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Indigenous Rights and Multinational Corporations at International Law

BY PATRICK MACKLEM*

Indigenous peoples confronting multinational corporate activity that adversely affects their interests occupy an ambiguous position in international law. Much of international law governs relations among sovereign states by and through a distribution of sovereignty constructed on an exclusion of indigenous peoples from the community of nations. In recent years, international human rights law has begun to recognize the legal significance of indigenous cultures, territorial commitments, and forms of governance in ways that begin to enable legal scrutiny of multinational corporate activity. But international legal recognition to date has been partial and ambivalent, in part because indigenous rights pose unique challenges to traditional understandings of the international legal order.

In my remarks today, I want to focus on two ongoing legal disputes involving indigenous peoples and multinational corporate activity that dramatically reveal these challenges. The first involves the Awas Tingni, an indigenous community residing on lands located on the northern Caribbean coast of Nicaragua. The lands include valuable rain forest that Nicaragua authorized Sol del Caribe, S.A. (Solcarsa) to harvest for timber. In 1995, the Awas Tingni presented a petition to the Inter-American Commission on Human Rights alleging that by awarding a timber concession to Solcarsa, Nicaragua had violated Article 21 of the American Convention on Human Rights (American Convention), which guarantees that “[e]veryone has the right to the use and enjoyment of his property.”¹ The matter is

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1. Petition by the Mayagna Indian Community of Awas Tingni and Jaime Castillo Felipe, on his own behalf and on behalf of the Community of Awas Tingni, Against Nicaragua, reprinted in S. James Anaya, *The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua*, 9 ST. THOMAS L. REV. 157, 164-201 (1996);

currently before the Inter-American Court of Human Rights.

The second involves the Kitkatla First Nation, an indigenous community residing in northern British Columbia. The Kitkatla are challenging the constitutionality of a license and several permits granted by British Columbia to International Forest Products Ltd. (Interfor).² The permits authorize Interfor to log lands that possess profound spiritual significance to the Kitkatla. The Kitkatla have alleged that by authorizing the logging, British Columbia has invaded the exclusive legislative authority of the Parliament of Canada. They are arguing that Parliament alone possesses the authority to enact laws in relation to indigenous heritage in light of section 35 of the Constitution of Canada, which recognizes and affirms the "existing aboriginal . . . rights of the aboriginal people of Canada." The matter is currently before the Supreme Court of Canada.

Although one rests on international law and the other on constitutional law, the two cases possess remarkable similarities. Both involve an indigenous community seeking to prevent a multinational corporation from engaging in resource extraction on ancient indigenous territory. Both draw attention to the role of the state in authorizing multinational corporate activity within its jurisdiction. And both involve an appeal to law as a means of mediating competing entitlements to lands and resources.

Beyond the fact that they both seek to legally interrogate a triangular relationship in which the state has authorized a multinational corporation to log lands occupied by an indigenous community, the two cases possess additional features in common. First, both cases implicate emergent jurisprudence on consultation requirements on states and corporations seeking to engage in activity that threatens the exercise of indigenous rights. In *Awas Tingni*, the Inter-American Court is considering whether Article 21(2) of the American Convention, which provides that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law," requires a state to consult with an indigenous community prior to engaging in or authorizing action that interferes with the enjoyment of indigenous title.

American Convention on Human Rights ("Pact of San José, Costa Rica"), Nov. 22, 1969, 1144 U.N.T.S. 123. For an update on the *Awas Tingni* case, see http://www.indianlaw.org/awas_tingni.html (last visited Sept. 13, 2001).

2. *Kitkatla v. British Columbia (Small Business, Tourism and Culture)*, [2000] B.C.J. No. 86 (B.C.C.A.).

In *Kitkatla*, it is not contested that British Columbia is under a duty to consult prior to authorizing activity that interferes with the exercise of indigenous rights. Canadian law obligates the state to consult with an indigenous community before undertaking action that might interfere with indigenous rights recognized by the Constitution.³ But the nature and scope of this duty remains relatively undefined, and earlier proceedings associated with the case raise important questions about when this duty is triggered, whether it extends to third parties, and what it requires of the parties to a dispute.⁴

Both cases therefore represent efforts to reconstitute the law – international law in the case of *Awes Tingni*, domestic law in the case of *Kitkatla* – in ways that create incentives *ex ante* to promote negotiation over litigation. Indigenous claims often involve oral histories, intercultural disagreement, and a complex set of competing interests that the judiciary lacks the institutional competence to resolve in a manner acceptable to all parties. Negotiation processes enable parties to participate directly in proposed solutions and produce compromises that litigation might otherwise foreclose. Negotiation also possesses the capacity to produce acceptable outcomes before state or third party action results in a violation of indigenous rights. By arguing that the state and, by extension, multinational corporations are subject to *ex ante* negotiation and consultation requirements, both the *Awes Tingni* and the *Kitkatla* are seeking a legal framework that protects their rights in ways that minimize the possibility of *ex post* violations.

