The 'I' in Indigenous; Enforcing Individual Rights Guaranties in an Indigenous Group Rights Context

Rebecca Gross, *University of Maine - Main*
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Guaranties in an Indigenous Group Rights Context

By,

Rebecca Gross
Introduction

On November 4, 2007, in the rural foothills of Mexico, a small town of about 1,500 people held what seemed like a routine local election for town mayor.\(^1\) One of the candidates, Eufrosina Cruz, 27, did not fare so well, for the entirety of the ballots cast in her favor were deemed invalid.\(^2\) The all-male town board had a very good reason for disqualifying Cruz: she is a woman, and women are not allowed to stand for or vote in public elections.\(^3\)

Such blatant discrimination may seem contrary in a country whose government the Inter-American Commission on Human Rights has praised for making substantial progress in protecting human rights guarantees.\(^4\) However, this is no ordinary Mexican town; it is ruled by local customary law, which often differs from the national law. Mexico has granted significant autonomy to its indigenous populations, allowing them to rule under a parallel system of government.

Legal recognition of indigenous customary law in Mexico is a manifestation of the international principle of the right of “self-determination of peoples.”\(^5\)

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\(^2\) *See id.*

\(^3\) *See id.*

\(^4\) *Infra* p. 27.

\(^5\) *See infra* notes 33,34, for an explanation on the more modern definitions of the principle of the peoples’ right of self-determination.
Originally conceived as a tool to facilitate the process of decolonization under a 1960 United Nations resolution,\(^6\) the principle of self-determination was interpreted narrowly by the international community to mean the will of the peoples’ “right to form separate states,” within the context of resisting external occupation.\(^7\) However, over the last 40 years, as human rights instruments have expanded in scope from protecting individual rights to include protecting the collective rights of indigenous communities across the globe, self-determination has, in some cases, become synonymous with autonomy from state control for indigenous people. For example, the recently enacted Declaration on the Rights of Indigenous Peoples\(^8\) makes this right of autonomy its primary objective. Consequently, the trend towards legal recognition of varying types of indigenous peoples’ collective right of autonomy by many nations has created a manifest conflict of rights within the body of human rights law.

If taken to include this new concept of indigenous peoples’ right of autonomy from state control, namely, the right to observe separate indigenous customary law within a sovereign state, human rights law in the aggregate would place a dual burden on subscribing sovereign nations; Nations must simultaneously protect cultural and political rights of their indigenous communities.

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\(^7\) Benedict Kingsbury, *Claims by Non-State Group* 25 Cornell Int’l L.J., 481, 486-488 (1992), *reprinted in* INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 263 (W. Michael Reisman, Mahnoush H. Arsanjani, et al. eds. Foundation Press 2004) (listing five principal categories in which state claims to separate statehood were generally favored); *See, e.g.*, Western Sahara 1975 I.C.J. 3,4 (Oct. 16) (finding G.A. Resolution 1514 in the “decolonization of Western Sahara” not affected by territorial claims by Morocco and Mauritania, based on the principle of “self-determination through the genuine free will of the people of the Territory).

\(^8\) *Infra* p. 14 and note 53.
while adhering to the principle of protecting fundamental individual human rights, which begs the question: in the event of a conflict, which rights take precedence?

Most scholarship on indigenous peoples’ legal rights has ignored the twofold legal and moral problem in advocating for collective autonomy for indigenous communities. First, autonomous rule by indigenous groups have, in some countries, created de facto states within states, which effectively shield indigenous communities from any obligation to protect the fundamental rights of their individual members who remain particularly vulnerable to the will of the collective group; second, states cannot meet both legal obligations of upholding their duties to protect the rights of individual citizens, and the duty to refrain from interfering with the collective right of indigenous groups to govern by separate customary law if those customary laws regarding fundamental individual rights conflict with national laws.

In this article, I will describe how the Declaration on Human Rights and its covenants evolved the concept of self-determination as a means to protect certain human rights of the individual against state abuses, and not, as some claim, as a means for indigenous groups to assert collective group rights. However, I provide examples of how existing human rights conventions may be used to protect minorities who wish to assert human rights violation claims collectively as a group. Second, I will analyze how the right of self-determination has been used as a tool to support the new principle of separate autonomous rule by indigenous groups within sovereign nations, and the subsequent political and legal tension that such expansion of rights has caused, especially for individual members within the group context. I use Mexico’s formal

9 See e.g. Siegfried Wiessner, Rights and Status of Indigenous Peoples; A Global Comparative and International Legal Analysis 12 HARV. HUM RTS. J. 57, 93-128 (1999), reprinted in Reisman and Arsanjani, supra note 7, at 278-282 (emphasizing the primacy of cultural preservation through greater rights of indigenous autonomy).
recognition of self-rule by customary law for certain indigenous communities, and specifically, a case analysis of Eufrosina Cruz’s legal battles, as a backdrop to analyze the hierarchy of human rights within the Mexican legal framework, which has incorporated international treaty obligations. Finally, I attempt to show that indigenous territorial dispute claims brought to the Inter-American Commission on Human Rights have been resolved under existing G.A. Resolutions on the rights of indigenous peoples, and that the Declaration on the Rights of Indigenous Peoples is both unnecessary and may serve to negatively impact future individual human rights claims. I will conclude by suggesting that certain fundamental individual rights must supersede the indigenous peoples’ collective right to self-determination, and without a clear and practical enforcement mechanism of protecting these fundamental individual rights by national governments, the personal rights of indigenous members will remain effectively subordinated against the group.

I. Background on the Development of Human Rights Law

a. From the Rights of the Nation to the Rights of the People.

Traditionally, and even today, the broad concept of “human rights” has been viewed within the hierarchy of international legal order (originally coined the ‘Law of Nations’) as rights concerned with “personal sovereignty” to be regarded as “falling within exclusive domestic jurisdiction of the sovereign States.”10 Since the Peace of Westphalia in 1648, the Law of Nations had been built on the nation-state system, with individuals treated as “objects of international law,” rather than as subjects, 11 meaning that states held almost “unlimited discretion” over the treatment of its citizens.12 One of the fundamental principles under the Law

of Nations was the concept of national sovereignty, a principle described in the *act of state doctrine*:

> ‘[E]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.’

However, prompted by the “tragic events accompanying the Second World War,” the international legal order ascribed to the concept of human rights a more universal character; one that transcended State sovereignty rights. Confronted by the horrific events of the Holocaust, the international community, recognizing the need for stronger legal protections for human rights, adopted the United Nations Charter (the “Charter”).

b. Self-Determination: Minority Rights in an Individual Rights Context

The very cornerstone of the Charter is the principle of self-determination for “all peoples,” and this principle is necessarily understood to mean an individually-held right: The Charter’s mission, as stated in Article 1, is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . ,” which implies that equality between individuals must be the basis on which the right to self-determination is applied.”

