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Why Indigenous Peoples' Property Rights Matter: Why the United Nations Declaration on the Rights of Indigenous Peoples May Be Used to Condemn Isis and the State of Iraq for Their Failure to Protect the Property Rights of Indigenous Peoples in the Nineveh Plains

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COMMENTS

WHY INDIGENOUS PEOPLES' PROPERTY RIGHTS MATTER: WHY THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES MAY BE USED TO CONDEMN ISIS AND THE STATE OF IRAQ FOR THEIR FAILURE TO PROTECT THE PROPERTY RIGHTS OF INDIGENOUS PEOPLES IN THE NINEVEH PLAINS

*Brooke E. Hamilton**

Crying and pleading for him to stop, a girl so small an adult's hands "could circle her waist," experienced excruciating pain as an Islamic State (ISIS) fighter repeatedly raped her.¹ Under ISIS' extremist interpretation of Islam, the militant informed the girl, only twelve in age, that for religious reasons he was "allowed to rape an unbeliever."² He "bound her hands and gagged her," then he would pray, rape her, and pray again, "bookending the rape with acts of religious devotion."³ The girl, a Yazidi residing in Northern Iraq, was sold as a sex slave solely because of her religion.⁴ The root of this atrocity occurred months prior, with ISIS's capture of the city of Mosul.

When ISIS forces entered Mosul, they systematically destroyed all property belonging to Assyrian Christians,⁵ publishing videos of its members demolishing centuries old monuments on the internet.⁶ The militants desecrated Christian churches, and banned the display of all

* Third-year student, University of Oklahoma College of Law. I would like to thank my faculty advisor, Professor Lindsay Robertson, for his comments and guidance on my research and writing.

1. Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES (Aug. 13, 2015), http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html?_r=0.

2. *Id.*

3. *Id.*

4. *Id.*

5. Lara Logan, *Iraq's Christians Persecuted by ISIS*, CBS NEWS: 60 MINUTES (Mar. 22, 2015), <http://www.cbsnews.com/news/iraq-christians-persecuted-by-isis-60-minutes/>.

6. Anne Barnard, *ISIS Onslaught Engulfs Assyrian Christians as Militants Destroy Ancient Art*, N.Y. TIMES (Feb. 26, 2015), <http://www.nytimes.com/2015/02/27/world/middleeast/more-assyrian-christians-captured-as-isis-attacks-villages-in-syria.html>.

symbols of Christianity in Mosul.⁷ Assyrian Christians were given three options when ISIS infiltrated and took control of Mosul: pay an outrageous tax (*jizya*), convert, or die by the sword.⁸ Indeed, more than one hundred and twenty thousand Assyrian Christians have been forced out of their homes, leaving, for the first time in two thousand years, no Christians in Mosul.⁹

ISIS attacks have been strategic, wiping away any trace of Assyrian Christians from the land in which they have lived for thousands of years.¹⁰ The Assyrian Christians have “survived centuries of conquerors and massacres,” and now ISIS is working to not only eradicate the people, but all “archeological traces of pre-Islamic antiquity.”¹¹ Manuscripts written by first century Christians, housed in churches in Mosul, were burned by ISIS militants and are now gone forever.¹² Just like the Nazis who marked the homes of Jews, in all of the territory under ISIS’s control, ISIS militants marked the homes of all Christians in red with the Arabic letter “N”, which stands for Nazarene, an early Islamic term for Christians.¹³

After ISIS had taken control of Mosul, Assyrian Christians living in Qaraqosh knew it was only a matter of time before they were targeted by ISIS.¹⁴ Qaraqosh, the largest Christian city in the Nineveh Plains, was a bustling community and home to more than fifty thousand individuals.¹⁵ Several Christians fled from Mosul to Qaraqosh, bringing with them stories of beheadings and mass executions committed at the hands of ISIS fighters.¹⁶

7. Logan, *supra* note 5.

8. Barnard, *supra* note 6.

9. Logan, *supra* note 5.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*; see Heba Kansa, *Symbol of ISIS Hate Becomes Rallying Cry for Christians*, CBS NEWS (Oct. 20, 2014), <http://www.cbsnews.com/news/for-christians-symbol-of-mideast-oppression-becomes-source-of-solidarity/>. ISIS fighters use the Arabic letter N, meaning Nazarene, as a religious slur to shame Christians. However, Christians have reclaimed the symbol and used it as one of “solidarity” and became part of a world-wide social media movement to bring awareness of ISIS’s actions, with the hashtag “#WeAreN.” *Id.*

14. Eliza Griswold, *Is This the End of Christianity in the Middle East?*, N.Y. TIMES (July 22, 2015), <http://www.nytimes.com/2015/07/26/magazine/is-this-the-end-of-christianity-in-the-middle-east.html>.

15. *Id.*

16. *Id.*

ISIS tightened their grip on Qaraqosh when they cut off their water supply—which came from Mosul.¹⁷ With wells quickly drying up, so withered the hopes of avoiding an ISIS attack.¹⁸ Months before, the Kurds had forbidden the people of the Nineveh Plains to arm themselves, and confiscated all of their weapons.¹⁹ Kurdish forces known as the Peshmerga were appointed by the Iraqi government to defend Qaraqosh, but they retreated the week before ISIS invaded Qaraqosh.²⁰ The Secretary General of the Peshmerga, Jabbar Yabbar, attempted to excuse their retreat by arguing they did not have the “weapons to stop” ISIS.²¹ Thus, the Assyrian Christians living in Qaraqosh were defenseless.²² Thousands fled, but for those who were left behind, life as they knew it was about to change completely.²³

ISIS militants “broke into stores and looted them.”²⁴ The militants went from house to house, seized all property, and “rooted out most of the residents cowering in their homes.”²⁵ ISIS militants “marked the walls of farms and businesses ‘Property of the Islamic State.’”²⁶ By the time of the attacks on Qaraqosh, ISIS was controlling Mosul, the second largest city in Iraq, as well as Ramadi and Fallujah.²⁷

The Yazidis, another minority group who live in the Nineveh Plains, have suffered from similar atrocious acts committed by ISIS militants. ISIS launched its major attack on the Yazidis on August 3, 2014, in the Sinjar region, taking all of their property.²⁸ The attack, (or at least its success) like those in Qaraqosh, could have been prevented if the Iraqi government had upheld its pledge to protect the Yazidi people and their territory.²⁹

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Fulfilling the Humanitarian Imperative: Assisting Victims of ISIS Violence: Hearing of the Subcomm. of Afr., Glob. Health, Glob. Human Rights & Int’l Org. of the H. Comm. on Foreign Affairs*, 114th Cong. 21 (2015) <http://docs.house.gov/meetings/FA/FA16/20151209/104273/HHRG-114-FA16-Transcript-20151209.pdf> [hereinafter *Hearing: Fulfilling the Humanitarian Imperative*] (statement of Mirza Ismail, Founder and Chairman, Yazidi Human Rights Org. Int’l).

29. *Id.*

On the eve of the attack on the Yazidis, “more than 10,000 of the local authority’s forces were present in the Sinjar region,” with the duty to “protect the [Yazidis].”³⁰ Early on the eve of the ISIS attacks, the Yazidi people tried to flee to Mount Sinjar, “but the local militia would not allow it.”³¹ Later that evening, the local authorities who had pledged to protect the Yazidis from an impending ISIS attack withdrew their support.³² Yazidi men were begging the militia men “for weapons and ammunition” to protect themselves from ISIS militants.³³ Their pleas were refused, and with no military protection and just a few basic weapons, ISIS militants took control of the Yazidi’s territory within a few hours.³⁴

The ISIS attacks on the Yazidi Kurds were sinister and systematic. After the fall of Mosul, ISIS fighters expanded into the lands of the Yazidis in the Nineveh Plains.³⁵ ISIS fighters separated the men and women “within the first hour of their capture.”³⁶ Adolescent boys were instructed to take off their shirts; “if they had armpit hair,” they joined the men, and those without joined the women.³⁷ The women, girls, and children were driven off in trucks, while the men were led to a field where they were forced “to lie down in the dirt and [were] sprayed with automatic fire.”³⁸

The women, children, and girls were taken to a village where they were separated again.³⁹ A survivor recounts that from there she was separated from her mother, and “[t]he young, unmarried girls were forced to get into buses.”⁴⁰ Overcrowded in buses disguised as those which transport people for pilgrimages to Mecca, the girls were driven to Mosul, which for some was over six hours away.⁴¹ There they were held captive until transported to be sold as sex slaves.⁴²

The atrocities committed against the Yazidis were premeditated.⁴³ When they arrived in Mosul, locations were already prepared for them. Khider

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Barnard, *supra* note 6.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Callimachi, *supra* note 1.

42. *Id.*

43. *Id.*

Domle, a Yazidi activist who has created a database to keep track of them, said the ISIS attacks were “100 percent preplanned.”⁴⁴ Domle spoke on the phone with one of the first families to arrive at a location in Mosul, and they said “the hall was already prepared for them. They had mattresses, plates and utensils, food and water for hundreds of people.”⁴⁵

The acts of ISIS are so horrific that many survivors wish they were still living under the rule of Saddam Hussein. One survivor recounts that:

We knew this (the crisis in Iraq) could happen if the power of a dictator (was removed). The day Saddam Hussein went, the radical Muslims came to surface. Even though Saddam Hussein was a dictator, he never bothered whether you were of a different religion . . . if you were politically with him, you were safe.⁴⁶

It is estimated that 5270 Yazidis were kidnapped within only a year, and 3144 are still being held captive.⁴⁷ To maintain this system, ISIS members have “developed a detailed bureaucracy of sex slavery, including sales contracts notarized by the ISIS-run Islamic courts.”⁴⁸ The sex trade of the Yazidi women has become ISIS’s greatest recruiting tool to gain new militant members.⁴⁹

This is what happens when the property rights of indigenous peoples are not protected. Both the Yazidis and the Assyrian Christians were promised protection of their territory and property by the Iraqi government. These promises were empty, as evidenced by the attacks made by ISIS militants. By allowing ISIS to gain control over Mosul, a domino effect occurred, and the rest of the Nineveh Plains quickly fell to the control of ISIS militants. For an organization like ISIS, territory is everything because it is how they gain their legitimacy and garner followers.⁵⁰ Thus, it was imperative that

44. *Id.*

45. *Id.*

46. Ritu Jha, *Islamic State Sells Yazidi Girls Like Furniture*, INDIA ABROAD, Nov. 14, 2014, at A22, <http://www.indiaabroad-digital.com/indiaabroad/20141114?pg=22#pg22>.