Second, the triangular relationship of the actors involved in each case reveals the fragility of efforts to establish a bright line between public and private action in the context of multinational corporate activity that threatens indigenous interests. Both cases go through the state to attempt to hold multinational corporations to the rule of law. Both demonstrate the realist insight that corporate authority is delegated state authority,⁵ manifest in the concession granted by Nicaragua to Solcarsa and the licenses granted by British Columbia to Interfor. Both illustrate the fact that states actively participate in

3. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1113.

4. Sonia Lawrence & Patrick Macklem, *From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult*, 79 CAN. BAR REV. 252 (2000).

5. For a classic articulation of this view, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (arguing that private authority is constituted by public distribution of property rights).

constructing the elusive legal character of multinational corporate authority.

Finally, both manifest a blurring of the divide between the domestic and the international. In *Awes Tingni*, the Assembly of First Nations (AFN), the national representative organization of over 600 First Nations in Canada, filed an amicus curae brief drawing the Inter-American Court's attention to domestic constitutional jurisprudence on indigenous title.⁶ Specifically, the AFN has argued that domestic constitutional jurisprudence in Canada should be an indicator of general principles of international law that ought to inform the Court's interpretation of the American Convention. It has argued that the fact that indigenous title is protected as of constitutional right in Canada⁷ supports the proposition that indigenous title constitutes a property right as affirmed by Article 21(1) of the American Convention.

In *Kitkatla*, the Kitkatla have argued that international legal developments concerning the rights of indigenous peoples are relevant in interpreting domestic constitutional obligations. They have relied on a report by the Special Rapporteur to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. The report advocates legal protection of the heritage of indigenous peoples, namely, "all objects, sites and knowledge, the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular peoples, clan or territory."⁸ They have also relied on a report by the Special Rapporteur on the Human Rights of Indigenous Peoples, which calls for formal processes of "identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground."⁹

Despite these similarities, there is a key difference between the

6. Patrick Macklem & Ed Morgan, *Indigenous Rights in the Inter-American System: The Amicus Brief of the Assembly of First Nations in Awes Tingni v. Republic of Nicaragua*, 22 HUM. RTS. Q. 569 (2000).

7. *Delgamuukw*, 3 S.C.R. at 1095.

8. *Protection of the Heritage of Indigenous People: Preliminary Report of the Special Rapporteur*, U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Annex ¶ 11, U.N. Doc. E/CN.4/Sub.2/1994/31 (1994).

9. *Indigenous Peoples and Their Relationship to Land: Final Working Paper Prepared by the Special Rapporteur*, U.N. ESCOR, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52d Sess. ¶ 49, U.N. Doc. E/CN.4/Sub.2/2000/25 (2000).

two cases, and it is not simply that one is grounded in international law and the other in domestic law. *Awas Tingni* implicates what might be termed an undifferentiated right – the right to property – that attaches to all persons governed by the American Convention, and the Awas Tingni are seeking to partake of that more general attachment. Although they argue that the right to property ought to protect indigenous forms of land tenure, they are seeking refuge in a right that attaches to all. *Kitkatla* implicates what might be termed differentiated rights – rights that differentiate among persons.¹⁰ The Kitkatla are asserting rights that recognize differences, partly denied and partly produced by the international distribution of territorial sovereignty initiated by colonization, that exist between indigenous and non-indigenous peoples.¹¹ In other words, the Kitkatla are asserting rights that differentiate indigenous people from non-indigenous people and directly implicate the moral significance of history.

The distinction between differentiated and undifferentiated rights is not one that maps directly on the distinction between the domestic and the international. A number of constitutional democracies entrench rights that attach to all citizens of a particular polity as well as rights that attach to particular classes of citizens, such as ethnic or cultural minorities, and, in the case of Canada and Nicaragua, indigenous peoples. International human rights law also commits itself to both differentiated and undifferentiated rights. The International Labour Organization (ILO) has long advocated the protection of differentiated indigenous rights at international law. ILO Convention 169, for example, enshrines the right of indigenous peoples to “participate in the formulation, implementation and evaluation of plans and programmes for national and international development which may affect them directly.”¹² More recently, the United Nations Draft Declaration on the Rights of Indigenous Peoples aspires to enshrine international rights that attach to indigenous peoples on account of their indigenous difference. Article

10. See generally WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 6-7 (1995) (introducing concept of “group-differentiated rights”).