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15 See Farer, *Human Rights Before the Second World War*, in Lillich & Hannum, supra note 10, at 35 (Farer explains that a key imperative of the UN Charter was to “promote and protect in a comprehensive and systematic fashion the basic human rights of all individuals against abusive state action”).

16 See generally id. at 34-35.

18 *Id.* (the “equal rights” referred to in art. 1 are concerned with individual attributes; art. 1 is “promoting and encouraging respect for human rights and for fundamental
Article 1 of the International Covenant on Social, Economic and Cultural Rights ("ICESCR") implies that the right of "self-determination" is exercised in the form of an individual right:

All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.19

Additionally, with the adoption of the Universal Declaration of Human Rights, and the later adoption of the "twin treaties", the International Covenant on Civil and Political Rights ("ICCPR") and the ICESCR, new duties attached to the state to protect the rights of the individual;20 Article 3 of the ICESCR states:

The states parties to the present covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present covenant.21

Despite certain individual protections having a "collective" characteristic, like the "freedom of association", and the "right to practice one’s religion" (both rights found in the ICCPR and the ICESCR), these human rights instruments in the aggregate retain an individualistic character.22 "Group" rights- "rights that pertain to and are exercised by the collectivity as such"-23 are delineated only in Article 23 of ICCPR24 and Article 10 of the


21 ICESCR, supra note 19, art. 23.

22 See generally Steiner & Alston supra note 20 at 153.

23 See id.; see also International Covenant on Civil and Political Rights, opened for
ICESCR to the extent of recognizing that “the family is the natural and fundamental group unit of society.”  

Finally, under Article 27 of the ICCPR, minority groups are given the right to enjoy their “own culture, to profess and to practice their own religion, or to use their own language,” where the majority culture differs. However, these are still the rights of the individual; such rights may not be subordinated to collective rights of a group. In an essay describing the tension arising from conflicting group interests in multiethnic Guatemala, Trygve Bendiksby describes a potential problem resulting from the current human rights model:

[W]hile ‘general human rights put clear limits on the way in which a state can treat its minority groups . . . the protection of minorities is principally within a state’s domestic jurisdiction. Where the state is reluctant or unwilling to establish or respect mechanisms for protecting the rights of minorities, minority groups have recourse to few legal or institutional alternatives for protection.’

Nevertheless, Bendiksby seemingly ignores the protection Article 27 of the ICCPR affords minority groups. In the Lubicon Lake Band Case, a case concerning ethnic minorities in Canada, the Human Rights Committee said that the right to preservation of one’s culture under


24 ICCPR, supra note , art. 23.

25 ICESCR, supra note 19, art. 10.

26 ICCPR, supra note 23, art. 27.


29 See Reisman & Arsanjani, supra note 7, at 264 (explaining that Article 27 is a useful tool of minority groups wishing to assert their collectively held cultural rights).
Article 27 of the ICCPR could be claimed collectively by a group of people who are similarly affected.\textsuperscript{30}

\textbf{II. The Rights of Indigenous People:}\textsuperscript{31} Beyond Traditional Human Rights Law

Unlike the traditional concerns of national minorities in protecting their language, religion, and culture, “assertion of indigenous rights has always involved claims to resources, territory, and governmental powers,” or in essence, claims to the right of “self-determination.”\textsuperscript{32} Much controversy has surrounded the inclusion of ‘self-determination of peoples’ in Article 1 of the UN Charter, and included again in Articles 1 of both the ICCPR and the ICESCR.\textsuperscript{33} The acuteness of this controversy can be found in the long-standing “conflict of authority-often debated in terms of sovereignty- between national and indigenous governments.”\textsuperscript{34}

\textsuperscript{30} See Ominayak v. Canada, Communication No 167/1984, Human Rights Committee, Report of the Human Rights Committee, UN Doc A/45/50 (1990), reprinted in Pritchard, supra note 27, 79, 189 (The Committee holding that Article 27 allows minority groups to bring collective claims where the groups can show that the individuals are similarly affected).

\textsuperscript{31} The term “Indigenous Peoples” is very broad and there is not yet a clear consensus on the definition, so for purposes of this paper the term will be defined under the ILO Convention, which regards indigenousness “on account of [a populations] descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art.1(b), May 9, 1991, 169 U.N.T.S. 1 [hereinafter ILO 169].

\textsuperscript{32} See Lillich & Hannum, supra note 10, at 333; see also Kingsbury, supra at note 10.


\textsuperscript{34} Lillich & Hannum, supra note 10, at 333.
Notwithstanding the holding in *Western Sahara* on “colonial peoples’” right to self-determination, the customary international law principle of self-determination in itself does not grant the right of secession from the nation, as the Canadian Supreme Court held in the *Secession of Quebec*.\(^{35}\) The Court in *Quebec* noted the UN General Assembly’s clarification on this point in its “Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, stating:

> Continue to reaffirm the right of self-determination of all peoples [. . .]. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or impart, the territorial integrity or political unity of sovereign and independent States . . .\(^{36}\)

Despite the continued controversy surrounding the meaning of “self-determination,” indigenous leaders have insisted that the creation of new states is not a primary objective, but rather, the recognition of a right of “high level of autonomy based on the fundamental values of ‘co-existence with nature’ and ‘peace through negotiation,’” is the object of focus.\(^{37}\) Some leaders have gone further in elucidating their desires for indigenous peoples, like Nobel laureate Rigoberta Menchu in his description of what form the exercise of self-determination should take:

> [T]he right to self-determination is undeniably the right to full political representation, without intermediaries, or limitations of any kind. This representation must be expressed at the local, regional, and national levels, in each country with which indigenous peoples have an historical relationship. Without losing sight of the necessity of national unity, but with mutual respect.\(^{38}\)


\(^{36}\) *Id.; see also* Fromsherz, *supra* note 33, at 38 (citing to the *Aalands Islands* case).