47. Callimachi, *supra* note 1.

48. *Id.*

49. *Id.*

50. Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> (“The Islamic State cannot [lose its territory]. If it loses its grip on its territory in Syria and Iraq, it will cease to be a caliphate. Caliphates cannot exist as underground movements, because territorial authority is a requirement: take away its command of territory, and all those oaths of allegiance are no longer binding.”).

the Assyrian Christians' and the Yazidis' territory was protected from ISIS militants.

Abuses to indigenous property rights have occurred for centuries. Throughout the course of the twentieth and twenty-first centuries, however, states have begun to take strides to protect the property rights of indigenous groups. Currently, evidence exists to show that customary international law has developed, or is being created to support the protection of the lands of indigenous peoples. The United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP) contains several provisions that address indigenous peoples' right to property.⁵¹ The UN DRIP states that indigenous peoples should not be "forcibly removed from their land or territories" without their "free, prior and informed consent."⁵² Further, the UN DRIP also states that indigenous peoples have the right to practice and manifest their "cultural traditions and customs," through the protection of their "archeological and historical sites [and] artifacts."⁵³ Although the UN DRIP is a non-binding instrument, a declaration can reflect principles of customary international law, which are binding on states. Thus, it is arguable that principles within the UN DRIP, specifically property rights of indigenous peoples, could be considered customary international law because there is evidence of both required elements: state practice and *opinio juris*.

This comment will analyze whether the Iraqi government and ISIS can be held liable for their actions through the UN DRIP. Section one will address the history of the UN DRIP, the purpose of its creation, and engage in an analysis of the assertion that the property rights written in the UN DRIP are customary international law, and can be legally binding through analyzing evidence of both state practice and *opinio juris*. Lastly, section one will address the legal implications of the UN DRIP for States such as Iraq and non-state actors like ISIS. The second portion of this comment will address how indigenous peoples can be defined, and why the Yazidis and

51. See generally G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

52. *Id.* at art. 10; *id.* at art. 26 ("1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.").

53. *Id.* at art. 11(1).

the Assyrian Christians should be considered indigenous peoples. Lastly, this comment will conclude with an analysis of potential remedies for both the Assyrian Christians and the Yazidis using the UN DRIP as evidence of human rights abuses.

I. History and Purpose of the United Nations DRIP

A. History of the United Nations Declaration on the Rights of Indigenous Peoples

For centuries, states treated indigenous peoples as ethnicities on the verge of extinction, believing they would eventually morph into mainstream culture.⁵⁴ A revitalization of indigenous peoples' rights began in 1971, with the United Nations appointment of Jose Martinez Cobo to analyze global "patterns of discrimination" against indigenous peoples.⁵⁵ Cobo's reports were received by the United Nations in 1982, shedding light on several human rights violations and abuses committed against indigenous peoples groups.⁵⁶ This spurred the creation of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Sub-Commission).⁵⁷ The UN Sub-Commission created the Working Group on Indigenous Populations (Working Group) in 1982, with the intent to draft a declaration on indigenous peoples' rights.⁵⁸ The Working Group hosted a forum in Geneva, invited all indigenous peoples, and gave each group in attendance five minutes to "bring [their] complaints to the attention of the world."⁵⁹ The Working Group began drafting a declaration on indigenous peoples' rights in 1985, incorporating the complaints and suggestions from

54. Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 539-540 (2009); see also Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1152 (2008) [hereinafter Wiessner, *Indigenous Sovereignty*].

55. Siegfried Wiessner, *Culture and the Rights of Indigenous Peoples*, in THE CULTURAL DIMENSION OF HUMAN RIGHTS 117, 140 (Ana Filipa Vrdoljak ed., 2014).

56. *Id.*

57. *Id.*

58. *Id.* ("[The Sub-Commission] appointed a Working Group on Indigenous Populations with the twofold mandate: (1) to review national developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous peoples; and (2) to develop international standards concerning the rights of indigenous peoples."); see also S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Toward Re-empowerment*, JURIST: ACADEMIC COMMENTARY (Oct. 3, 2007), <http://jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php>.

59. Wiessner, *Indigenous Sovereignty*, *supra* note 54, at 1153.

indigenous peoples into their draft of the UN DRIP. Finally, after eleven years, the Working Group presented a draft of a declaration, and the Sub-Committee adopted it in 1994.⁶⁰

Between 1995 and 2006, a different working group, appointed by the Commission on Human Rights, worked to create a consensus among states on the draft of the UN DRIP. During this time, state policies towards indigenous peoples were shifting, granting more protections to indigenous peoples rights.⁶¹ Thus, several of the rights listed in drafts of the UN DRIP were already being implemented into states' domestic practices.⁶² The United Nations Human Rights Council (formerly the Commission on Human Rights) adopted the draft of the UN DRIP as one of its first actions in 2006, and submitted it to the UN General Assembly for a final vote.⁶³

After more than twenty years of laborious work, the UN DRIP finally passed.⁶⁴ One hundred and forty-four states in the General Assembly voted yes, “[f]our countries—the United States, Canada, Australia, and New Zealand—voted against it,” and eleven countries abstained.⁶⁵ For the first time in history, the United Nations General Assembly passed an instrument dedicated to the rights of indigenous peoples.⁶⁶

60. Siegfried Wiessner, *United Nations Declaration on the Rights of Indigenous People*, UNITED NATIONS: AUDIOVISUAL LIBR. OF INT'L LAW (2009), http://legal.un.org/avl/pdf/ha/ga_61-295/ga_61-295_e.pdf [hereinafter Wiessner, *UN Declaration*].

61. See Coulter, *supra* note 54, at 539-40.

62. See *id.*

63. Wiessner, *UN Declaration*, *supra* note 60, at 3 (noting that the resolution was adopted “by a vote of 30 in favor to 2 against, with 12 abstentions”).

64. *Id.*; see also Anaya & Wiessner, *supra* note 58.

65. Wiessner, *UN Declaration*, *supra* note 60, at 3; see also Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007), <http://www.un.org/press/en/2007/ga10612.doc.htm> [hereinafter Press Release, General Assembly Adopts Declaration] (noting that the following countries abstained from voting: “Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine”; and that the following countries were absent from voting: “Chad, Côte d’Ivoire, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gambia, Grenada, Guinea-Bissau, Israel, Kiribati, Kyrgyzstan, Marshall Islands, Mauritania, Montenegro, Morocco, Nauru, Palau, Papua New Guinea, Romania, Rwanda, Saint Kitts and Nevis, Sao Tome and Principe, Seychelles, Solomon Islands, Somalia, Tajikistan, Togo, Tonga, Turkmenistan, Tuvalu, Uganda, Uzbekistan, Vanuatu”).

66. See Wiessner, *UN Declaration*, *supra* note 60.

B. Purpose of the United Nations Declaration on the Rights of Indigenous Peoples

The purpose of the UN DRIP is to recognize that indigenous peoples “in the exercise of their rights, should be free from discrimination of any kind” while enjoying all human rights.⁶⁷ The UN DRIP acknowledges the contributions indigenous peoples have made “to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.”⁶⁸ The UN DRIP is composed of forty-six articles that list the individual and collective rights states should observe.⁶⁹ Some of the rights included in the UN DRIP are the right to protection from “forced assimilation or destruction of their culture,” protection from forced “transfer” or dispossession of their land, the right to protect and “revitalize, use, develop, and transmit to future generations” their oral traditions, languages, history, and culture, the right to determine the education of their youth, the right protect their children from exploitation, and several other rights.⁷⁰

C. Legal Implications of the UN DRIP

A declaration from the United Nations General Assembly is “a ‘formal and solemn instrument’ resorted to ‘only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.’”⁷¹ A declaration “creates ‘a strong expectation that Members of the international community will abide by it’” and will implement it into state practice, converting it into “custom . . . binding upon States.”⁷² The UN DRIP serves as a “response” to the grievances suffered by indigenous peoples, and states that approved the UN DRIP are expected to be in “maximum compliance.”⁷³ Declarations in themselves are non-binding statements, however, declarations often contain legal principles which are codifications of customary law and represent the collective values of

67. G.A. Res. 61/295, pmb., United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

68. *Id.*

69. *See id.*

70. *Id.* at arts. 8(1), 8(2)(b), 13(1), 14, 22.

71. Wiessner, *UN Declaration*, *supra* note 60, at 5.

72. *Id.* (quoting Comm'n on Human Rights, Rep. on the Work of Its Eighteenth Session, U.N. Doc. E/3616/Rev. 1, para. 105 (1962)).

73. *Id.*

states.⁷⁴ Although non-binding, the UN DRIP is a unified statement, representing an agreement by the majority of states that the rights listed are and should be the rights of indigenous peoples.⁷⁵

Some of the articles in the UN DRIP may already be representative of customary practices of states. Evidence of this can be determined through “[s]cholarly analyses of State practice and *opinio juris*.”⁷⁶ Customary international law is akin to common law, and there is no single source from which it originates.⁷⁷ Customary international law exists when there is “(1) a relatively uniform and consistent state practice regarding a particular matter; and (2) a belief among states that such practice is legally compelled” (*opinio juris*).⁷⁸ Customary international law is seen as a “unitary phenomenon that pervades international law and international relations.”⁷⁹ Legal norms derived from customary international law are often incorporated into domestic law within states, and “national courts apply [customary international law] as a rule of decision, or a defense, or a cannon of statutory construction.”⁸⁰ Whether or not an act breaches principles of customary international law is a topic of great debate among

74. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 113-14 (2d ed. 2012); *see also* Wiessner, *UN Declaration*, *supra* note 60, at 5 (“Some of the rights stated therein may already form part of customary international law, others may become the *fons et origo* of later-emerging customary international law.”); *see also* Michael Wood (Special Rapporteur to the Int’l Law Comm’n for Formation and Evidence of Customary Int’l Law), *Third Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/682. At 38-39 (Mar. 27, 2015) [hereinafter Special Rapporteur, *Third Rep.*] (noting that “[t]he United Nations General Assembly has recommendatory powers, and resolutions are not binding as such . . . resolutions may very well play a significant part in the formation and identification of rules of customary international law . . .”).

