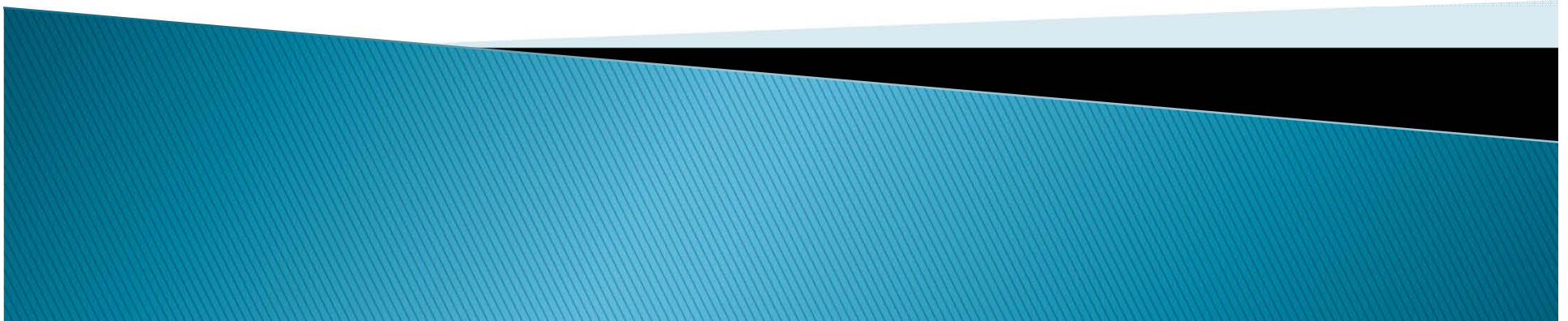


The collective rights of indigenous peoples: Their conceptual foundations and Implications

James Anaya

UN Special Rapporteur on the rights of indigenous peoples



Recognition of indigenous peoples' collective rights

- ▶ The United Nations Declaration on the Rights of Indigenous Peoples (2007)
- ▶ ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries (1989)
- ▶ UN treaty monitoring bodies
 - Human Rights Committee
 - The Committee on the Elimination of Racial Discrimination (CERD)
 - The Committee on Economic Social Cultural Rights
- ▶ Regional bodies, in particular
 - Inter-American institutions (Commission and Court)
 - The African Commission on Human and Peoples' Rights

UN Declaration on the Rights of Indigenous peoples

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.



Nagoya Protocol on access to genetic resources and benefit sharing (CBD)

Article 7


In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.



- ▶ The concept of collective rights generally:
Those rights that are enjoyed by particular groups of people in association with each other. Business corporations and research institutions are associations that acquire and control rights that are protected by law, including intellectual property rights.
 - The collective rights of indigenous peoples similarly are those rights enjoyed by them as groups and not just individually
- ▶ The intergenerational and human rights foundations of indigenous collective rights
distinguish them from the collective rights of business or other associations



The relationship between human rights and indigenous collective rights

- ▶ The traditional view is that human rights are necessarily individual
 - ▶ But now there is acknowledgment of the relationship between human rights and collective rights of indigenous peoples, as manifested in the Declaration on the Rights of Indigenous Peoples
 - ▶ The Declaration places broadly applicable human rights principles in the context of indigenous peoples' experiences, especially the associational and collective dimensions of those experiences.
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The Awas Tingni case

Inter-American Court of H.R., 2001 Judgment

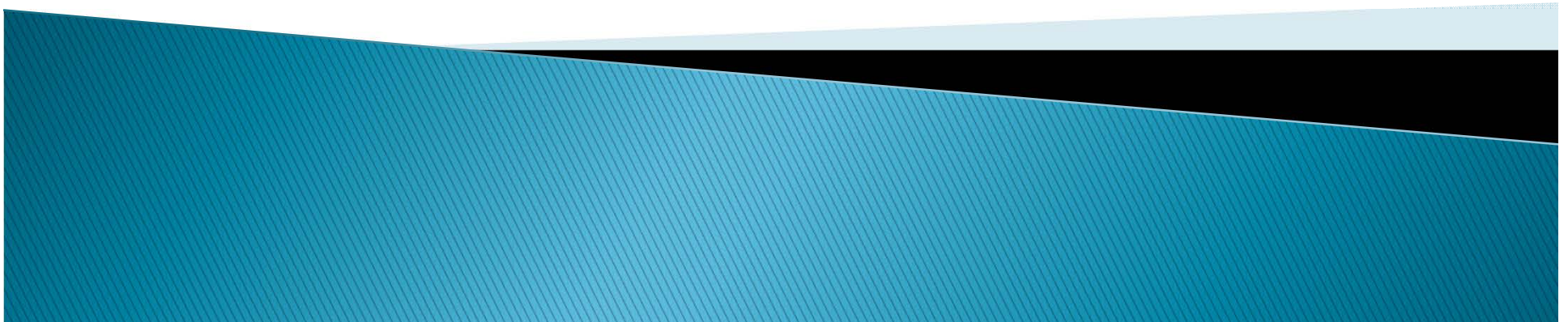
- ▶ An illustration of the affirmation of indigenous collective land rights on the basis of generally applicable human rights – even before Declaration.
- ▶ In this case Awas Tingni, a Mayangna indigenous community in Nicaragua, challenged the granting of a logging concession on its traditional lands, arguing, inter alia, a violation of the right to property which is protected by the Article 21 of the American Convention on Human Rights



American Convention on Human Rights

Article 21


Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.



