THE EVOLUTION OF RIGHTS: INDIGENOUS PEOPLES AND INTERNATIONAL LAW

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International law is no monolith, but more like a network of interlinked, evolving and eminently challengeable assumptions.1

I Introduction

International law developed in the 16th century from the recognition of the relationship between Indigenous peoples and European colonists. As it evolved in the 19th century, however, international law came to reflect little of this historical background. Departing from a natural legal theory framework in which ‘indigenous peoples’ survival as distinct autonomous communities’ was to some extent supported,2 international law became dominated by positivist notions of law and Western philosophical thinking in which only states had standing and non-Westernised peoples were ‘necessarily inferior’.3 With the advent of human rights law and the recognition that states should be held accountable for actions against their own citizens, there came an opportunity for Indigenous peoples to find a place within an expanding framework of rights.

A number of inherent tensions arise, however, in the incorporation of Indigenous rights into international law. In the first instance, states which are generally responsible for actions leading to Indigenous peoples’ claims maintain ultimate legitimacy in this positivist legal framework: ‘states sign on to treaties, adopt declarations, determine the content of … and general principles of international law and have standing before the International Court of Justice.’4 Further, questions arise regarding the limits of the contemporary human rights discourse and its capability to accommodate Indigenous rights and interests. What defines an Indigenous person? How can collective rights be recognised? And how can the advancement of the right to self-determination proceed within the current structure of rights?

II History of Indigenous Peoples in International Law

The jurisprudential beginnings of the rights of peoples and the birth of international law can be associated with pre-positivist conceptions of natural law as expressed by the 16th century Spanish theologians Francisco de Vitoria, Bartolomé de las Casas and others collectively referred to as the ‘Spanish School’.5 Concerned with the rights of Indians as against the Spanish conquistadores, and more broadly, the conquest and colonisation of the New World by European powers, these jurists sought to espouse the legal and moral relationship between the European states and Indigenous peoples.6 While
their philosophies were not altogether sympathetic, they maintained that Indigenous peoples were self-determining communities who owned their lands, and who held rights under natural law, whether ‘derived from God or, as Grotius suggested, from reason’, above the positive laws of the state.9

Little regard for the sentiments of the Spanish School was shown throughout the history of conquest and colonisation, yet the recognition of the rights of Indigenous peoples in the origins of international law ‘confirms, justifies and supports the claim of indigenous peoples today.’10 Greg Marks suggests that it also provides a fuller understanding of the nature of international law, away from the ‘simplistic positivist conception of international law as a self-serving arrangement between established states in a Euro-centric world order’ and is a reminder of the ‘natural law inheritance of international law.’11

With the rise of positivism in the 19th century came the ‘denial that universal rights for all human beings existed in natural law’.12 European state behaviour became the focus of international law and only nation states could act and hold legal rights and duties.13 In the context of Africa, Charles Alexandrowicz states:

The Europeans arriving in Africa at first brought with them a law of nations based on natural law ideology which started fading out in the nineteenth century, giving way to positivism. Positivism discarded some of the fundamental qualities of the law of nations, particularly the principle of universality of the Family of nations irrespective of creed, race, colour and continent … international law shrank into a Eurocentric system.14

Indigenous peoples were denied statehood and came within the ambit of the domestic law of their successor states, which were immune from the interference of other states.15 Applying domestically and internationally, the positivist view of law provided a rationalisation for colonising states to legally justify the acquisition of Indigenous peoples’ territory and the denial of their rights.16 The positive law doctrine of terra nullius was applied to land occupied by Indigenous peoples. Defined under the doctrine of terra nullius as ‘the land of no one’, it could be acquired by settlers without any encumbrances. Thus, ‘international law moved to embrace what the “civilized” states had done, and what they had done was to invade foreign lands and peoples and assert sovereignty over them.’17

Direct appeals by Indigenous groups from Canada and New Zealand to the League of Nations in the early 1920s were disregarded, and cases brought before the international courts confirmed the invisibility of Indigenous groups at international law and their ‘loss of international personality’.18 In the Island of Palmas case,19 the Permanent Court of Arbitration did not consider that the treaties made between the Dutch East Indian Company and Indigenous peoples were binding international treaties; in Cayuga Indians Claims20 Indian tribes were not regarded as legal entities; and in Legal Status of Greenland,21 the Permanent Court of International Justice did not consider the Greenlandic Inuit as possessing locus standi, or the right to be heard.22 The operation of positivist international law, which ‘affirmed sovereignty built upon colonialism’, was thus effective in excluding the sovereignty and standing of Indigenous peoples.23