11. See generally PATRICK MACKLEM, *INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA* (2001).

12. ILO Convention No. 169, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO Convention].

30 of the Draft Declaration, for example, declares that indigenous peoples have “the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources.”¹³

In contrast, various articles of the International Covenant on Civil and Political Rights (ICCPR),¹⁴ as well as the American Convention, enshrine rights that attach to all persons. Indigenous peoples have asserted several of these rights – specifically, the right to self-determination, culture, privacy, and family life, in a variety of cases to protect cultural, economic, territorial and political interests threatened by assimilative forces of the broader societies in which they are located.¹⁵ The Human Rights Committee has expressed the view that Article 27 of the ICCPR, which guarantees a right to belong

13. *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., 36th mtg., Annex at 112, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994). See also *Proposed American Declaration on the Rights of Indigenous Peoples*, Inter-Am. C.H.R., 1333d Sess., OEA/Ser/L/V/II.95 (1997) (proposing to enshrine indigenous cultural, land, territorial and resource rights and indigenous rights of autonomy, self-government, and political participation) (approved by Inter-Am. C.H.R. on Feb. 26, 1997), reprinted in *ORG. OF AM. STATES, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1996*, at 633-45 (1997), available at <http://www.cidh.oas.org/annualrep/96eng/96encont.htm> (March 14, 1997).

14. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

15. See *R.L. v. Canada*, Communication No. 358/1989, *Report of the Human Rights Commission*, U.N. GAOR, Human Rights Commission, 47th Sess., Supp. No. 40, at 366, U.N. Doc. A/47/40 (1992) (concluding that Article 1 right to self-determination cannot be adjudicated under the Optional Protocol, which is available only for individual, not collective, rights). *But see* General Comment No. 12(21), regarding Article 1 of the ICCPR, U.N. Doc. CCPR/C/21/Rev.1 (1984) (stating the right to self-determination is “an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights”); *Kitok v. Sweden*, Communication No. 197/1985, *Report of the Human Rights Commission*, U.N. GAOR, Human Rights Commission, 43d Sess., Supp. No. 40, at 229, U.N. Doc. A/43/40 (1988) (suggesting Article 27 right to culture protects economic activity that is an “essential element in the culture” of an indigenous community); *Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984, *Report of the Human Rights Commission*, U.N. GAOR, Human Rights Commission, 45th Sess., Supp. No. 40, vol. II ¶ 32.2, U.N. Doc. A/45/40 (1990) (stating Article 27 right to culture protects the right of indigenous persons, “in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong”); *Hopu & Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1 (1997) (stating Articles 23 and 17 rights to privacy and a family life protect indigenous heritage lands).

to one's culture, contemplates the protection of a "way of life which is closely connected with territory and use of its resources," and the protection of economic and social activities that are essential elements of the culture of an indigenous community.¹⁶

Part of the appeal of undifferentiated rights, such as the right to belong to one's culture,¹⁷ lies in their relation to universal conceptions of human rights, a cornerstone of contemporary international human rights law. Such rights attach to indigenous peoples not on account of their indigenous difference but instead because they relate to aspects of identity that are seen as constituting fundamental attributes of all human beings regardless of individual, social or historical differences. The fact that a community is indigenous may be relevant to the content, but not the availability, of these rights. Thus the right to belong to one's culture may entail a unique set of protections given an indigenous community's location in and relationship with the broader society, but the right itself is one that attaches to all persons regardless of their cultural backgrounds.

Part of the appeal of differentiated rights of indigenous peoples lies in the intuition that there is something about indigenous difference that merits legal protection. Attempts at defining what constitutes an indigenous people typically list factors that implicitly attempt to articulate this intuition. ILO Convention 169, for example, defines indigenous peoples in terms of "their descent from the populations which inhabited the country, or geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries."¹⁸ But the implicit

16. General Comment No. 23(50), regarding Article 27 of the ICCPR, *Report of the Human Rights Commission*, U.N. GAOR, Human Rights Commission, 49th Sess., Supp. No. 40, vol. I, Annex V ¶ 3.2, U.N. Doc. A/49/40 (1994).