75. *See* Coulter, *supra* note 54, at 546.

76. Wiessner, *UN Declaration*, *supra* note 60, at 5; *see also* Wenona T. Singel, *New Directions for International Law and Indigenous Peoples*, 45 IDAHO L. REV. 509, 512 (2009) (“The Declaration’s adoption creates a strong signal that the rights articulated within it constitute binding international customary law.”); *see also* Coulter, *supra* note 54, at 551-52 (“Many of the rights proclaimed in the Declaration are already binding as rules of customary international law.”).

77. MURPHY, *supra* note 74, at 93-94; *see also* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law 1* (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 63) (“C[ustomary] I[nternational] L[aw] . . . is typically defined as a ‘customary practice of states followed from a sense of legal obligation.’”) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1986)).

78. MURPHY, *supra* note 74, at 93.

79. Goldsmith & Posner, *supra* note 77, at 1.

80. *Id.*

nations, and if customary international law principles are infringed upon such “[v]iolations of [customary international law] are grounds for war or an international claim.”⁸¹ Therefore, if provisions from a nonbinding instrument, such as the UN DRIP, can be proven to be norms of customary international law, they can become binding on states.

II. Customary Law Analysis

A. Land Rights

One of the central acts ISIS committed against the Assyrian Christians and the Yazidis in the Nineveh Plains was the unjust taking and destruction of their property.⁸² Such conduct is egregious regardless of a person’s ethnicity, but it is especially so for indigenous peoples. Land rights are important for indigenous peoples because for most indigenous groups, there is a strong “connection to ancestral land [that] is central to religious, social, and cultural values.”⁸³ The connection between indigenous peoples and their land is special because indigenous communities possess their own unique “social, political, and economic history” that is rooted in the territory and land which they inhabit.⁸⁴ Thus each indigenous group forms their “own customary laws for governing its lands and resources.”⁸⁵ The laws for property are diverse among indigenous peoples, and it is impossible for there to be a “one-size-fits-all definition of indigenous property rights’ for an international agreement to reflect or for an international tribunal to apply.”⁸⁶

The need for a consensus on a basic standard on indigenous property rights for states to draw from was critical. UN Human Rights Treaty Bodies, the Committee on the Elimination of Discrimination (hereinafter the CERD) and the ICCPR’s Human Rights Committee both published general recommendations regarding indigenous land rights prior to the United Nations adoption of the UN DRIP, during its drafting process. Recommendations published by UN Treaty bodies are persuasive because UN treaty bodies are composed of committees of independent experts “that

81. *Id.*

82. See generally Griswold, *supra* note 14; *Hearing: Fulfilling the Humanitarian Imperative*, *supra* note 34.

83. Jonathan P. Vuotto, Note, *Awas Tingni v. Nicaragua: International Precedent for Indigenous Land Rights?*, 22 B.U. INT’LLJ. 219, 223 (2004).

84. *Id.* at 223.

85. *Id.* at 224.

86. *Id.*

monitor implementation of the core international human rights treaties.”⁸⁷ Committee members are nominated by State parties for renewable four year terms.⁸⁸ Therefore, although published recommendations are non-binding, because these recommendations are given by treaty bodies which are composed of state elected experts, their comments are very persuasive and can demonstrate developing trends in international law.⁸⁹

In 1997, the CERD published a general recommendation addressing indigenous peoples’ land rights.⁹⁰ The CERD stated that because indigenous peoples’ rights fell within the nondiscrimination clauses of the CERD, states should respect the rights of indigenous peoples.⁹¹

Additionally, the ICCPR’s Human Rights Committee interpreted the ICCPR to provide cultural and land rights to indigenous peoples.⁹² ICCPR Article 27 specifically targets “ethnic, religious or linguistic minorities,” and addresses their right to culture. The Human Rights Committee has interpreted the right to culture to include indigenous people’s rights to live peacefully with their land resources.⁹³ According to the Human Rights Committee, culture is “manifested” in numerous ways, “including a particular way of life associated with the use of land resources, especially . . . [for] indigenous peoples.”⁹⁴ Although the general comments released by both of these committees are non-binding, they demonstrate the discussion of indigenous property rights taking place in the international community, and were likely influential in the drafting process of the UN DRIP.

87. *Monitoring the Core Internal Human Rights Treaties*, UNITED NATIONS HUMAN RIGHTS: OFF. OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (last visited Jan. 25, 2017).

88. *Id.*

89. *See generally id.*

90. Office of the UN High Comm’r for Human Rights, General Recommendation No. 23: Indigenous Peoples (Aug. 18, 1997), <http://www.tebtebba.org/index.php/all-resources/category/24-committee-on-the-elimination-of-racial-discrimination-cerd?download=217:general-recommendation-no-23-indigenous-peoples>.

91. *Id.* (“[T]he Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.”)

92. *See* G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

93. *Id.*

94. Mauro Barelli, *The Role of Soft Law in the International Legal System: the case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 INT’L L. Q. 957, 974 n.105 (2009).

When the UN DRIP was adopted by the United Nations General Assembly, it was evident that the UN DRIP's provisions on indigenous property rights were influenced by prior human rights instruments and precedents in human rights case law. Indigenous peoples groups genuinely did not believe that they were receiving new rights, but rather the UN DRIP provided "recognition and application of universal human rights to indigenous peoples."⁹⁵ In a speech given to the UN General Assembly, Les Malezer emphasized this point by stating the UN DRIP "contains no new provisions of human rights."⁹⁶ Malezer further stressed his point by stating "it affirms many rights already contained in international human rights treaties, but rights which have been denied to the Indigenous Peoples."⁹⁷

Thus, there is a strong argument that the human rights in the UN DRIP intentionally reflect international law, and the only element that is new is "the application of these rights to indigenous people as peoples."⁹⁸ Additionally, because the UN DRIP uses established international human rights law norms, provisions in the UN DRIP likely are customary international law.⁹⁹ Even though the entirety of the UN DRIP is not legally binding, sufficient evidence of state practice and *opinio juris* exists to assert that the UN DRIP provisions addressing the property rights of indigenous peoples' are customary international law, or at minimum are developing into customary international law.

Using the standards of proof for customary international law set forth in the most recent report from the International Law Commission¹⁰⁰ by UN

95. Paul Oldham & Miriam Anne Frank, 'We the Peoples...' *The United Nations Declaration on the Rights of Indigenous Peoples*, ANTHROPOLOGY TODAY, Apr. 2008, at 5, 6.

96. *Id.*

97. *Id.*

98. *Id.* at 5; see also Press Release, General Assembly Adopts Declaration, *supra* note 65 ("It contained no new provisions of human rights. It was based on rights that had been approved by the United Nations system but which had somehow . . . been denied to indigenous peoples. It was a framework for states to protect and promote the rights of indigenous people without exclusion or discrimination.").

99. Oldham & Frank, *supra* note 95, at 6 ("[I]n 1986 the General Assembly established that the development of new instruments should 'be consistent with the existing body of international human rights law'" (quoting G.A. Res. 41/120)).

100. *International Law Commission*, UNITED NATIONS OFF. OF LEGAL AFFAIRS, <http://legal.un.org/ilc/> (last visited Jan. 25, 2017) ("The International Law Commission was established by the General Assembly in 1947, to undertake the mandate of the Assembly, under article 13(1)(a) of the Charter of the United Nations to 'initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.'").

Special Rapporteur Michael Wood, the following analyzes evidence of state practice and *opinio juris* to support this assertion.¹⁰¹ Although this is a non-binding document, working groups such as the International Law Commission and the position of special rapporteur are part of the UN Special Procedures System. These positions are appointed often by the UN Secretary-General or the Office of the High Commissioner for Human Rights for several different purposes, but one of which is to “undertake studies of a particular . . . issue with a view to enhancing understanding and . . . contributing to the process of developing jurisprudence. Therefore, Wood’s report from the findings of the International Law Commission is highly persuasive, and serves as a guide of the direction the international community is taking in interpreting state practice and *opinio juris*”

B. State Practice

According to the International Law Commission, one of the central ways state practice is evidenced is when states modify their national policies and legislation.¹⁰² Further, national courts precedent can serve as evidence of state practice.¹⁰³ Thus, an argument can be made that the indigenous property rights within the UN DRIP are customary international law because both prior to and after its adoption, states altered their national policies for indigenous peoples’ land rights.

1. National Policy and Legislation Supporting Indigenous Property Rights

State practice supporting the assertion that indigenous property rights have or are developing into customary international law is evidenced through the changes several countries made in their domestic law prior to the passage of the UN DRIP regarding the right of indigenous people to the title of their land. In Guatemala, in December of 1996, a peace accord was signed between the Guatemalan government and “the guerrilleros, many of them Maya Indians,” ending civil war, and granting a guarantee of “Indian rights and land” to the Maya.¹⁰⁴ The Guatemalan government recognized

101. PHILLIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 699-701 (2013).

102. See Special Rapporteur, *Third Rep.*, *supra* note 74, at 39-40.

103. *Id.* at 42.

104. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 86 (1999) [hereinafter Wiessner, *Rights and Status*]; see also *Indigenous Minority Rights: Accord for a Firm and Lasting Peace*, UNIV. OF NOTRE DAME (May 6, 1996), <https://peaceaccords.nd.edu/>

that indigenous peoples' lands were not protected and were being plundered, thus a constitutional obligation was created for the state to "give special protection to cooperative, communal or collectively-held lands."¹⁰⁵ Further, they were granted the right to "maintain the system of administration of the lands which they hold" that historically were possessed by indigenous people in Guatemala.¹⁰⁶

In Brazil, state action was taken to provide protection of indigenous peoples' land rights in the Brazilian Constitution of 1988.¹⁰⁷ The Brazilian Constitution states that "[l]ands traditionally occupied by Indians are those inhabited by them permanently," and gave them the rights to ownership over the resources of their land.¹⁰⁸ This was a landmark case because prior to the changes to the Brazilian Constitution, the Fundacao Nacional do Indio (FUNAI), the Brazilian government for Indian Affairs, was abusing its power over Brazil's indigenous population in regards to land rights.¹⁰⁹ With the constitutional guarantees and pressures put on the Brazilian government from the Inter-American Commission on Human Rights, the Brazilian government limited FUNAI's power and prevented the Executive Branch from authorizing interventions on indigenous lands.¹¹⁰

Additionally, in Australia, several legislative acts were passed to advocate for indigenous rights to their land. In 1976, the Aboriginal Land Rights Act recognized Aboriginal claims to land in the Northern Territory of Australia based on spiritual ties to the land.¹¹¹ Further, the 1989 Lands Acquisition Act gave the government the authority to compel the sale of land to meet indigenous claims to land, and the Native Title Act of 1993 created a forum to determine indigenous title over areas of land and water, and a means to address compensation claims.¹¹²

Although it is not explicit to indigenous property rights, the Iraqi Constitution gives protection to the general property rights of all of its citizens, which can be applied to indigenous populations within its

provision/indigenous-minority-rights-accord-firm-and-lasting-peace ("The rights relating to land of the indigenous peoples include both the communal or collective and the individual tenure of land, rights of ownership and possession and other real rights, and the use of natural resources for the benefit of the communities without detriment to their habitat.").