In the late 19th and early 20th centuries, notions of trusteeship or guardianship surfaced in the international arena, reinvigorating the ideas of Vitoria and the Spanish School. These doctrines, while acknowledging Indigenous peoples, were nevertheless built on the predication of Indigenous peoples as backwards and in need of civilising. Ultimately, the notions of trusteeship and guardianship were used by states ‘as grounds and parameters for the non-consensual exercise of authority.’24 Writing in the 1920s, M F Lindley noted:

Governments and peoples at home have been more and more concerned with the general welfare of the natives under their control. Their professed aim has been to raise them in the scale of civilisation, and furnish them with the mental and manual training and the material equipment necessary to enable them to improve their conditions; and the duty of the advanced towards the backward races has come to be expressed as that of trustee towards his cestui que trust, or of a guardian towards his ward.25

The guardianship doctrine was internationalised most notably in Article VI of the General Act of the Berlin Conference (1884–85) in which the signatories agreed to bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being … and [bring] home to them the blessings of civilisation.26

Thus, as S James Anaya notes, while Indigenous peoples became, in some limited sense at least, objects of international
concern, the doctrine of trusteeship ‘translated into more of a justification for colonial patterns than a force against them.’

Despite early assertions of Indigenous peoples’ rights, international legal discourse developed historically to support the forces of colonisation and empire and undermine the capacity of ‘indigenous peoples to determine their own course under conditions of equality.’ However, just as international law once departed from its foundation in natural legal theory, in the mid-20th century it embraced human rights as ‘an alternative discourse to the state-centred, historical sovereignty one’. This move represented a significant shift in valuing the rights of human beings as separate from those of the state; and Indigenous peoples, as I will show, seized on the opportunities provided by this evolving discourse. Whilst progression was slow, in time these advancements paved the way for some recognition of Indigenous rights within the international legal framework.

III The Human Rights Era

Following the atrocities of the Second World War and the adoption of the Charter of the United Nations, the United Nations (‘UN’) began to rethink the discretion states had with regard to the treatment of their own citizens. The prevailing ideology remained positivist, but human rights became a proper subject for international law as international legal theorists accepted that natural law’s moral concepts of rights could form the basis of what states adopted and recognised as international law.

The contemporary human rights discourse valued the welfare of human beings over the interests of the state, and held that rights ‘belong to any individual as a consequence of being human, independently of acts of law’.

The Charter of the United Nations, adopted in 1945, was the first international instrument to embody human rights and self-determination of peoples, and to promote fundamental freedoms for all as the main purpose of the UN. While limiting formal UN membership to states and maintaining respect for ‘sovereign equality’, ‘territorial integrity’ and non-intervention in domestic affairs, the Charter opened the way for non-state participation in the deliberative processes of the UN Economic and Social Council by various nongovernmental organisations as well as experts acting in their individual capacity.

By this time, the political theories that had supported colonialism had become, as Anaya suggests, discredited for depriving people of their own self-government and were being eroded by the contending political theories of Western democracy and Marxism in their various forms. The decolonisation regime implemented by the Charter required states administering non-self-governing territories to report to the UN on progress towards self-government. The thrust of decolonisation thus took hold along with ‘a new anti-colonial and anti-racist consciousness and discourse.’

For Indigenous peoples, taking advantage of the decolonisation provisions that enabled former colonies to become independent was not so straightforward, as these provisions applied only to the population of colonial territories as an integral whole and ‘largely bypassed indigenous patterns of association and political ordering’. Belgium attempted to apply universally the self-determination principal to Indigenous peoples at the UN, claiming that:

a number of states were administering within their own frontiers territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogenous peoples differing from the rest of the population in race, language and culture.

What became known as the ‘Belgian thesis’ was, however, defeated as states regarded Indigenous peoples as minorities within states, and they were therefore entitled only to general minority rights. Gordon Bennett suggests that:

It was the putative threat to the sovereignty of newly independent states that secured the final rejection of the Belgian thesis and the purported restriction of Chapter XI to colonial territories; and the vagaries of international politics thereby imposed upon the United Nations a hypocritical stance towards the problems of indigenous peoples which was to frustrate organised efforts on their behalf for more than a decade.

A consequence of the focus on the colonial territorial unit was the ‘salt-water doctrine’ or the ‘blue water thesis’ requiring that salt water separate the people claiming self-determination under the United Nations Charter from the metropolitan area of the nation-state. This had the desired effect of precluding the right to secede from Indigenous peoples and others living within the confines of a nation-state. While early human rights initiatives and the associated
decolonisation procedures worked for the benefit of external colonial territories, international normative principles were yet to truly incorporate Indigenous people within the ambit of international concern.46

IV Instruments Relevant to Indigenous Peoples
Within the Modern Human Rights Frame