\(^{38}\) *Id.*
However, incommensurate with Menchu’s definition of “self-determination,” the right to indigenous representation is not an “actionable right” under Article 25 of the ICCPR, according to the U.N. Human Rights Committee in its 1990 decision in *Mikmaq Tribal Society v Canada*. In *Mikmaq* the Committee found that Canada did not violate the Mikmaq Tribal Society’s Article 25 right to participate in public affairs when the Canadian government failed to invite the Society to constitutional conferences on Aboriginal matters.

a. Collective Land Ownership and Political Rights

One year after *Mikmaq* was decided, the GA adopted the International Labor Organization (“ILO”) Convention No. 169, which explicitly recognizes “indigenous peoples’” collective rights to internal decision-making, representation in national decision-making, and control of development.” The rights of indigenous people enumerated in the Convention appear to echo Menchu’s version of self-determination; the Convention not only requires that indigenous peoples be “consulted whenever laws or administrative regulations affecting them are considered,” Article 14 of the Convention goes further to recognize “the rights of ownership and possession of its peoples concerned over the lands which they traditionally occupy.”

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39 Pritchard, supra note 27, at 193.

40 Id.

41 See Watters, supra note 37, at 21-22.

42 Lillich & Hannum, supra note 10, at 333.
Although only a limited number of countries have ratified the Convention, indigenous claims to territorial rights have gained legitimacy under international law. Worldwide, indigenous groups have reported environmental and cultural exploitation of their lands directly or indirectly by their national governments. For example, Ecuador opened titled land belonging to the “Huaorani hunter-gatherers” to oil companies, whose drilling activity generated “millions of gallons of toxic waste” and caused numerous oil spills. The U.N. Human Rights Commission noted the violent invasions of 12 indigenous Indian tribes’ lands within the Amazon Basin by “lumberjacks, gold-panners, fishermen, large landowners, and mining companies,” perpetuated by the Brazilian government through both direct action and non action, and a report by the “U.N. Centre on Transnational Corporations” noted how the pollution caused by “radioactive ore spoils” left on a Navajo reservation by the Kerr-McGee Company caused a severe breakdown in the tribe’s “traditional subsistence activities which contribute to proper nutrition and cohesion of the family unit.”

Within this territorial and environmental context, agreements between nations and their indigenous peoples to the right of self-determination have taken many forms. In 1997 the Australian government formed the “Native Title Agreement” with the “Opevale and Dingaal” aboriginal clan, demarcating internal land boundaries, and the government of New Zealand passed

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43 ILO169, supra note 31 (only 20 countries have so far ratified the Convention and those countries are primarily from Latin America).

44 See generally Watters, supra note 37, at 9; see also discussion infra p.25.

45 Id. at 10.

46 Id. at 11.
the Maori Fisheries Act of 2004 for “allocation of quota shares of the Maori sea fishery to different Maori tribal bodies.” ⁴⁷

Indigenous peoples’ right to now has legal force under customary international law; in Nicaragua, the Awas Tingni Mayagna community won an important communal land-rights decision in the Inter-American Court of Human Rights in 2001. ⁴⁸ In that case, indigenous communities claimed that Nicaragua had infringed on their land-use rights when it granted a thirty-year concession to a commercial logging company. ⁴⁹ The Court read a communal right to property into the American Convention on Human Rights, under Article 21, and order Nicaragua to demarcate and title the lands belonging to the indigenous communities. ⁵⁰

b. A Move Towards Self-Government

Beyond the protection of collectively-held land rights, the indigenous peoples’ claim to “self-determination” has expanded to include political autonomy over internal tribal matters in the form of self-government. ⁵¹ In a Columbia Human Rights Law Review article describing the historical struggle of Mexico’s indigenous tribes, Marco Palau concludes the following:

‘[T]he idea of autonomy has now come to the fore, succeeding land as the single most important means through which these populations can secure a better life, as well as


⁴⁹ Id. at 285.

⁵⁰ Id. at 285.

⁵¹ See Wiessner, supra note 9, at 276.
minimum standards of respect and dignity. They have understood that rights to land without political power-- i.e., a governing apparatus--are hollow.”

Nevertheless, despite the GA’s adoption of the legally non-binding Declaration on the Rights of Indigenous Peoples (“DRIP”) in 2007, indigenous peoples’ right to autonomy largely falls under the domestic jurisdiction of the sovereign States. To that end, Mexico has given significant autonomy to its various indigenous Indian tribes by allowing self-rule in the form of indigenous “norms and practices” (“usos y costumbres”).

III. Mexico and Usos y Costumbres

In 1996, after years of protracted violent uprisings against the Mexican State, the Zapatista National Liberation Army (the “EZLN”), signed an unprecedented agreement, known as the San Andres Accords (the “Accords”), with the federal government in the state of Chiapas, after substantial international political pressure was placed on the Mexican government.

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53 United Nations Declaration on the Rights of Indigenous Peoples, opened for signature September 13, 2007, 61 U.N.T.S. 295 [hereinafter the “DRIP”] (the Declaration has been ratified by most UN member countries but rejected by four: the U.S., Canada, New Zealand, and Australia); see discussion infra pp.32-33.

54 Cf. Lillich & Hannum, supra note 10, at 332-334 (describing the role the ILO 169 has played in obligating its signatories to do more to respect indigenous peoples’ right to “self-determination,” but that outside the colonial context, self-determination must not conflict with territorial integrity of the nation).

55 “Autonomy” is yet another term not clearly defined yet under international law, but in Article four of the DRIP, autonomy is implied as collectively having complete control over internal matters relating to the indigenous group. DRIP, supra note 53, at 4.


57 See Palau, supra note 52, at 2.
For over 500 years since the Spanish conquest, a festering discord pervaded Mexico’s “indigenous Mesoamerican cultures” who struggled as the impoverished peasant class to gain land rights and economic equality. For example, Mexico’s International Federation of Human Rights estimates that forty-five percent of the land in Chiapas once controlled by indigenous tribes is now owned by one percent of the non-indigenous population.

As post-revolutionary Mexico developed economically after 1917, the government grew increasingly oppressive, and social unrest began to brew among “coalitions of workers unions and indigenous communitie[s].” Complaints included, inter alia, government misappropriation of titled farm lands, whereby depriving indigenous communities of their livelihood; military force being employed to halt protests; and a lack of government initiatives to improve “extreme social and economic inequality . . . .” Most of these grievances “were channeled through the overarching demand that the state formally recognize indigenous autonomy.”

A change to the Constitution in 1992 emboldened the indigenous movement (the “Zapatistas”) to mobilize in greater numbers and with more violent force. Article 27 of the Mexican constitution (commonly known as the “Agrarian Reform Law”) “established collective land tenure as one of the protected modalities of ownership,” primarily benefitting indigenous

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58 See Zamora, supra note 56, at 1-2.

