONCLUSION

Utilizing customary international indigenous rights law as an interpretive force in federal law (acting as highly persuasive authority) is the most effective approach currently open to indigenous peoples in the United States and Australia wishing to use international law to advance their rights. This approach is effective while a more robust customary international law for indigenous peoples' rights fully develops and until an international treaty schema can be put into place. In the meantime, "soft" enforcement of emerging customary international law principles—especially the ones that have most crystallized, such as the right to cultural integrity and "internal" self determination—has the most realistic potential "to take effect in the actual lives of [indigenous] people."[205]

In fact, sustained use by indigenous peoples of international legal precedent derived from the emerging international indigenous rights' norms not only serves to secure rights for indigenous peoples in the United States and Australia on a case by case basis; it also serves to accelerate and further crystallize emerging customary law and the creation of an international comprehensive and binding treaty governing the rights of indigenous peoples worldwide.

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[204] *See generally id.* ("[T]aking Indian sacred lands by eminent domain for a water project that results in the flooding of those lands causes harm to religion well beyond the nuisance factor experienced by [a] Lutheran congregation [and their church]. The flooding drowns the gods present on those lands and effectively destroys the religious beliefs of these people.").

[205] ANAYA, *supra* note 1, at 185.