105. *Id.* at IV.F.3.

106. *Id.*

107. Wiessner, *Rights and Status*, *supra* note 104, at 76.

108. *Id.*

109. *Id.* at 75.

110. *Id.* at 76.

111. *Id.* at 73.

112. *Id.*

borders.¹¹³ The Iraqi Constitution explicitly states “every Iraqi shall have the right to own property anywhere in Iraq,” further stating only Iraqis may possess property in Iraq, unless otherwise exempted.¹¹⁴ The Iraqi Constitution guarantees that no property will be taken away from citizens unless for “public benefit in return for just compensation.”¹¹⁵ The Iraqi Constitution takes this a step further, stating “ownership of property for the purposes of demographic change is prohibited.”¹¹⁶

When it comes to the protection specifically of religious and cultural properties, a right that is imperative to indigenous populations, the “State is committed to assuring and maintaining their sanctity, and to guaranteeing the free practice of rituals in them.”¹¹⁷ Thus, the State of Iraq has taken on the obligation to its citizens to protect their religious entities and their rights to worship there. Although the Constitution states that laws are to be based on Islam, it does explicitly give religious freedom rights to both Christians and the Yazidis to practice their beliefs.¹¹⁸

Additionally, the State of Iraq has an anti-racist policy in its Constitution, banning any entity or program from promoting “racism or terrorism or accusations of being an infidel (takfir) or ethnic cleansing”¹¹⁹ Iraq has even taken on the obligation of “combat[ing] terrorism in all its forms, and shall work to protect its territories from being a base, pathway, or field for terrorist activities.”¹²⁰ The Iraqi Constitution is evidence of state practice because it demonstrates the steps that the Iraqi government has taken to not only protect the property rights of its general citizenry who practice state-sponsored beliefs, but even the indigenous/minority populations. Further, the Iraqi Constitution shows the importance of protecting the rights of the Christians and Yazidis to the Iraqi government, which are groups that should be designated as indigenous

113. *See* Preamble, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (“The adherence to this Constitution preserves for Iraq its free union of people, of land, and of sovereignty.”); *see also id.* at Article 23, Section 1 (“[P]rivate property is protected. The owner shall have the right to benefit, exploit and dispose of private property within the limits of the law.”).

114. *Id.* at Article 23, Section 3(A).

115. *Id.* at Article 23, Section 2.

116. *Id.* at Article 23, Section (3)(B).

117. *Id.* at Article 10.

118. *Id.* at Article 2, Section 2 (“This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeans.”)

119. *Id.* at Article 7, Section 1.

120. *Id.* at Article 7, Section 2.

peoples. Thus, the Iraqi Constitution provides support of state practice for demonstrating indigenous property rights codified in the UN DRIP are, or are developing into customary international law.

2. International Case Law Creating Changes in National Policy and Legislation

The *Awes Tingni* case was a groundbreaking international law case for indigenous peoples' rights to land.¹²¹ The Awes Tingni are one of the several Mayangna or Sumo indigenous communities in Nicaragua.¹²² Their ancestral land is in Nicaragua, and they have inhabited their territory in Nicaragua for several hundred years.¹²³ The Awes Tingni discovered that the Nicaraguan government planned to grant a logging license to SOLCARSA, a Korean lumber company for 62,000 hectares of their land.¹²⁴ The Nicaraguan government denied that the Awes Tingni possessed legal title or ancestral rights to the land.¹²⁵ Thus, the Awes-Tingni and the Nicaraguan government battled over the issue for several years, leading up to a hearing before the Inter-American Court.¹²⁶

In *Awes Tingni v. Nicaragua*, the Inter-American Court held that "the international human right to enjoy the benefits of property . . . includes the right of indigenous peoples to the protection of their customary land and resource tenure."¹²⁷ The *Awes Tingni* case is precedent for international recognition of the customary right of indigenous people to their land. More recent cases that address the land rights of indigenous people use *Awes Tingni* as precedential evidence of their right to their traditional lands.¹²⁸

The holding from the *Awes Tingni* case serves as evidence of state practice because of the implementation and compliance the Nicaraguan government demonstrated in response to the holding of the Inter-American

121. Vuotto, *supra* note 83, at 243 ("The Awes Tingni Community is poised to become a model for legal and political recognition of Indigenous land rights.").

122. S. James Anaya & Claudio Grossman, *The Case of Awes Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L COMP. L. 1, 1 (2002).

123. Vuotto, *supra* note 83, at 219.

124. *Id.*

125. *Id.* at 220.

126. *Id.*

127. Anaya & Grossman, *supra* note 133, at 1.

128. Leonardo Alvarado, *Prospects and Challenges in the Implementation of Indigenous People's Human Rights in International Law: Lessons from the Case of Awes Tingni v. Nicaragua*, 24 ARIZ. J. INT'L & COMP. 609, 613-14 (2007).

Court.¹²⁹ The implementation process began in January of 2003, with the adoption of a new indigenous land demarcation law by the Nicaraguan National Assembly.¹³⁰ On December 14, 2008, the Nicaraguan government officially awarded the Awas-Tingni their title to their traditional territory.¹³¹ Thus, state practice is evidenced because the Nicaraguan government created new legislation and altered their state policy in favor of indigenous property rights.¹³²

Additional evidence of state practice is shown through the implementation of the Inter-American Court's decision in *Sawhoyamaxa Indigenous Community v. Paraguay*. In *Sawhoyamaxa Indigenous Community*, the Inter-American Court held "traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title . . . and traditional possession entitles indigenous people to demand official recognition of property title."¹³³ In Judge Cancado Trindade's concurring opinion in *Sawhoyamaxa Indigenous Community*, he explained the tie between indigenous people and their land is part of their identity.¹³⁴ Thus, if indigenous peoples' right to occupy and use their land is "deprived of them, by means of forced displacement, it seriously affects their cultural identity, and finally, their very right to life."¹³⁵

Although the holding is persuasive because the Inter-American Court found in favor of indigenous property rights, the evidence of state practice is demonstrated by Paraguay's implementation of new policies to respect indigenous property rights.¹³⁶ The Inter-American Court set a deadline for implementation of January 2013, however, at this point, the Paraguayan

129. *Nicaragua Issues Title to Awas Tingni's Lands!*, UNIV. OF ARIZ.: JAMES E. ROGERS C. OF L., <https://law2.arizona.edu/iplp/outreach/pdf/Awas%20Tingni.pdf> (last visited Mar. 25, 2016).

130. *Id.*

131. *Id.*

132. *Id.*

133. Alvarado, *supra* note 128, at 616 (quoting *Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (Ser. C) No. 146, ¶ 128 (Mar. 29, 2006)); *Id.* at 643 n.35 ("concerning another . . . indigenous community that involuntarily lost its ancestral lands and the consequent state of vulnerability threatening the community's survival"); *see also id.* at 617 ("Judge Cancado Trindade's separate concurring opinion reflects, 'The right to life is . . . viewed in its close and unavoidable connection to cultural identity . . . [which for indigenous peoples] is closely linked to their ancestral lands.'").

134. *Id.* at 617.

135. *Id.* (quoting Trindade, J., concurring).

136. *See Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, ESCR-NET (Mar. 29, 2006) <https://www.es-cr-net.org/caselaw/2013/case-sawhoyamaxa-indigenous-community-v-paraguay> (summarizing the opinion in the *Sawhoyamaxa* case).

government and the Sawhoyamaxa community were still in the negotiations phase.¹³⁷ In June of 2013, however, members of the Sawhoyamaaxa community re-inhabited the disputed territory, which pressured the Paraguayan government to expedite the negotiations process.¹³⁸ In April-May of 2014, the Paraguayan Congress approved an expropriation bill, which was signed by the President in June of 2014, furthering the implementation of the decision in the *Sawhoyamaxa Indigenous Community* case.¹³⁹ This case is evidence of state practice because the Paraguayan government took legislative action to respect the rights of indigenous peoples, and took action which it had not traditionally taken in the past.

3. State Practice Evidenced Through National Judicial Decisions

Evidence of state practice supporting the argument that indigenous property rights have or are developing into customary international law is best demonstrated through court cases in both Australia and Belize. Australian High Courts recognized the importance of indigenous rights to land in both the *Mabo v. Queensland* decision and in *Wik Peoples v. State of Queensland*.¹⁴⁰ In the *Mabo* case, the Australian High Court held in a 6-1 decision that “the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants in accordance with their laws and customs, to their traditional lands.”¹⁴¹ The Court in the *Mabo* decision rooted their decision in international law principles of antidiscrimination, specifically from the United Nations Covenant on Civil and Political Rights.¹⁴² Indigenous property rights were affirmed again by the Australian High Court in *Wik Peoples*, where the Court held that “pastoral leases did not extinguish Native Title.”¹⁴³

The Supreme Court of Belize referenced the UN DRIP in a decision favoring “indigenous land rights for members of Maya communities in villages of the Toledo District in southern Belize.”¹⁴⁴ In *Cal v. Attorney General*, Maya community members filed a complaint against the

137. *Id.*

138. *Id.*

139. *Id.*

140. See Wiessner, *Rights and Status*, *supra* note 104, at 73-74.

141. *Id.* at 72.

142. *Id.* at 73.

143. *Id.* at 74.