International acknowledgement of the place of Indigenous peoples within the human rights framework did eventuate, and the ‘conceptual and institution medium’ of human rights became ‘the basis for a much enhanced international concern’ for Indigenous peoples’ rights.46 In 1957 the International Labour Organisation Convention 107 on Indigenous and Tribal Populations47 (‘ILO Convention 107’) became the first convention within the UN framework to deal exclusively with Indigenous peoples. Developed alongside the decolonisation movement, ILO Convention 107 was formed as a result of studies and expert meetings that elucidated the vulnerability of Indigenous workers and sought to promote economic and social equality and integration with other citizens of the state.48 The Convention was, however, highly assimilationist,49 and rights existed for members of Indigenous populations rather than groups.50 Despite this, the Convention was significant in bringing recognition of Indigenous peoples to the fore and is notable for its acknowledgement, although qualified, of Indigenous customary laws and the right of collective land ownership.51

A number of international human rights instruments followed with varied relevance for Indigenous peoples. Adopted in 1966, the International Covenant on Civil and Political Rights52 (‘ICCPR’), though not containing any specific articles on Indigenous rights, nonetheless applies to the concerns of Indigenous peoples. Importantly, art 1 of the ICCPR recognises the rights of ‘peoples’ to self-determination, introducing the possibility of group rights.53 Under general international law, however, the Human Rights Committee54 has failed to clarify the ‘peoples’ to whom art 1 applies,55 and how claims might be properly brought before the Committee.56

Article 27 of the ICCPR, which expressly applies to minorities, has been utilised more commonly by Indigenous peoples. It states:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

While states argued that this was a negative duty not to harm rights, it has been extended to a positive duty for states to uphold the ‘minority’ culture.57 Indigenous peoples have been successful to some extent with their claims under art 27 to the Human Rights Committee, pursuant to the First Optional Protocol to the ICCPR, which allows individual communications once ‘all domestic remedies’ have been exhausted.58 Canada was found to be in breach of art 27 for allowing an oil and gas exploration and other developments in the Lubicon Band territories;59 traditional activities such as Saami Reindeer Hunting were afforded protection,60 and the right to culture was extended to individuals’ right to membership in their tribe in the Lovelace case.61 Other appeals have not been as successful.62

The International Covenant on Economic, Social and Cultural Rights63 (‘ICESCR’) shares a common first article with the ICCPR, providing the right of self-determination to all peoples. It further addresses economic, social and cultural rights, ‘in the enjoyment of which indigenous peoples experience considerable disadvantage’.64 The Convention on the Elimination of All Forms of Racial Discrimination65 (‘CEDR’) protects minorities and individuals against racial discrimination within states. In force since 1969, it is widely ratified and commits signatories to introduce measures for compliance and established the first international human rights treaty monitoring mechanism.66 While the CERD does not explicitly mention Indigenous peoples, it has become an important instrument in the elimination of discrimination in areas important to Indigenous peoples, including property rights and the right to political participation.67

The earlier Convention on the Prevention and Punishment of the Crime of Genocide68 was the first post-war instrument to protect group rights. Under the Convention, genocide is made a crime at international law, and is defined as consisting of ‘acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.’69 Other instruments of relevance to Indigenous peoples’ interests include the Convention on the Elimination of All Forms of Discrimination Against Women,70 the Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,71 and the Convention on the Rights of the Child, which explicitly refers to Indigenous individuals.72
These instruments have guaranteed important rights for Indigenous peoples and addressed important areas of disadvantage. However, the question has remained as to whether these protections are sufficient to meet the needs of Indigenous peoples, or whether a separately formulated response to their situation is necessary and/or appropriate. As Patrick Thornberry points out:

indigenous individuals may and do benefit from navigating their way through charters of undifferentiated human rights or utilising rights of minorities. … The problem with focussing on these ‘undifferentiated’ instruments is that the specific indigenous voice may be lost.

The case for a set of specialised rights within the human rights framework was still to be properly conceived and recognised.

V The Case for Specialised Rights

Indigenous peoples are diverse and disparate, yet many share a common set of experiences resulting from colonisation or subjugation, including confiscation of land, imposed systems of law and governance, and resulting poverty. The International Commission on International Humanitarian Issues has noted that poverty, debt, poor health, high infant mortality and low life expectancy affect Indigenous peoples disproportionately and cite the severe loss of cultural diversity and languages amongst a number of groups.

Anaya acknowledges that Indigenous peoples have survived with great resilience in the face of tremendous adversity … they have survived as they have striven to maintain the cultural integrity that makes them different, while adapting, often ingeniously, to the changing conditions around them.

It is for these reasons that the Indigenous experience is not just ‘an abstraction that can be lumped together with other categories of injustice’.