59 Palau, supra note 52, at 1.

60 Id. at 2.

61 Id.


63 See Palau, supra note 52, at 2.
communities, but to prepare for the implementation of NAFTA and to modernize the economy, the government altered the article by allowing individual shareholders in communal lands to sell their shares to buyers outside the community. In addition to the necessity of collective land rights, the Accords presented autonomy as a necessary tool for the survival of the group.

**Implementation**

The Accords, modeled after the ILO Convention 169, “committed the government to respect indigenous autonomy in the following terms:

> ‘Indigenous peoples have the right to free self-determination, and, as the means of their expression, autonomy from the Mexican government to ... apply their own normative systems in the regulation and resolution of internal conflicts, honoring individual rights, human rights, and specifically, the dignity and integrity of women’.

Additionally, in an effort to strengthen recognition of indigenous rights in more absolute terms, Congress imported specific guarantees to “the right of free determination and autonomy for indigenous peoples and their communities (including the rights of women)” into Article 2 of the Constitution. Article 2 requires that the “form of local government” of each state municipality with a majority indigenous population, “shall be according to indigenous rules of local governance and customs, rather than the rules dictated by Article 115 of the Constitution.

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64 *Id.*

65 *See id.* at 4.


67 Zamora, *supra* note 56, at 238.

68 *Id.*
Over time, as the indigenous autonomy structure developed into many different forms, varying from state to state, a potential problem emerged: “The unequal power relations that exist within indigenous communities, particularly gender inequalities.”

For example, one area where individual liberty is perhaps weakened under “customary law” is political participation by women. One study finds that “women have the right to vote in only 76% of customary-rule municipalities, and the right to hold cargos or offices in only 72%.” Consequently, “women are typically not allowed to be members of the communal assemblies nor are they allowed to legally inherit land.”

If the prohibition of women from the political process is in accordance with some traditional custom or rule, such a rule would seem to violate indigenous peoples’ obligation under the Accords to honor the fundamental individual rights of its members, in conjunction with Mexico’s constitutional and treaty obligations to protect its individuals’ rights to participate in the political process. Conversely, an evolving body of international law protecting indigenous peoples’ collective right puts an obligation on states, including Mexico, to respect indigenous peoples’ desires “to exercise control over their own institutions [and] ways of life.” In fact, a UN Economic and Social Council report stated, “general human rights and freedoms should be

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69 Hernandez, supra note 66, at 4-5.
70 See generally Cleary, supra note 62, at 23.
71 Id. at 23, 24.
72 Id. at 23.
73 See generally Hernandez, supra note 66, at 4.
74 See discussion infra Part III. i-iii.
75 ILO 169, supra note 31.
recognized in a manner ‘consistent with indigenous customs, societal institutions and legal traditions.’”

It is against this backdrop of potentially conflicting body of human rights law that Eufrosina Cruz struggles to assert her own rights as an individual, as a women, and as a member of an autonomous indigenous tribe.

Facts

Six years ago Eufrosina Cruz’s Mexican village, Santa Maria Quiegolani, was given “full legal status” to run its village by “use and customs,” or in other words, allowed to define its own normative state. With a dearth of educational opportunities for girls, Cruz left her town at age eleven to stay with relatives and go to school in a nearby city, eventually attaining an accounting degree. She later returned home and, decided, at age 27, to become the first women in her village to run for mayor, “despite the fact that women aren’t allowed to attend town assemblies, much less run for mayor.”

On the day of the election, the town council, headed by the deputy mayor, Valeriano Lopez, tore up the ballots cast in favor of Cruz. The all-male council claimed that according to tribal custom, women are not “citizens” of the town, and only citizens, i.e. men, are allowed to vote and hold office, therefore any ballot cast in favor of Cruz was invalid due to her gender.

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76 Hernandez, supra note 66, at 185.
77 Stevenson, supra note 1, at 1.
78 See Id. at 2.
79 Id.
80 Id.
81 Mexican human rights board: Town improperly barred Indian woman from seeking
The town-council secretary told a Miami Herald newspaper reporter, ‘“We live differently here . . . than people in the city. Here women are dedicated to their homes, and men work the fields.”’

The council elaborated by explaining that “only men who participate in collective work projects are considered citizens in Santa Maria, according to customs that in some cases predate the Spanish conquest.”

Cruz claims that by nullifying the ballots cast for her, on the grounds that women are not citizens, the council violated her right to equal protection and her right to vote under the Mexican Constitution. Cruz says Quiegolani women should have the right to “decide [their] lives, to vote and run for office.” On this basis, Cruz first submitted her complaint to the Oaxaca state electoral council, then to the state congress, asking for the election to be annulled, and that a new election be held with women voting.

Both the state electoral council and the state congress upheld the election without comment, but in March 2008, Mexico’s National Human Rights Commission (the “CHRC”) ruled that the town council had violated Cruz’s rights when it tore up ballots cast in her favor.


82 Stevenson, supra note 1, at 1.

83 Assoc. Press, supra note 81, at 1.

84 See Stevenson, supra note 1, at 1 (quoting Cruz, “...the constitution says we have these rights,” but no exact legal argument has been publicly expressed).

85 Id.

86 See id.

87 See Assoc. Press, supra note 81, at 1 (there was no published statement from either institution, according to the article).

88 Id.
Nevertheless, the CHRC, a federal agency equipped with “quasi-judicial functions,” is specifically prohibited from reviewing “acts and decisions of electoral officials,” and so it appealed to Oaxaca state authorities to enact reforms to ensure equal rights and outlaw such discrimination “even in semi-self-governing Indian communities.” While commenting on the ruling to the Associated Press, a CHRC inspector, Mauricio Ibarra, stated:

‘Respecting the system of 'use and customs' allows us to preserve our nation's varied ethnic and cultural richness, which we are proud of. However, our broad cultural legacy puts the country in the situation of having to reconcile the 'use and customs' systems with the current legal framework.’

Bolstered by the CHRC ruling, notwithstanding its lack of enforcement authority, Cruz has since appealed the Oaxaca Electoral Council’s decision to state and federal courts, where any rulings have yet to be made.

III.-Addressing the Adequacy of the Current Laws and Remedies

Mexico is party to two treaties that specifically require its signatories to prohibit gender discrimination in the area of political participation.

89 See Zamora, supra note 56, at 224-225 (the Commission was created in 1990, but has been criticized for its role as an observer rather than an authoritative body with the ability to call for legal action); see also Press Release, HUMAN RIGHTS WATCH, MEXICO: EFFECTIVE ACTION BY HUMAN RIGHTS BODY (Feb.12, 2008) (on file with the Human Rights Watch online news archive available at http://www.hrw.org/en/news/2008) (recommending Mexico strengthen and expand its National Human Rights Commission’s authority, even in election cases).