144. Saira Mohamed, *Introductory Note to the United Nations Declaration on the Rights of Indigenous Peoples and Cal v. Attorney General*, *Supreme Court of Belize*, 46 INT'L LEGAL MATERIALS 1008, 1009 (2007).

government of Belize for their “failure to respect [Maya] land rights and interests.”¹⁴⁵ The Belize Supreme Court used the UN DRIP to support their holding in favor of the Maya people, and held the State of Belize accountable to the UN DRIP because Belize voted in favor of it.¹⁴⁶ Article 26 of the UN DRIP¹⁴⁷ was critical in their analysis because it “reflects ‘the growing consensus and the general principles of international law on indigenous peoples and their lands and resources’ and it could not be ignored by Belize.”¹⁴⁸

The Court further asserted the existence of obligations of states who approved of the UN DRIP, asserting that despite the instrument’s non-binding nature, because Article 42 encourages states to promote and enforce the rights in the UN DRIP,¹⁴⁹ Belize is bound to respect indigenous peoples’ rights.¹⁵⁰ The Belize Supreme Court wrote “the Declaration ‘imports . . . significant obligations for the State of Belize in so far as the indigenous Maya rights to their land and resources are concerned,’” and the Belize Supreme Court would be “unwilling, or even loath to take any action that would detract from the provisions of this Declaration.”¹⁵¹ Thus, the importance of the UN DRIP, particularly the rights of indigenous peoples’ to their traditional land, is further evidenced through *Cal*.

C. *Opinio Juris*

According to the most recent report released by the UN International Law Commission and Special Rapporteur Sir Michael Wood, declarations from the UN General Assembly themselves can be evidence of *opinio juris*.¹⁵² In general, those who assert that the UN DRIP contains provisions which are binding of customary international law argue that *opinio juris*

145. *Id.* at 1009.

146. *Id.* at 1010.

147. *See* United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 67, at art. 26.

148. Mohamed, *supra* note 144 (quoting *Cal v. Attorney Gen.*, Claim Nos. 171 and 172 of 2007, at 131-32 (Sup. Ct. Oct. 18, 2007) [Belize]).

149. *See* United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 67, at art. 42 (“The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”).

150. Mohamed, *supra* note 144, at 1010 (quoting *Cal v. Attorney Gen.*, Claim Nos. 171 and 172 of 2007, at 131-32).

151. *Id.* at 1011 (internal citations omitted).

152. *See* Special Rapporteur, *Third Rep.*, *supra* note 74, at 33.

exists because the UN DRIP does not create any new rights. Instead, the UN DRIP is “constructed from elements” of international human rights declarations and treaties such as the United Nations Charter, the Universal Declaration of Human Rights (UDHR), the International Labour Organization (ILO) Convention 169, and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).¹⁵³ The UN DRIP “merges” international, regional and national developments in indigenous peoples rights over recent years, with “established principles of international human rights law” and “existing international standards for the protection of indigenous peoples” to form a comprehensive set of rights, many which already exist.¹⁵⁴ Although some principles in the UN DRIP are “far-reaching” and aspirational, the declaration as a whole is composed of “established norms of international law, and particularly, international human rights law.”¹⁵⁵

Opinio juris is demonstrated in a declaration by examining the wording of a declaration, because “resolutions drafted ‘in normative language are those that may be of relevance, and the choice (or avoidance) of particular terms may be significant.’”¹⁵⁶ The reason being that the type of language used in a declaration reflects the “intent of the Member States as to the legal significance” of the declaration.¹⁵⁷ It is imperative to closely examine the statements’ made by member states during the adoption of a resolution because it reflects the nature of the instrument.¹⁵⁸

An additional method for determining *opinio juris* is an analysis of the number of signatories and parties to a treaty,¹⁵⁹ as well as the number of states who voted in favor of a UN declaration/resolution.¹⁶⁰ Therefore, the

153. Oldham & Frank, *supra* note 95, at 6; *see also* Barelli, *supra* note 94, at 962 (“The Declaration does not create special rights in the sense that they are ‘separate[d] from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific . . . circumstances of indigenous peoples.’”).

154. Barelli, *supra* note 94, at 962.

155. *Id.* at 976.

156. Special Rapporteur, *Third Rep.*, *supra* note 74, at 34.

157. *Id.* at 35.

158. *Id.* at 32, 33 (“Importantly, ‘[a]s with any declaration by a state, it is always necessary to consider what states actually mean when they vote for or against certain resolutions in international fora.’”).

159. *Id.* at 18 (quoting R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT’L L. 41, 275 (1965-66) (“[A] treaty to which a substantial number of states are parties must be counted as extremely powerful evidence of law.”).

160. *Id.* at 35 (citation omitted) (“Clearly: ‘[T]he degree of support is significant. A resolution adopted by consensus or by unanimous vote will necessarily carry more weight

following will first analyze the voting records of various instruments regarding indigenous property rights, and second, will analyze statements made during the General Assembly vote on the UN DRIP.

1. Votes

In the last twenty-seven years, three instruments addressing indigenous people's property rights, The International Labor Organization's Convention No. 169 signed in 1989, the 1992 Convention on Biological Diversity, and the UN DRIP passed in 2007, have been adopted and voted on by UN Member States.¹⁶¹ As time has progressed, each instrument has gained more state support, showing a development of *opinio juris* for indigenous property rights.

The first treaty that was voted on, International Labor Organization's Convention 169 on Indigenous and Tribal Peoples, recognizes the "special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship," rights which are cohesive with the UN DRIP.¹⁶² Currently, the treaty has been ratified by twenty countries, mainly those in South America.¹⁶³ Despite this seemingly low number, the consent of twenty states to become members demonstrated the beginning of states acknowledging the importance of, supporting and deliberately choosing to give their consent to respect indigenous peoples' rights to property, thus demonstrating a development of *opinio juris*.

The next instrument which addressed indigenous property rights is the 1992 Convention on Biological Diversity, which is one of several international conventions and declarations in environmental international

than one supported only by two-thirds majority of states. Resolutions opposed by even a small number of states may have little effect if those states are among ones most immediately affected.")

161. See generally United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 67; Convention Concerning Indigenous and Tribal Peoples in Independent Countries, I.L.O. Conv. 169, I.L.O., 76th Sess., reprinted in 28 *I.L.M.* 1382 (1989), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_COD E:C169 [hereinafter Convention No. 169]; Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, <http://legal.un.org/avl/ha/cpbcbd/cpbcbd.html>.

162. Convention No. 169, *supra* note 161, at art. 13.

163. INT'L LABOUR ORG., INDIGENOUS AND TRIBAL PEOPLES' RIGHTS IN PRACTICE: A GUIDE TO CONVENTION 169, at 1, 5 (2009), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf.

law which address indigenous rights.¹⁶⁴ Indigenous peoples have deep spiritual ties to their land, and international environmental instruments like the 1992 Convention on Biological Diversity promote the protection of traditional lifestyles tied to their land.¹⁶⁵ The text of the Convention on Biological Diversity instructs states to “respect, preserve and maintain knowledge, innovations and practices of indigenous . . . communities embodying traditional lifestyles.”¹⁶⁶ The 1992 Convention on Biological Diversity contains 196 parties and is signed by 160 states.¹⁶⁷ The continued development of *opinio juris* for indigenous property rights is demonstrated with the 1992 Convention on Biological Diversity, because this instrument was ratified only three years after ILO Convention 169. Thus demonstrating a growing belief among states that observing the property rights of indigenous people’s is legally compelling.

In 2007, when the resolution for the UN DRIP was brought to the UN General Assembly, it passed with an overwhelming majority, with one hundred and forty-four states voting yes, out of the one hundred and fifty-nine present for the vote.¹⁶⁸ Although four states voted no, the United States, Canada, Australia, and New Zealand, by 2010 each of these states reversed their vote, and now openly support the UN DRIP.¹⁶⁹ Thus, using the standard currently endorsed by the International Law Commission, a strong argument can be made that *opinio juris* exists as demonstrated by the rapid growth in state support of instruments promoting indigenous property rights.

2. Intent of the Member States

Although analysis of votes taken on instruments championing indigenous property rights provides strong evidence for *opinio juris*, examination of the intent of the member states is where much of the debate lies on whether *opinio juris* exists for provisions of the UN DRIP to be viewed as customary international law. Some argue that *opinio juris* does not exist for

164. Barelli, *supra* note 94, at 973.

165. *Id.*

166. Convention on Biological Diversity, art. 8(j).

167. *List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/information/parties.shtml#tab=0> (last visited Jan. 3, 2016).

168. Wiessner, *Indigenous Sovereignty*, *supra* note 54, at 1162; *see also* Press Release, General Assembly Adopts Declaration, *supra* note 65.

169. *See Indigenous Foundations: UN Declaration on the Rights of Indigenous Peoples*, UNIV. OF BRITISH COLUMBIA: FIRST NATIONS & INDIGENOUS STUD. (2009), <http://indigenousfoundations.arts.ubc.ca/home/global-indigenous-issues/un-declaration-on-the-rights-of-indigenous-peoples.html>.

indigenous property rights because during the General Assembly's vote on the UN DRIP, some countries expressed that the instrument was purely aspirational.¹⁷⁰

In its initial vote against the UN DRIP, (Australia reversed its decision in 2009)¹⁷¹ Australia believed that the UN DRIP was not legally binding "nor reflective of international law."¹⁷² Australia stated the UN DRIP did not accurately state "current State practice or actions that States considered themselves obliged to take as a matter of law."¹⁷³ New Zealand, (who also reversed its vote in 2010 to support the UN DRIP)¹⁷⁴ also acknowledged that the UN DRIP was "explained by its supporters as being an aspirational document, intended to inspire rather than to have a legal effect," and was non-binding on States.¹⁷⁵ The reason certain States emphasized the UN DRIP was not reflective of customary international law was because they believed the UN DRIP "did not enjoy consensus support and had not been duly approved by all interested parties," as the Russian Federation explained during voting.¹⁷⁶ Even states that supported the UN DRIP explained at voting that it was a significant step in the process of protecting the rights of indigenous people groups.¹⁷⁷ Further, supporting states also believed that the provisions within the UN DRIP were the standard to which States should strive to match their domestic laws.¹⁷⁸ Some states did