Awas Tingni judgement

“ ‘Property’ can be defined as those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.”

...The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.

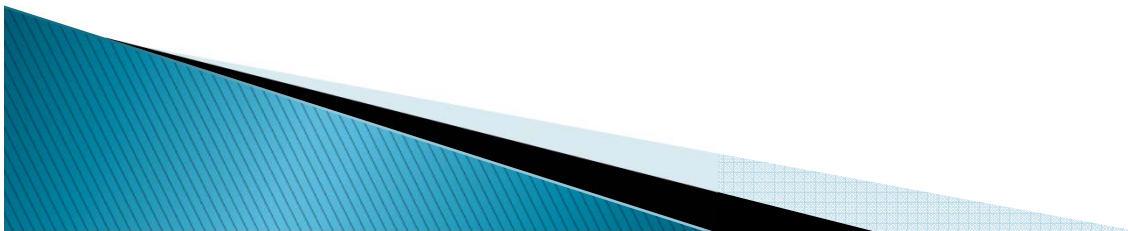


...it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property ...

... Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land ... Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.

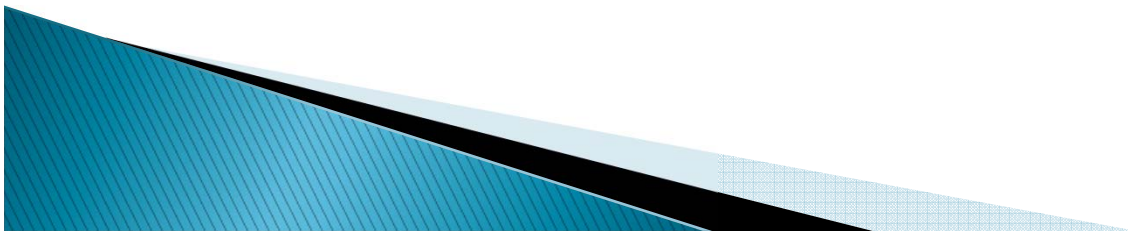


. . . Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.”




Fundamental human rights implicated in the context indigenous traditional knowledge and cultural expression


- ▶ The right to property
- ▶ The rights to life and and health
- ▶ The rights to culture and religion
- ▶ The right to equality
- ▶ The right to self-determination



Illustrative situations in relation to indigenous traditional knowledge, cultural expression and genetic recourses

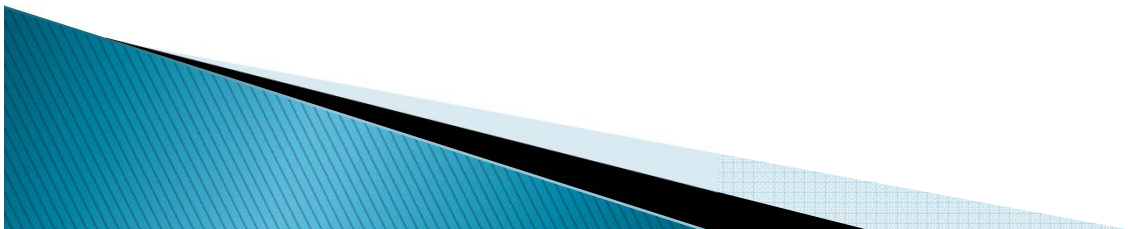
- ▶ Barsarwa (San) in Botswana and their traditional knowledge in plant and animal life. Subsistence and ability to transmit knowledge to future generations is threatened as a they lose access to traditional lands – rights of life, health and culture implicated
 - ▶ Sami traditional clothing. Sami complain of demeaning and unauthorized use of their traditional clothing – rights to culture, equality and self-determination.
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Illustrative situations

- ▶ San (South Africa) use of hoodia plant to ward off hunger. The plant's properties were developed and patented for commercial use by a research consortium – rights to property, equality implicated in claim for equitable benefit sharing
 - ▶ Certain style of pottery produced by Pueblo indigenous peoples in the United States and sold to outsiders has economic value in part because of where the property originates. The property interested in that economic value can be threatened by imitations.
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Some practical concerns

- ▶ Issues of definition and representation of beneficiaries of collective rights, especially with regard to
 - The granting of free, prior and informed consent for access or transferring of the rights,
 - Fair and equitable benefit sharing
 - Invoking legal remedies
- ▶ The significance of customary law and practices in addressing such concerns



First, there needs to be due regard for customary law

- ▶ Generally a significant aspect of the collective rights of indigenous peoples
 - As an element of the right of self-determination
 - As a means by which indigenous peoples generate and regulate the use and distribution of benefits of those tangible and intangible objects that collectively pertain to them
- ▶ Many decisions about traditional knowledge and cultural expressions can and should defer to customary law, both as a practical matter and as a matter of principle



Second, there needs to be active stakeholder cooperation toward pragmatic and creative solutions

- ▶ Deference to customary law may not always yield clear answers about definition and representation of rights beneficiaries.
- ▶ Indigenous peoples themselves will need to work toward defining and clarifying for the outside world they're representative structures, which might be done through building on their existing customary law and institutions.
- ▶ The practical difficulties should never be an excuse for not doing the right thing



Concluding remarks

- ▶ Significant progress has been made in the process for new, groundbreaking instruments to protect indigenous peoples' TK and TCE
- ▶ Further progress is a matter of securing basic human rights
- ▶ The need for greater participation by indigenous peoples and local communities at in the process
- ▶ All the best and thank you.