90 Assoc. Press, supra note 81, at 1.

91 Id.

92 See Id.

93 Mexico ratified the CEDAW and the Inter-American Convention on Human Rights. See Infra notes 80, 81.
CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) includes Article 6, which requires State Parties take specific steps to “eliminate discrimination against women in the political and public life of the country,” and further enumerates three specific rights to which women must be ensured on an equal basis as men: (a) to vote in all publicly-held elections; (b) to hold public office and participate in government activity at all levels; and, (c) to participate in non-governmental organizations relevant to political concerns of the country.\(^{94}\)

Additionally, the American Convention on Human Rights (the “American Convention”) stipulates in Article 23 the right of “every citizen” to enjoy taking part in public affairs through “freely chosen representatives,” and the right “to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage.”\(^{95}\) Moreover, Article 23 lists the specific bases on which any regulation of the foregoing political rights may be done, and gender is an invalid basis.\(^{96}\)

Mexico is also a party to the ILO Convention 169, which provides that indigenous peoples “shall have the right to retain their own customs and institutions.”\(^{97}\)


\(^{95}\) American Convention on Human Rights, art. 25, para. b., opened for signature Nov.22, 1969, Pan-Am. T.S. No. 36.

\(^{96}\) Id. at art. 23, para. 2 (quoting para. 2, “the law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceeding”).

\(^{97}\) ILO 169, supra note 31, at art. 8, para 1.
The caveat of this provision is that indigenous peoples have the right to retain their own customs “where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights,” with the burden being on the State to establish procedures “whenever necessary, to resolve conflicts which may arise in the application of this principle.” Although Mexico has stipulated in its agreements with indigenous tribes that customary practices cannot contradict Constitutional rights, any oversight or procedures to enforce compliance with such stipulations seem to be deficient.

a. Analysis of Legal Remedies Under Mexican Law.

The following four parts show how the State institutions and court system provide a rather byzantine structure for anyone wishing to assert his or her guaranteed individual rights, especially for the individual members of indigenous communities whose rules, even when inconsistent with the Constitution, would seem to be protected by public policy, or a parallel governmental system where there is no clear hierarchy of authorities.

i. Customary Rule in the State of Oaxaca

98 Id. At art. 8, para. 2.

99 See Zamora supra note 56, at 234 (Zamora writes, “[the customary rules] cannot conflict with constitutional rights, nor can they contradict higher laws (federal laws, state constitutions, or state laws”); see also Hernandez supra note 66, at 3 (citing the San Andres Accords, “‘Indigenous peoples have the right to free self-determination, and, as the means of their expression, autonomy from the Mexican government to ... [a]pply their own normative systems in the regulation and resolution of internal conflicts, honoring individual rights, human rights, and specifically, the dignity and integrity of women . . . ’”).

100 No case law is cited under this section because Mexico’s Supreme Court hears thousands individual cases a year, due to a complex procedure called, amparo, which is a means by which individuals may bring claims of constitutional rights violations, but under the civil law system, the law cannot be invalidated even where a violation is found, and any rulings in favor of a complainant apply to that person only there is no stare decisis. Therefore decisions are not published often, or if they are they contain only the judgment but no reasoning. See e.g. Zamora, supra note 66, at 98-100.
As stated previously, Mexico reformed Article 2 of its Constitution in 2001, which leaves implementation of the “conversion to indigenous rules of governance to the local legislatures of each state.”\textsuperscript{101} To date, Oaxaca is the only state to change its “organic law” to allow indigenous “customary rule” at the municipal level,\textsuperscript{102} as well as the only state in which indigenous governments are “formally recognized by the federal government.”\textsuperscript{103}

While customary rule varies between each municipality, in general, town representation is left to “usos y costumbres,” and conflict resolution rests on conciliation,\textsuperscript{104} rather than resting on the constitutional underpinnings of the national system.\textsuperscript{105} In terms of legal jurisdiction, Cleary notes the following in his report on Mexico’s indigenous affairs:

\begin{quote}
[L]ocal justice is often administered by indigenous judges or courts, whose jurisdiction may not coincide with municipal or district boundaries, and whose practices often differ substantially from those of the federal court system.\textsuperscript{106}
\end{quote}

In some respects, this implies that the final arbitrator will always be the State, but it is unclear on what conditions the State would actually intervene in a civil matter that originally arises under customary law. For criminal matters, the ILO Convention call for State Parties to

\textsuperscript{101} Zamora supra note 56, at 238.

\textsuperscript{102} Cleary, supra note 62, at 18-19 (explaining that despite the comparable indigenous population sizes in other states the discrepancy in recognition of usos y costumbres between Oaxaca and other states may be more attributable to the language of a 1995 state reform law in Oaxaca allowing customary law to be used where such a system as already been developed, and most indigenous municipalities had been using such law de facto anyway, which allowed for faster formal recognition).

\textsuperscript{103} Id. at 7.

\textsuperscript{104} Id. (explaining that conciliation is based on tradition, defined as being “oral and flexible”).

\textsuperscript{105} Hernandez, supra note 66, at 21.

\textsuperscript{106} Cleary, supra note 62, at 10.
respect, to the fullest extent possible, “the methods customarily practiced by the peoples concerned for dealing with offences committed by their members” and for “the customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.” Such requirements are reflected in the amendment to Article 220 of Mexico’s Federal Penal Procedures Code that recognizes the validity of expert witness testimony on “cultural context.” Article 220 states:

‘[W]hen the accused belongs to an indigenous ethnic group an effort will be made to follow expert testimony in order that the judge may . . . may . . . better understand [the] cultural difference [of the accused] to the national norm [sic].’