170. Press Release, General Assembly Adopts Declaration, *supra* note 65.

171. See *Indigenous Foundations: UN Declaration on the Rights of Indigenous Peoples*, *supra* note 169.

172. Press Release, General Assembly Adopts Declaration, *supra* note 65.

173. *Id.*

174. See *Indigenous Foundations: UN Declaration on the Rights of Indigenous Peoples*, *supra* note 169.

175. Press Release, General Assembly Adopts Declaration, *supra* note 65.

176. *Id.* During voting the United States echoed the same sentiments stating, "the international community had not been presented with a text that was clear, transparent, or capable of implementation. Those Fundamental shortcomings meant that the document could not enjoy universal support and become a true standard of achievement." *Id.*

177. *Id.* The United Kingdom believed the UN DRIP was an "important tool in helping enhance the promotion and protection of the rights of indigenous peoples." *Id.* Chile stated that "the Declaration was a significant step" in advancing the rights of indigenous peoples who play "an important role . . . in the development of all societies". *Id.* Bolivia stated that the UN DRIP "was a step forward in allowing indigenous people to participate in global processes for the betterment of all societies, including their own traditional communities." *Id.*

178. *Id.* Norway "said that the Declaration set the standard of achievement to be pursued in a spirit of cooperation." *Id.* Cuba stated that the "Declaration and its future impact on the work of the United Nations would serve as a guide for future claims of the indigenous

see potential for the UN DRIP to become legally binding. During voting, Guyana stated that although “the Declaration was political in character,” and not legally binding, “potential legal implications” could be developed from the passage of the UN DRIP.¹⁷⁹

D. Customary International Law Likely Exists

Upon analysis of the previous evidence presented, it is likely that customary international law exists, or is developing because there is sufficient evidence for both state practice and opinion juris. Upon examining state practice, it is evident that over the last several years, states have been making policy and legislative changes to their stance on indigenous property rights, creating policies in favor of indigenous peoples. Although some states believed that the UN DRIP as a whole was aspirational, upon analyzing the voting records and the growing support towards indigenous peoples’ rights by states when voting on international treaties or resolutions, *opinio juris* likely exists. Therefore, it is likely that indigenous peoples groups’ property rights have become a right based in customary international law, or are developing into customary international law.

E. Application to ISIS and Other Non-State Actors

Organized terrorist groups like ISIS are prevalent in today’s society and are the source of severe human rights abuses.¹⁸⁰ Although organized terrorist groups are not parties to existing treaties, it is arguable that armed resistance groups are bound by international human rights law under customary international law.¹⁸¹ Additionally, most treaties also bind armed resistance groups to follow humanitarian practices listed in such.¹⁸² In 1999,

community.” *Id.* Portugal stated that adoption of the UN DRIP “would advance their rights and ensure the continued development of indigenous peoples around the world.” *Id.*

179. *Id.*

180. See Sandesh Sivakurman, *Binding Armed Opposition Groups*, 55 INT’L & COMP. L.Q. 369 (2006) (“Armed opposition groups are becoming increasingly sophisticated and are responsible for some of the most egregious atrocities committed in conflicts.”).

181. *Id.* See generally Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 863 INT’L REV. RED CROSS 491, 503 (2006).

182. Clapham, *supra* note 181 (“As a non-state actor, the LTTE does not have legal obligations under the ICCPR, but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.”); see also ALSTON & GOODMAN, *supra* note 101, at 1497-98 (“Invoking the Convention on the Rights of the Child, as well as the Geneva Convention, the Special Representative [of the UN Secretary-General for Children and

the Institute of International Law adopted the position that not only are armed opposition groups bound by international humanitarian law, but “irrespective of their legal status . . . [non-state actors] have the obligation to respect . . . fundamental human rights.”¹⁸³ The resolution further states that “individuals remain under the protection of international law guaranteeing fundamental human rights,” and all parties involved in armed conflict are “bound to respect fundamental rights under the scrutiny of the international community.”¹⁸⁴ Because many of the rights listed within the UN DRIP are already within treaties and are established as customary law, ISIS can be held accountable for human rights abuses against indigenous peoples.

The international community should address the human rights abuses of ISIS in Iraq in the same manner with which the United Nations approached the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka.¹⁸⁵ The LTTE are a “separatist group” that are “notorious for having pioneered the suicide bomb jacket,” and are responsible for the deaths of more than seventy thousand individuals and the assassination of twelve high-level Sri Lankan government officials.¹⁸⁶ UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Phil Alston, explains that human rights law functions on “three levels—as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community.”¹⁸⁷ Alston further explained that as a non-state actor, the LTTE technically was not bound by treaties, however, the LTTE is subject to the expectations and demands of the international community.¹⁸⁸ The Universal Declaration of Human Rights, expresses that “every organ of society [is to] respect and promote human rights” as part of customary international law, thus binding non-state actors to respect the human rights of all peoples.¹⁸⁹

Armed Conflict] has sought and obtained commitments from groups as diverse as the Sudan’s People’s Liberation Movement, The Revolutionary United Front in Sieere Leone, the Liberation Tigers of Tamil Eelam in Sri Lanka and the Revolutionary Armed Forces of Colombia.”)

183. Clapham, *supra* note 181, at 505.

184. *Id.*

185. *See generally id.*

186. Preeti Bhattacharji, *Liberation Tigers of Tamil Eelam (aka Tamil Tigers) (Sri Lanka, Separatists)*, COUNCIL ON FOREIGN RELATIONS (May 20, 2009), <http://www.cfr.org/separatist-terrorism/liberation-tigers-tamil-eelam-aka-tamil-tigers-sri-lanka-separatists/p9242>.

187. Clapham, *supra* note 181 (citing UN Doc.E/CN.4/2006/53/Add.5).

188. *Id.* at 505.

189. *Id.* at 506.

Further, the international community has legitimate expectations for armed opposition groups to follow international human rights norms if they “exercises significant control over territory and population and [have] an identifiable political structure.”¹⁹⁰ The LTTE met both of these qualifications, yet members of the international community were fearful to enforce human rights obligations on the LTTE because they did not want to recognize them as a State.¹⁹¹ This should be of no concern however, because “human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they addressed.”¹⁹² For several years, it has been the standard of the United Nations Security Council to address non-member groups that are not recognized as states to uphold their human rights obligations.¹⁹³ Furthermore, when the United Nations General Assembly looks to adopt a new member state, groups are evaluated based on their “conduct according to the Universal Declaration’s ‘common standard of achievement,’” showing a group will not even gain legitimacy if they do not observe and enforce human rights.¹⁹⁴ Therefore, groups like ISIS that have committed serious human rights abuses would not pass muster to be recognized as a state by the United Nations, regardless of how much territory they possess.

The militant group, ISIS, is liable for its human rights abuses because like the LTTE, ISIS is a member of the international community and is expected to follow human rights norms.¹⁹⁵ ISIS controls a territory larger than the United Kingdom.¹⁹⁶ Also, ISIS has a sophisticated governing structure.¹⁹⁷ Abu Bakr al-Baghdadi serves as ISIS’s central Commander in Chief or Caliphate, and their government consists of a cabinet and a set of governors who oversee financial and legislative bodies.¹⁹⁸ ISIS separates the administrative governing duties between Syria and Iraq, designating them as “sub-states” in order to avoid “downplaying the caliphate” but making it easier for them to govern the two distinct territories.¹⁹⁹ Further,

190. *Id.* at 507 (quoting UN Doc. A/HRC/2/7 (Oct. 2, 2006)).

191. *Id.* at 506.

192. *Id.*

193. *Id.*

194. *Id.*

195. *See generally id.*

196. Wood, *supra* note 50.

197. Nick Thompson & Atika Shubert, *The Anatomy of ISIS: How the ‘Islamic State’ Is Run, from Oil to Beheadings*, CNN (Jan. 14, 2015, 9:11 AM), <http://www.cnn.com/2014/09/18/world/meast/isis-syria-iraq-hierarchy/>.

198. *Id.*

199. *Id.*

the “hierarchy” of ISIS’s government is arguably similar to that of western countries, but only if “you take away the democracy and add in a council to consider who should be beheaded.”²⁰⁰

Thus, there is a legitimate expectation for ISIS to observe human rights because they control expansive amounts of territory and have a complex political structure within their organization.²⁰¹ Acknowledging this obligation will not put the international community in a position of recognizing ISIS as a state, but rather gives the international community teeth to take action against ISIS and combat their actions.²⁰² The international community may use the UN DRIP to bolster a UN Security Council or General Assembly resolution as a means to examine the punishment of ISIS, because the UN DRIP likely contains elements of customary international law regarding indigenous peoples’ property rights.²⁰³

III. Defining Indigenous Peoples Through the UN DRIP

A. How Are Indigenous Peoples Defined?

The creation of a uniform definition of indigenous peoples was a point of contention during the negotiation/drafting process of the UN DRIP, so much so that no formal definition has been adopted by the United Nations.²⁰⁴ Even during the final vote on the UN DRIP at the General Assembly, states expressed uncertainty about the failure to include a uniform definition for indigenous peoples.²⁰⁵

The United Nations decided not to adopt an official definition of indigenous peoples because they believe it is simpler to identify indigenous peoples, rather than attempt to define the phrase because of the vast

200. *Id.*

201. *See generally id.*; Bhattacharji, *supra* note 186.

202. *See generally* Bhattacharji, *supra* note 186.

203. *See generally* United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 67, at art. 1.

204. *See generally* Press Release, General Assembly Adopts Declaration, *supra* note 65.