17. It might be that Article 27 enshrines a differentiated right because it provides that persons belonging to ethnic, religious and linguistic minorities shall not be denied the right to enjoy their own culture, and thus conditions the right to cultural protection on minority status. For a clearer case in which an indigenous community has sought and received protection by way of an undifferentiated right enshrined in the ICCPR, see *Hopu & Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1 (1997) (stating Articles 23 and 17 rights to privacy and a family life protect indigenous heritage lands).

18. ILO Convention, *supra* note 12, art. 1(1)(b). See also José R. Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. ESCOR, 13th Sess., Annex I, Agenda Item 4 ¶ 379, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1987) ("Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them.").

needs to be made explicit. Differentiated rights of indigenous peoples represent legal commitments to address adverse distributional consequences produced by assertions of territorial sovereignty over indigenous peoples and indigenous territory. Whether by international or domestic law, they impose constraints on the exercise of territorial sovereignty acquired in the absence of indigenous consent and thereby lend a measure of legitimacy to sovereign authority acquired through morally suspect colonization projects.

It is perhaps for this reason that indigenous peoples occupy an ambiguous position at international law. Indigenous rights expose the suspect origins and ongoing adverse consequences of the international distribution of sovereignty. In the context of state-sanctioned multinational corporate activity that threatens indigenous interests, international law thus confronts the following difficult question. Why do indigenous interests yield rights at international law that do not attach to a non-indigenous community facing a similar set of harms? Why does an indigenous people, in other words, possess legal personality at international law that authorizes international scrutiny of state-sanctioned multinational corporate activity? International indigenous legal personality in such circumstances is a far cry from the traditional understanding of international law – one that regards international law as producing and maintaining the distribution of sovereignty among states and seeking to prevent the exercise of sovereignty in ways that infringe universal human rights. Given that international law was founded in part on the denial of indigenous legal personality, this question is especially challenging to the international legal imagination.

The flip side of this question is the international legal status of the multinational corporation. Corporations historically have not been subject to international legal obligations to respect human rights, including indigenous rights, except through and by the force of domestic law.¹⁹ But, as several participants in this Conference have noted, international law is also beginning to acknowledge that multinational corporations possess international legal obligations in a

19. See generally HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS (Michael K. Addo ed., 1999). At its second meeting, on Aug. 1, 2000, the U.N. Sub-Commission on Human Rights decided to establish a sessional working group to examine the working methods and activities of transnational corporations. U.S. ESCOR, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/Dec/2000/101 (2000).

number of circumstances.²⁰ At the very least, the ICCPR and the International Covenant on Economic, Social and Cultural Rights make indirect reference to private actors, stipulating that they do not authorize “any State, group or person” to engage in activity that would infringe international human rights.²¹ And *Awatitgin* and *Kitkatla* demonstrate the extent to which the state is deeply implicated in multinational corporate activity that threatens indigenous interests.

If indigenous peoples possess international legal rights and multinational corporations possess international legal duties, including a duty to consult with an indigenous community prior to engaging in action that threatens the community’s interests, then international law is not simply a body of law that balances the imperatives of state sovereignty and universal human rights. It becomes a project that blurs litigation and negotiation, the domestic and international, the public and the private, and the universal and particular; that imposes on non-state actors intergenerational rights and responsibilities that protect interests rooted in history; and that obligates states to acknowledge that the legitimacy of the authority they delegate to multinational corporations rests on their capacity to

20. See generally THE LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000). It is also beginning to vest corporations with the capacity to sue states in certain circumstances. North American Free Trade Agreement, Dec. 17, 1992, ch. 11, Can.-Mex.-U.S., 32 I.L.M. 283, 32 I.L.M. 605.

21. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 5, 993 U.N.T.S. 3 (“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.”) [hereinafter ICESCR]. The ICCPR has similar language. ICCPR, *supra* note 14, art. 5. The preambles of both Covenants also state that “the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.” ICESCR, *supra* note 14, preamble; ICESCR, *supra*, preamble. Article 45 of the Draft United Nations Declaration provides that “[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.” *Draft United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 13, at 115. See also *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810, art. 30 (1948) (“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”); *id.*, art. 29(1) (“Everyone has duties to the community in which alone the free and full development of his personality is possible.”).

come to grips with sovereignty's suspect origins. It becomes, in other words, an exciting, postcolonial project with a curious, conservative twist – one that reconfigures the present to enable the future to respect the past.