Finally, political representation, often in the form of town assemblies, is entirely under the “jurisdiction” of the autonomous municipality, with affairs of the town to be decided by the assembly.

d. Indigenous Citizenship

Mexico’s Constitution distinguishes between nationality and citizenship; the former is conferred on the basis of jus soli ("by place of birth"), or through naturalization,

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107 ILO 169, supra note 31, at art. 9, para. 1,2
108 Hernandez supra note 66, at 5-6.
110 Constitution Poltica de los Estados Unidos Mexicanos [Const.], as amended, Diario Oficial de la Federacion [D.O.], 5 de Febrero de 1917 (Mex.), art. 33 [hereinafter “Mex Constitution”].
and the latter is conferred upon having satisfied the following three conditions enumerated in Article 34 of the Constitution: (1) having the status of a Mexican; (2) having reached a certain age; and (3) having an honest means of livelihood.\textsuperscript{111}

The benefits of citizenship are civil and political rights, such as the right to vote for and stand for public office.\textsuperscript{112} Upon meeting these conditions, indigenous members of self-governing municipalities should attain both Mexican nationality and Mexican citizenship. In contrast, the policies governing internal “indigenous” citizenship of members within autonomous towns are not as clear. In the case of Lovelace, Maliseet Indian chiefs in Canada stripped a female member, Sandra Lovelace, of her Maliseet status when she married a non-member, in accordance with a provision of Canada’s Indian Act.\textsuperscript{113} Although that provision of the Indian Act applied only to women, the Human Rights Committee did not address the discriminatory nature of the Act, but did hold that “excluding her from the reservation” was a violation of her “individual right to belong to a minority” under Article 27 of the ICCPR, which “guarantees the individual rights of persons belonging to minorities.”\textsuperscript{114} The Committee held that:

\begin{quote}
[P]ersons who are brought up on a reserve, who have kept their ties with the community and wish to maintain those ties must normally be considered as belonging to that minority.\textsuperscript{115}
\end{quote}

\begin{itemize}
\item \textsuperscript{111} \textit{Id.} at art. 34.
\item \textsuperscript{112} \textit{Id.} at art. 35.
\item \textsuperscript{113} \textit{Lovelace v. Canada}, Communication No 386, UN Doc CCPR/C/52/D386/1989(27 October 1994) p.2.
\item \textsuperscript{114} \textit{Id.} at 8
\item \textsuperscript{115} \textit{Id.}
\end{itemize}
According to a report on gender conflict within minority and indigenous groups by the NGO, Minority Rights Group International (MRG), the Maliseet chiefs in Lovelace had used the “legitimacy” of the Canadian Indian Law as justification to strip Lovelace of her membership rights, whereas Canada claimed to have enacted the Indian Law according to Indian culture—perhaps in the interest of protecting its indigenous peoples’ right to self-determination.  

Interestingly, after Lovelace Canada subsequently repealed many of the Indian Act’s provisions to comply with its obligations of the CEDAW, in concert with Article 5 of the ICERD (International Convention on the Elimination of all forms of Racial Discrimination), which delineates ‘the right to marry, to choose one’s spouse, the right to own property and the right to inherit with a specific impact on Aboriginal women and children.’”

Unlike Canada, Mexico, as previously discussed, has bestowed some indigenous groups the right to rule by “customary law” and leaves enactment procedures to the states.  

Semantically, “membership” may refer to belonging to a particular group, but “citizenship” suggests the political rights to internal group ordering. It is not clear if the individual “right to minority membership” under Article 27 of the ICCPR is interchangeable with “citizenship” rights, or whether there is more than a semantic difference. In terms of policy or on the principle of comity, Mexican courts would most likely refrain from intervening in conflicts regarding autonomous municipal “membership” or “citizenship,” which is similar to the current United States policy on tribal membership disputes. In Pueblo v. Martinez, the U.S. Supreme Court held

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117 Id. at 26.
118 See Hernandez, supra note 66, at 38.
that federal courts should not intervene in a membership dispute involving particular Indian tribes, and instead deferred the issue to Congress. In Pueblo, the child of a Navajo women was denied membership because the child’s father was a non-Navajo member, and the rights of Navajo membership pass exclusively through paternal lineage.

The Court’s ruling in Pueblo came almost a decade before the Human Rights Committee’s decision in Lovelace (which came before the ILO Convention 169) so it would be interesting to see how the Committee would review the Court’s decision today in light of its interpretation of Article 27.

iv. Constitutional Guarantees of Individual Rights

Mexican law is based on a civil law tradition, with the Constitution being the “fundamental law of society.” However, there are two possible impediments to the assertion of individual liberties under the Constitution: (i) the sheer vastness of the heavily amended Constitution (136 Articles and 17 “technical provisions”) signifies the document’s character as a work-in-progress or a statement of “ideals,” rather than serving as an established norm for “political and legal infrastructure to follow,” as evidenced by Mexican scholars who have described the document as an “aspiration” on which the law as applied by all levels of the court system is often different than the law as stated; and, (ii) the Mexican courts’ power to interpret “constitutional language” is limited to the language of the document itself- the Constitution is

120 Id. at 52-53.
121 Zamora, supra note 56, at 78.
122 See generally Mex Constitution supra note 110.
123 Zamora, supra note 56, at 79.
considered an “exhaustive” wellspring of rights and duties, only to be amended by the Congress.\textsuperscript{124} Despite such challenges, the Supreme Court of Justice may hold any regulation or official ruling invalid if it contradicts any provision of the Constitution.\textsuperscript{125}

The constitutional right of equal protection is restricted to the prohibitions of “any governmental act, either \textit{de jure} or \textit{de facto}” deemed to violate equal protection, not private acts.\textsuperscript{126} Equal protection, which applies to all individuals within the “United Mexican States,”\textsuperscript{127} includes the equal treatment of men and women “under the law,”\textsuperscript{128} and discrimination against “human dignity or individual rights or liberties,” such as gender, civil status, or ethnic origin, is prohibited.\textsuperscript{129} Equal protection between men and women should, by extension, apply to political rights guaranteed under Article 35, which confers “the right to vote in popular elections and the right to stand for election.”\textsuperscript{130} However, critically affecting these rights is the Supreme Court’s interpretation of the separation of powers under Article 49; the Court has ruled that political rights are not ‘constitutional protections’ and therefore any claims involving a violation of such rights are not reviewable by any federal court.\textsuperscript{131} Instead, violations of political rights as described in Article 35 may be reviewed by Mexico’s Electoral Tribunal of the Federal Judicial Branch (the

\textsuperscript{124} Id. at 29.

\textsuperscript{125} See id. at 235.

\textsuperscript{126} Id. at 237

\textsuperscript{127} Mex. Constitution, \textit{supra} note 110, at art. 20.

\textsuperscript{128} Zamora, supra note 56, at 236.

\textsuperscript{129} Mex. Constitution \textit{supra} note 110, at art. 1.

\textsuperscript{130} Zamora \textit{supra} note 56, at 248.

\textsuperscript{131} Id. at 249.
“tribunal”), which is empowered to review “appeals from judgments resolutions of state electoral officials and protect the political and voting rights of individuals.”