205. *Id.* Bangladesh abstained from voting on the UN DRIP because “the Declaration, in its present form, contained some ambiguities, particularly that ‘indigenous people’ had not been identified or explicitly defined in any way.” *Id.* India also acknowledged there was no formal definition, and thus tried to create their own, stating “peoples . . . who were regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region which the country belonged, at the time of conquest or colonization or the establishment of present State boundaries and who . . . retained some or all of their socio-economic, cultural and political institutions.” *Id.*

diversity among different groups of indigenous peoples.²⁰⁶ Thus, the United Nations believes having no official definition is more effective than creating a definition that may exclude indigenous people groups.²⁰⁷

The decision to not adopt an official definition was birthed in the Working Group on Indigenous Populations.²⁰⁸ According to reports drafted by the Working Group, members of indigenous groups and organizations “developed a common position” and “rejected” the concept of a formal definition of indigenous peoples to be adopted by the United Nations.²⁰⁹ Many state delegations agreed it was not essential or beneficial to include a universal definition of indigenous peoples in the UN DRIP.²¹⁰ The Working Group officially decided in 1997, during the drafting process of the UN DRIP, that a universal definition would not be included in the UN DRIP.²¹¹ Their reasoning was similar to indigenous organizations and State delegations, that it was not possible to create a universal definition nor necessary for adoption of the UN DRIP.²¹²

Several definitions exist to define indigenous people groups, however, three definitions— (1) the United Nations, (2) Special Rapporteur Martinez Cobo, and (3) ILO Convention 169, all take a similar approach. Thus, the following analyzes these three definitions to make the assertion that a uniform definition for indigenous peoples does likely exist.

1. United Nations Factors for Identifying Indigenous Peoples Groups

To assist in identifying indigenous people groups, the United Nations has produced a list of factors.²¹³ According to the identification factors; first,

206. *Indigenous Peoples, Indigenous Voices Factsheet: Who Are Indigenous Peoples?*, UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES (last visited Sept. 6, 2015), http://www.un.org/esa/socdev/unpfi/documents/5session_factsheet1.pdf.

207. *Id.*

208. *See generally* Dep’t on Econ. & Soc. Affairs, *The Concept of Indigenous Peoples: Background Paper Prepared by the Secretariat of the Permanent Forum on Indigenous Issues*, U.N. Doc. PFII/2004/WS.1/3 (Jan. 2004) [hereinafter *Background Paper*].

209. *Id.* at 2; *see also* Comm’n on Human Rights, *Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on Its Fourteenth Session*, UN Doc. E/CN.4/Sub.2/1996/21 (Aug. 16, 1996).

210. *Background Paper*, *supra* note 208, at 3.

211. *Id.*

212. *Id.* The language in the 1997 Draft of the UN DRIP in Article 8 states, “Indigenous peoples have a collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.” *Id.*

213. *Indigenous Peoples, Indigenous Voices Factsheet: Who Are Indigenous Peoples?*, *supra* note 206.

there must be “historical continuity with pre-colonial and/or pre-settler societies,” and a “strong link to territories and surrounding natural resources.”²¹⁴ Additionally, the group needs to possess a “distinct social, economic, or political system,” as well as their own culture, beliefs and language.²¹⁵ Forming the “non-dominant group” in their society evidences indigenous people groups, and “self-identification as indigenous peoples” exists at both the “individual. . . and community” levels.²¹⁶

2. *Special Rapporteur Martinez Cobo’s Definition of Indigenous Peoples*

One of the most cited definitions of indigenous peoples derives from United Nations Special Rapporteur Jose R. Martinez Cobo’s *Study on the Problem of Discrimination against Indigenous Populations*.²¹⁷ In Cobo’s definition, it is key for indigenous peoples to be able to themselves define “what and who is indigenous.”²¹⁸ Indigenous peoples are those who have “a historical continuity with pre-invasion and pre-colonial societies that developed on their territories.”²¹⁹ Indigenous peoples are “distinct” from other people groups now living in those same territories, and “form at present non-dominant sectors of society,” and desire to preserve their unique “ethnic identity,” and “are determined to preserve, develop and transmit to future generations their ancestral territories.” Indigenous peoples desire to maintain their existence “in accordance with their own cultural patterns, social institutions and legal system.”²²⁰ Additionally, Cobo created a list of factors such as language and residence, in order to help determine whether groups are indigenous peoples.²²¹

214. *Id.*

215. *Id.*

216. *Id.*

217. Background Paper, *supra* note 208, at 1.

218. *Id.* at 2.

219. *Id.*

220. *Id.*

221. *Id.* (“This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors: a) Occupation of ancestral lands, or at least of part of them; b) Common ancestry with the original occupants of these lands; c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); e) Residence on certain parts of the country, or in certain regions of the world; f) Other relevant factors.”)

3. *ILO Convention 169's Definition of Indigenous Peoples*

Past attempts to create a uniform definition are evident in the International Labor Organization's Convention 169 on Indigenous and Tribal Peoples (ILO 169).²²² ILO 169 defines indigenous peoples as:

Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization 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.²²³

ILO 169, also contains a separate definition for tribal peoples.²²⁴ The definition of tribal peoples differs from the definition of indigenous peoples, because there is no requirement of having lived in the territory at the time of "colonization or the establishment of present state boundaries."²²⁵ The definition created for ILO 169 does not create a bright-line rule of who is included in the definition of indigenous peoples.²²⁶ ILO 169 rather states that "self-identification as indigenous or tribal is fundamental" to determine which portions of the convention apply to different people groups.²²⁷

Although the definition created in ILO 169 is evident in Cobo's reports and the UN DRIP, the definition used in ILO 169 on its own cannot be interpreted as customary international law and is not legally binding on all the states. Only twenty countries are currently parties to the convention.²²⁸ Therefore it is difficult to argue ILO 169 on its own is legally binding on all states.²²⁹ Nevertheless, it is persuasive evidence of a universal definition of indigenous peoples.

4. *Analysis*

Despite the lack of an "official" universal definition, it is evident in a comparison of Cobo's definition, ILO 169, and the United Nations' guiding

222. Convention No. 169, *supra* note 161, at art. 1(1)(b).

223. *Id.*

224. *Id.* at art. 1(1)(a).

225. *Id.*

226. *Id.* at art. 1(2).

227. *Id.*

228. *Id.*

229. *Id.*

factors to assist states in defining indigenous peoples, that a universal definition is developing.²³⁰ According to a report released by the Working Group on Indigenous Peoples—which discussed the decision to not adopt a universal definition—the “understanding of the term [indigenous peoples] commonly accepted is the one provided in the Martinez Cobo study.”²³¹ Furthermore, The United Nations Permanent Forum on Indigenous Peoples has endorsed both the Cobo study and ILO 169 as the guiding principles on identifying indigenous peoples,²³² by compiling a list of factors derived from Cobo’s study and ILO 169 to help guide states in discerning whether a people group is an indigenous people group.²³³ The factors are:

- self-identification as belonging to an indigenous people, nation or community;
- a common ancestry and historical continuity with pre-colonial or pre-settler societies;
- a special relationship with ancestral lands, which often forms the basis of the cultural distinctiveness of indigenous peoples;
- distinct social, economic and political systems, as well as a distinct language, culture, beliefs and customary law;
- formation of non-dominant groups within society; and
- determination to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.²³⁴

230. See generally UNITED NATIONS, IMPLEMENTING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: HANDBOOK FOR PARLIAMENTARIANS NO. 23 (2014), <http://www.ipu.org/PDF/publications/indigenous-en.pdf> [hereinafter HANDBOOK].

231. Background Paper, *supra* note 208, at 4.

232. HANDBOOK, *supra* note 230, at 11.

233. *Id.*

234. *Id.* at 11-12; see also Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Econ. & Soc. Council (ECOSOC), Study of the Problem of Discrimination Against Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/476 (July 30, 1981); U.N. Doc. E/CN.4/Sub.2/1982/2 (Aug. 10, 1982); U.N. Doc. E/CN.4/Sub.2/1983/21 (Aug. 5, 1983); U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (Jan. 1, 1987) (prepared by José R. Martínez Cobo); Convention No. 169, *supra* note 161, at art. 1(1)(b).

Thus, although there is no formally adopted universal definition, because there is strong evidence to support these factors, it is likely that these factors are, or are becoming the universal standard to define indigenous people groups.

Therefore, in order to determine if the UN DRIP applies to the Yazidi People and the Assyrian Christians, first it must be proven that they are in fact indigenous people groups. The above guiding principles for identification from the United Nations handbook on *Implementing the UN Declaration on the Rights of Indigenous Peoples* likely are the principles that should be used, and are therefore used below.

B. Yazidi People

When analyzing the factors given by the United Nations Permanent Forum on Indigenous Peoples, it is evident that the Yazidi people can be identified as indigenous. Because the Yazidis self-identify as an indigenous group, they fulfill the first factor.²³⁵

The second factor is fulfilled because the Yazidi people have lived in the Nineveh Plains prior to the creation of the current State of Iraq.²³⁶ Evidence exists that as early as the twelfth century, the Yazidi people have inhabited the Mosul area of Iraq.²³⁷ The Yazidis have since continued to inhabit the mountains of northwestern Iraq for centuries.²³⁸

The third factor, a special, cultural relationship to the land, is also fulfilled. The land in northern Iraq is the location of their holy places, shrines, and their ancestral villages.²³⁹ Yazidis who do not reside in Iraq, make pilgrimages to this region, to visit their holy city, Lalesh.²⁴⁰

Additionally, the fourth factor is fulfilled because the Yazidis have their own distinct culture from other Iraqis. The Yazidis main distinction from other people groups in Iraq is their religion. Yazidism is a polytheistic belief which “integrates some Islamic beliefs with elements of Zoroastrianism, the ancient Persian religion, and Mithraism, a mystery

235. *Yazidi: Religious Sect*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/Yazidi> (last visited Jan. 2, 2016).

236. *Id.*

237. *Id.*

238. Avi Asher-Schapiro, *Who Are the Yazidis, the Ancient Persecuted Religious Minority Struggling to Survive in Iraq?*, NAT'L GEOGRAPHIC NEWS (Aug. 11, 2014), <http://news.nationalgeographic.com/news/2014/08/140809-iraq-yazidis-minority-isil-religion-history/>.

239. *Id.*

240. *Id.*

religion originating in the Eastern Mediterranean.”²⁴¹ The Yazidis are structured as a tribe and are also a separate economic group, mainly engaging in cattle breeding and agriculture.²⁴² The Yazidis also have an organized political system, “with a chief sheikh as the religious head and an emir, or prince, as the secular head.”²⁴³ A strict religious caste system is enforced, further evidencing that the Yazidis have a distinct cultural, social, and economic system.²⁴⁴

With an estimated population of only 500,000 in Iraq, it is evident that the Yazidis are a non-dominant group in Iraq, and thus meet the fifth factor.²⁴⁵ Further, the Yazidis believe heavily in religious purity, and do not encourage their people to contact outsiders, such as by serving in the military and formal education.²⁴⁶

Lastly, Yazidis must marry within the culture, therefore satisfying the sixth factor, determination to preserve their own distinct culture.²⁴⁷

Therefore, because the Yazidi people fulfill all six of these factors, they should be identified as an indigenous people group and should receive the rights given to indigenous peoples in international law.

C. Assyrian Christians

Upon analyzing the Assyrian Christians under the standards set forth by the United Nations Permanent Forum on the Rights of Indigenous Peoples, it is evident that they too should be classified as an indigenous people group. The Assyrian Christians themselves self-identify as their own separate group, thus fulfilling the first factor.²⁴⁸

The Assyrian Christians easily meet the second factor, having inhabited the land in the Nineveh Plains several centuries prior to colonization and have shared a common culture for centuries. The Assyrian Christians have inhabited their territory in the Nineveh plains since 5000 B.C.²⁴⁹ The Assyrian Christians were some of the first peoples to become Christians after the crucifixion of Christ, with Apostle Thomas and Thaddeus

241. *Id.*

242. Nelida Fuccaro, *Communalism and the State in Iraq: The Yazidi Kurds*, 35 MIDDLE EASTERN STUD. 1 (1999).

243. *Yazidi: Religious Sect*, *supra* note 235.

244. *Id.*

245. Asher-Schapiro, *supra* note 238.

246. *Yazidi: Religious Sect*, *supra* note 235.

247. Asher-Schapiro, *supra* note 238.

248. Logan, *supra* note 5.

249. Peter BetBasoo, *Brief History of Assyrians*, ASSYRIAN INT’L NEWS AGENCY (Nov. 1, 2013), <http://www.aina.org/brief.html>.

founding the Assyrian Church of the east in city of Edessa, which is the first and oldest church in the world.²⁵⁰

The third factor is fulfilled because there is a special relationship between the Assyrian Christians and their land in the Nineveh Plains. Having lived there for thousands of years, several of the Assyrian Christians' churches and other religious structures have stood in the Nineveh Plains for centuries and since the beginning of Christianity.²⁵¹ The Assyrian Christians are the oldest Christian group in the world, and have been trying to gain their independence from Iraq for several years.²⁵²

As of 2015, Assyrian Christians only comprise four percent of Iraq's population, thus clearly fulfilling the fifth factor, being a non-dominant group in Iraq.²⁵³ Because of their religious beliefs, the Assyrian Christians have their own distinct social system, language, culture, beliefs, and customs. Deeply rooted in Christianity, the Assyrian peoples were some of the first converts to Christianity after the crucifixion of Christ.²⁵⁴ The Apostle Thomas, along with Thaddeus and Bartholomew, founded the Assyrian Church of The East, the first church.²⁵⁵ Because of their religious difference from the majority of Iraq, an Islamic state, there are strong political beliefs and customs that are practiced by the Assyrians.²⁵⁶ Due to these differences, the Assyrian Christians have argued for their own independent state, free from the rule of Iraq or the Kurds.²⁵⁷ The historic language of the Assyrians is Aramaic, the oldest language of the Semitic family of languages, and the language spoken by Jesus Christ himself.²⁵⁸ Aramaic is still spoken as the "liturgical language" of the Church and in parts of Iraq, Iran, and Syria.²⁵⁹

Desires to preserve their culture are evident through the desire to have their own separate state.²⁶⁰ Because ISIS has forced the Assyrian Christians

250. *Id.*

251. *Id.*

252. Kaitlyn Landgraf, *Torn from Their Homeland, Bay Area Assyrians Yearn for Persecution to End*, KQED NEWS (Dec. 17, 2015), <http://ww2.kqed.org/news/2015/12/17/torn-from-their-homeland-bay-area-assyrians-yearn-for-persecution-to-end>.

253. Griswold, *supra* note 14.

254. BetBasoo, *supra* note 249.

255. *Id.*

256. *Assyria*, UNREPRESENTED NATIONS & PEOPLES ORG. (Mar. 25, 2008), <http://unpo.org/members/7859>.

257. *Id.*

258. *Id.*

259. *Id.*

260. Griswold, *supra* note 14.

into a second class citizenship (at best), many have left their homes in order to maintain their beliefs and culture, and not be forced to convert to Islam.²⁶¹

Under these standards both the Yazidis and the Assyrian Christians meet the criteria of indigenous peoples, and thus both groups should receive such recognition. By doing so, the Assyrian Christians and the Yazidis are within the scope of the UN DRIP, therefore, receiving any of the rights in the UN DRIP which are customary international law.

IV. Remedy

As indigenous peoples, the Yazidis and Assyrian Christians have certain rights that have been enumerated in the UN DRIP, and that are likely protected as Customary International Law. Without question ISIS has committed atrocious human rights violations in the Nineveh Plains, committing acts which have been condemned by both the United States, and the European Parliament as genocide.²⁶² Because of the nature of genocidal acts, the focus on providing reparations of compensation and restoration of property may seem to pale in comparison to the creation of criminal tribunals for victims to receive justice.²⁶³ Survivors of the Rwandan Genocide²⁶⁴ were interviewed by non-governmental organizations, African Rights and REDRESS, and through these interviews, survivors expressed that, “accountability of perpetrators, as well as

261. *Id.*

262. Frida Ghitis, *U.S. Right to Call ISIS Actions Genocide*, CNN (Mar. 17, 2016), <http://www.cnn.com/2016/03/15/opinions/obama-reluctant-to-call-isis-murders-a-genocide-ghitis/>; Jack Moore, *European Parliament Recognizes ISIS Killing of Religious Minorities as Genocide*, NEWSWEEK (Feb. 4, 2016), <http://www.newsweek.com/european-parliament-recognizes-isis-killing-religious-minorities-genocide-423008>.

263. *Access to Reparation for Survivors of the 1994 Genocide in Rwanda*, REDRESS (Aug. 17, 2011), http://www.redress.org/downloads/17August2011_Torture_Survivors_Conference_BackgroundNote.pdf.

264. *Id.* There are several comparisons that may be made between the Rwandan Genocide of 1994 and the acts committed by ISIS in that

[t]he genocide and massacres that took place in Rwanda in 1994 decimated a population and caused about two million Rwandans to flee. It completely destroyed the infrastructure of the country, leaving the justice system in tatters. Rebuilding communities and indeed, Rwandan society, was made ever the more difficult in light of the huge number of perpetrators, often living next to those who survived the genocide.

Id.

adequate reparation,” equally provided them justice.²⁶⁵ After the Rwanda Genocide, although criminal tribunals were arranged, the state of Rwanda and the international community failed to put adequate systems in place for victims to receive restitution and compensation²⁶⁶ for their property loss. Therefore, as imperative as it is for ISIS militants to be tried in a criminal tribunal, it is equally important that both Assyrian Christians and Yazidis receive compensation and/or restoration of their rights to their land to receive adequate justice.

The UN DRIP is critical in providing an avenue for reparations for Assyrian Christians and Yazidis because the UN DRIP provides a basic standard for remedies which indigenous peoples should receive when their rights to property have been violated. Because the UN DRIP’s provisions on indigenous property rights are likely customary international law, or are developing into customary international law, Iraq, who approved of the UN DRIP, should use the UN DRIP as a guideline for restoration of land and property to indigenous peoples. Further, Iraq’s own constitution promises the protection of property to *all* of its citizens, even specifically referencing the Assyrian Christians and Yazidis in Iraq in Article 28, the UN DRIP provides that:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.²⁶⁷

265. *Access to Reparation for Survivors of the 1994 Genocide in Rwanda*, *supra* note 263.

266. G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

267. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 67, at art. 28.

By using Article 28 as a guide for providing relief for the Yazidis and Assyrian Christians, the state of Iraq would not only be fulfilling potential customary international law obligations, but their commitment made to uphold the principles within the UN DRIP when voting in its favor.

If Iraq does not take action to provide relief, the international community should use the standards listed in Article 28 UN DRIP to hold ISIS accountable for their unjust destruction and taking of Assyrian Christians and the Yazidis' property. Therefore, a suggested remedy would be first, to attempt to receive a resolution from the Security Council, because they are the only body within the UN to create binding resolutions on the international community.²⁶⁸ As contemplated in the case of the LTTE, UN Security Council resolutions can be used to condemn and punish non-state actors for their gross human rights abuses. Because Security Council resolutions are difficult to obtain, an alternative would be to pass a General Assembly resolution to encourage the enforcement of the Assyrian Christians and Yazidis UN DRIP Article 28 rights, and pressure Iraq to take action to ensure the restitution or compensation of their property.

There are several avenues which can be taken to provide remedies for the indigenous groups in the Nineveh Plains for ISIS's destruction of their property and the loss of their land to ISIS militants. It is imperative that the international community create a solution because the dangers of not providing remedies to marginalized groups post-tragedy can be evidenced through the struggles to provide appropriate reparations to survivors of the Rwanda Genocide of 1994.

V. Conclusion

The protection of indigenous peoples is imperative for their continued existence. Currently in the Nineveh Plains, the Yazidis and the Assyrian Christians are on the brink of extinction because the territory and property rights of Iraqi indigenous peoples were not protected. Because of the failure to protect indigenous peoples' property rights in the Nineveh Plains, girls are being forced into sex slavery, tens of thousands of innocent men, women, and children are dead, thousands of individuals are homeless, displaced, and have been forced to flee for their lives. Moreover, ancient artifacts, documents, books, churches, statues, and buildings are forever gone. It is time the international community took action against ISIS and

268. *See Are UN Resolutions Binding?*, DAG HAMMARSKJÖLD LIBRARY (Jan. 9, 2017), <http://ask.un.org/faq/15010>.

lived up to the promise of “never again,” before “never again” becomes “if only we would have. . .”²⁶⁹

269. *Frequently Asked Questions*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/research/ask-a-research-question/frequently-asked-questions> (last visited Jan. 13, 2016) (statement by Jimmy Carter, 39th President of the United States, at the presentation of the report of the President’s Commission on the Holocaust, September 27, 1979) (“Out of our memory . . . of the Holocaust we must forge an unshakable oath with all civilized people that never again will the world stand silent, never again will the world . . . fail to act in time to prevent this terrible crime of genocide . . . we must harness the outrage of our own memories to stamp out oppression wherever it exists. We must understand that human rights and human dignity are indivisible.”).