Further complicating the matter is the prohibition of the Tribunal from considering the “constitutionality of electoral laws or regulations,” which is a Supreme Court matter. Therefore, constitutional challenges to an electoral law based on an international treaty in conjunction with the Constitution would most likely be a matter for the Supreme Court to decide.

v. Treaty Law Applied Domestically

Consistent with its obligations under the Vienna Convention on the Law of Treaties, treaties entered into by Mexico, having been approved by the Senate, are the “Supreme Law of the Union,” where not inconsistent with the any constitutional provisions. Article 133 of the Constitution requires that ‘each state's judges . . . follow such Constitution, laws and treaties despite the dispositions in the opposite way that could exist in the Constitutions or laws of the states,’ which suggests that where any conflict arises between treaty law and federal or local law, the law of the Treaty should take precedence, on par with the Constitution. However, in

132 Id. at 250.
133 Id. at 249.
136 See generally Jorge Ulises, The Judicial Application of International Human Rights Treaties, 7 U.S.- Mex. L.J. 1, (2007) (discussing the hierarchy of laws, including treaty law, in Mexico and the problem with lack of consistent judicial application of the laws according to their hierarchy; also, the author regards Mexico to be a monist nation, where all treaties are self-executing).
practice, scholars note that human rights treaties in particular are rarely enforced by Mexican courts.\textsuperscript{137}

b. The Inter-American Human Rights Commission

In addition to the being a party to a multitude of United Nations human rights conventions, Mexico, by ratification of the American Human Rights Convention, has accepted the “adjudicatory jurisdiction of the Inter-American Court of Human Rights,” and made a binding obligation upon itself to adhere to the principles listed in the American Convention on Human Rights.\textsuperscript{138} In an annual evaluation report on the status of human rights in Mexico,\textsuperscript{139} the Inter-American Commission on Human Rights noted that Mexico had made progress in terms of making “greater commitments to international rights instruments,” like the ratification of the inter-American conventions.\textsuperscript{140} Surprisingly, the report cites women’s rights and political rights as being two areas of great reform and progress in Mexico’s compliance with its human rights obligations.\textsuperscript{141}

The report referred to a study submitted by Mexico in 2000 that purported the State had thoroughly evaluated its federal laws in regard to the equality of men and women in

\textsuperscript{137} Zamora, supra note 56, at 253.

\textsuperscript{138} Charter of the Organization of the American States, parts F., G. Dec. 12, 1951 Pan-Am. T.S. NOS. 1-6 & 61.

\textsuperscript{139} See generally Follow-up on IACHR Recommendations on its Reports on member States: Mexico, 1999 Inter-Am. C.H.R.1501 (1999) (evaluating the progress Mexico had made in implementing the Commissions recommendations since the Commissions on-site visit to Mexico from July 14 to 24, 1996) [hereinafter “IACHR Mexico Report”].

\textsuperscript{140} Id. at 16 (the Commission remained silent on the lack of enforcement of human rights treaties in the Mexican courts, as previously noted).

\textsuperscript{141} See generally id.
order to “verify its consonance with international instruments,” and listed proposed areas in need of amending. Not surprisingly, the study specifically proposed laws to strengthen gender equality

   in the state of Oaxaca, among others, but the report did not specify as to the types of laws proposed. The Commission found Mexico’s initiative to strengthen “effective observance” of women’s rights as encouraging.

   Additionally, the same report praised the transformation of Mexico’s political transparency through the creation of the judicially autonomous Federal Electoral Institute and Tribunal. In particular, the Commission highlighted the Institute’s decision in 1998 to adopt the “recommendations and observations” made by the inter-American Human Rights Commission “contained in the Report on the Situation of Human Rights” as far as the law would allow it. The fact that the Electoral Tribunal is willing and authorized to adopt recommendations made by the Commission, and ostensibly any Human Rights Court rulings, suggests that the following cases and report could influence its consideration in matters concerning fundamental rights under international law in election matters.

   i. The Case of Maria Eugenia Morales De Sierra

   In February of 1995, the Center for Justice and International Law together with Eugenia Morales de Sierra, a working Guatemalan mother, (collectively, the “Petitioners”), submitted a

142 Id. at 14.
143 See Id.
144 Id. at 15.
145 See Id. at 10.
146 Id. at 11.
petition to the Inter-American Commission on Human Rights alleging that the Republic of Guatemala (the “State”) had violated Morales de Sierra’s rights under four articles of the American Convention.\(^{147}\) The Petitioners claimed that certain provisions of the Civil Code of Guatemala that established a clear distinction between men and women by prescribing unequal roles for husbands and wives had violated the general principle of equal protection under the American Convention.\(^{148}\) The disputed provisions of the Civil Code provided, inter alia, that a husband is empowered to “represent the marital union,” has the sole power to “administer marital property,” and has the right to prohibit the wife from working outside the home if doing so appears to “prejudice her role as a mother and homemaker.”\(^{149}\) In 1993, the Guatemalan Court of Constitutionality, the final authority of national law, held that the disputed Civil Code provisions did not conflict with the equal protection clause in the Constitution, nor any international treaty prohibiting gender discrimination.\(^{150}\) The Court reasoned that protection of the “marital unit” by outlining distinct responsibilities of the respective partners did not conflict with the right to equal protection, but rather enhances protection of the family as a fundamental unit.\(^{151}\)

In its final report, which was transmitted to the respective parties on November 7, 2000, the Commission decided the State was responsible for “having violated the rights of Mar . . . Eugenia Morales de Sierra to equal protection, respect for family life . . . in Articles 24, 17, and


\(^{148}\) See Id. at 2.

\(^{149}\) Id. at 1.

\(^{150}\) Id. at 9.

\(^{151}\) See id.
11 in the American Convention of Human Rights.” The Commission also found the State responsible for failing to uphold its Article 1 and Article 2 obligations requiring the State to adopt enforceable measures protecting such rights. Applying a standard of strict scrutiny, the Commission found that the rights to “equal protection” and “non-discrimination” underpinning the American Convention to be the “essential bases for the very concept of human rights.” Accordingly, any distinction made, statutorily or other, based on the criteria of gender, for example, would require “very weighty reasons.” Finding no “weighty reasons” for establishing the Civil Code provisions in dispute, the Commission found the State to have failed in its obligations under the American Convention to:

‘respect the rights and freedoms recognized therein and to ensure to all persons . . . the free and full exercise of those rights and freedoms without discrimination for reasons of . . . [inter alia] . . . sex . . . . Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.’

The Commission recommended that the State amend its Civil Code to reflect “reciprocal duties of men and women in marriage,” in “conformity with the norms [established] under the American Convention.”

ii. “Special studies” report on the political participation of women and affirmative action

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152 Id. at 21.
153 Id.
154 Id. at 9.
155 Id. at 9.
156 Id. at 4.
157 Id at 21.
In 1999, the Inter-American Commission on Human Rights (the “Commission”) issued a report in response to a request by the Inter-American Commission of Women (the “CIM”) asking the Commission to provide a “juridical analysis of the compatibility of affirmative action measures designed to promote the political participation of women, including quota systems, with the principle of non-discrimination on the basis of gender.” The Commission emphasized in its report the serious underrepresentation of women in government and public life throughout the world, including in Latin America. Noting the general trend at that time for Latin American governments to implement some sort of quota system designed to ensure that women hold a minimum number of elected offices, the report cites as an example Argentina, where its government claimed that female representation in the Congress increased at least 30% since implementing a quota system.

In addressing whether increasing political participation by women through means of affirmative action can be reconciled with the rights to equality, the Commission pointed out that even where “as a matter of law” women are accorded equal treatment as men, “de jure barriers to equality” persist without affirmative measures to enforce such laws. Accordingly,

158 Consideration Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination, 1999 Inter-Am. C.H.R. 1525, 1 (1999) (attempting to reconcile the measure of affirmative action to increase political representation by women with the fundamental rights to equality and non-discrimination).

159 See id. At 2.

160 Id. (Venezuela implemented a minimum quota system setting aside a certain number of seats for women in the Congress).

161 Id.

162 See id. at 6-7.
the Commission concluded that affirmative action designed to fulfill a state’s obligation to protect women’s rights to political participation was “in compliance with the principle of non-discrimination and the applicable provisions of human rights law.”  

iii. The case of Belize

The Belize Supreme Court case of *Cal v. Attorney General*, with remarkably similar facts to the *Maya Indigenous Communities* case(cite), is one of the first indigenous land rights cases to invoke the recently adopted DRIP (“Declaration on the Rights of Indigenous Peoples”) in its judicial decision.  

The claimants in *Cal*, representatives of an indigenous Mayan village in southern Belize, asserted that the Ministry of Natural Resources and Environment had “issued or threatened to issue leases and concessions” to lands the claimants contended were collectively held by them through “traditional land tenure.”  

The Court, encouraged by the recommendations made by the Commission in *Maya Indigenous Communities*, agreed that the claimants had a collective legal interest in customary lands critical to their survival, and ordered the government to properly recognize and demarcate the disputed land.  

The novelty of this case, however, lies in the Court’s importation of the non-binding DRIP into customary international law to further support its conclusions. The Court cited Article 26, 

163 *Id.* at 8.


165 *See id.* at 1023.

166 *See id.*

concerning indigenous land-use rights, as authoritatively reflecting the “general principles of
ternational law on indigenous peoples and their land and resources.”  

The significance of the Court’s ascription to the DRIP a more binding importance than its
non-binding nature suggests may be influential on courts in other jurisdictions, including the
Inter-American Commission on Human Rights. In 2006, the Commission issued a press release
welcoming the adoption of the DRIP. The press release lauded the DRIP for recognizing the
“collective rights of indigenous peoples,” and expressed its firm commitment to formally adopt
an American version that reflects the DRIP commitments.

The DRIP is the most expansive instrument in defining both the rights of indigenous
peoples and their respective States’ obligation to honor these rights. Article 3 reiterates
indigenous peoples’ right to “self-determination,” but Article 4 goes further and includes the right
to “autonomy or self-government in matters relating to internal and local affairs,” the right to

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168 Cal supra note 164, at 1045.
UNIVERSAL DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES (July 3, 2006)
170 Id. (the whole quote says, “this instrument recognizes the right of the indigenous
peoples to self-determination, establishes that they must give their consent to the
exploitation of natural resources on their lands, and limits military activities in their
territories. Further it recognizes the collective rights of indigenous peoples, such as the
preservation of their cultural values and their ethnic identity, and the protection of any
attempt to expel them from their ancestral lands”).
171 Id. (although it has not yet adopted its working draft on the rights of indigenous
peoples).
172 See generally DRIP, supra note 53.
strengthen and maintain their distinct political . . . institutions,” and finally, “the right to determine their own membership in accordance with their culture.”

In a feeble acknowledgment of individual human rights, the DRIP faintly obliges the States to assist its indigenous peoples in maintaining respect for fundamental rights, but does not clarify the means of which a State may do so without violating indigenous peoples’ rights to autonomy and maintenance of their own political institutions and culture enshrined in the DRIP.  

\[173\] Id. at arts. 4-5.

\[174\] Id. at art. 33.

\[175\] See generally id. at arts. 17-46.
Conclusion

The supremacy of gender equality and the principle of non-discrimination among the vast body of human rights law appear to have garnered consensus throughout the international legal community, even within most indigenous communities. Accordingly, Mexico seems to have made a firm commitment to the principle of equality for all people within its borders. Appearances, though, can be deceiving; the problem is not a lack of de jure laws protecting gender equality, or the equal right to political participation, but rather, a lack of clear mechanisms by which to enforce those laws.

The creation of a parallel system of law and government in Mexico may shelter autonomous indigenous communities from the burdens of incorporating a modern system of individual human rights protections, especially when the political reality of civil warfare puts a country like Mexico in the precarious position of balancing the rights of individuals without intruding into local indigenous affairs. If a national government were to interfere with towns ruled by customary law, such interference may fan the flames of rebellion and civil unrest.

Conversely, where indigenous customary law is formally recognized by the government, individuals living under such rule would have no formal means of redress for violations of individual rights if the government is de facto barred from monitoring or interfering with local customs. The reality for most indigenous women especially, is that they lack formal education, independence and the financial means to bring the type of claim as Eusofrina Cruz’s forward though the national system.
Collective or group autonomy and self-government as conceived in the DRIP and by indigenous communities throughout the world would seem to put a strain on the current body of human rights law that emphasizes fundamental rights for individuals. Indigenous peoples have suffered greatly throughout history, and continue to suffer at the hands of their own national governments, but it seems like their common plight is related to communal land use and economic rights. Since the right to communal use and protection of indigenous lands has begun to receive legal recognition under existing international customary law, the expanded claims to the right to self-government are unnecessary. It remains unclear to what degree existing self-governing indigenous communities are also obligated to respect the fundamental right to personal sovereignty, and if they are, what kind of clear legal mechanism could provide enforcement of such rights.

As indigenous autonomy is achieving greater recognition, Cruz’s plight in Mexico provides a good example of an inherent human rights conflict, and should prompt the signatories to the DRIP to consider carefully how they will reconcile individual rights with collective indigenous rights.