Wiessner offers five basic claims of Indigenous peoples that arise from these conditions:

1. Traditional lands should be respected or restored, as a means to their physical, cultural and spiritual survival;
2. indigenous peoples should have the right to practice their traditions and celebrate their culture and spirituality with all its implications;
3. they should have access to welfare, health, educational and social services;
4. conquering nations should respect and honor their treaty promises; and
5. indigenous nations should have the right to self-determination.

A number of these issues, as I have shown, have been addressed in general human rights prescriptions to some extent – for example, the right to survival, social and economic rights and the general freedom of religion. Some commentators, such as Jeff Corntassel and Tomas Primeau, believe that generalist human rights principles are sufficient to secure the cultural survival of Indigenous peoples. Others such as Benedict Kingsbury and Siegfried Wiessner assert that Indigenous rights resist subsumption. Wiessner suggests that:

What is missing … is specific protection of the distinctive cultural and group identity of indigenous peoples as well as the spatial and political dimension of that identity, their way of life.

Richard Falk agrees, stating that ‘Indigenous peoples are in the situation where their claims for protection cannot be coherently understood except when treated separately.’

A Developments in the Recognition of Prescriptive Rights

Developments in human rights in the early to mid-20th century provided an important ‘foothold’ for Indigenous peoples in international law by extending the scope of rights and moderating the doctrine of sovereignty. Yet despite improvements in the standing of Indigenous peoples, the status of their unique rights long remained unresolved. Indigenous voices within the international realm were, however, growing stronger and their influence increasing. The case for specialised rights was gaining traction.

Driven by the efforts of Indigenous people in collaboration with non-governmental organisations and independent experts, a series of international conferences and appeals to international institutions took place in the early 1970s. These events drew attention to the specific demands of Indigenous peoples for their survival as ‘distinct
communities with historically based cultures, political institutions, and entitlements to land.\textsuperscript{86} The local struggles of Indigenous groups were internationalised and Indigenous non-governmental organisations such as the International Indian Treaty Council in 1974 and the World Council of Indigenous Peoples in 1975 became established bodies within the UN system.

Among the first major initiatives within the UN was the Study on the Problem of Discrimination Against Indigenous Populations.\textsuperscript{86} The Report, prepared by Special Rapporteur José R Martínez Cobo of Ecuador, comprised 24 documents and took 13 years to complete. The drafting process was key to the development of relations between the UN and Indigenous people and contributed significantly to the recognition that Indigenous peoples were of separate international concern.\textsuperscript{87} The first international conference of non-governmental organisations on Indigenous issues was convened in Geneva in 1977. Attended by Indigenous peoples’ representatives primarily from the Western hemisphere, the Conference on Discrimination Against Indigenous Populations helped to establish a coordinated response to the formulation and communication of Indigenous peoples’ demands.\textsuperscript{88} The Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere, that was drafted and circulated as part of the Conference, became an early benchmark for Indigenous peoples’ rights in the international arena.\textsuperscript{89} These initiatives were followed by the Geneva Conference on Indigenous Peoples and the Land in 1981, and resulted in the increased presence of Indigenous peoples’ representatives appearing before UN human rights bodies.\textsuperscript{90}

Another significant development was the Advisory Opinion of the International Court of Justice in the 1975 Western Sahara case,\textsuperscript{91} in which the application of the positive law doctrine of terra nullius to land inhabited by Indigenous peoples was deemed inappropriate. Referring to the Spanish School, Judge Ammoun stated that:

The concept of terra nullius, employed in all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned. It is well known that in the sixteenth century Francisco de Vittoria protested against the application to the American Indians, in order to deprive them of their lands, of the concept of res nullius.

This approach by the eminent Spanish jurist and canonist, which was adopted by Vattel ...was hardly echoed at all at the Berlin Conference of 1885. It is however the concept which should be adopted today.\textsuperscript{92}

Thus, through sustained efforts, Indigenous people ‘ceased to be mere objects in the discussion of their rights and become real participants in an extensive multilateral dialogue.’\textsuperscript{93} As Thornberry states ‘[t]here is now in existence what may be called “an” or “the” international indigenous movement’.\textsuperscript{94} These developments provided the basis for the formation of the Working Group on Indigenous Populations, which proved to be a most significant advancement in terms of influencing and affecting international awareness of the rights of Indigenous peoples.


The Working Group on Indigenous Populations (‘WGIP’)\textsuperscript{95} was established by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities with a mandate to review developments pertaining to the human rights of Indigenous populations and to give attention to the evolution and drafting of standards concerning the rights of such populations.\textsuperscript{96} One of its most well-known endeavours was the drafting the Declaration on the Rights of Indigenous Peoples. Whilst a number of amendments were made to the declaration as drafted by the WGIP, it was eventually adopted by the General Assembly in September 2007. In undertaking its work the WGIP was to rely on materials supplied by international agencies, the Secretary General, governments and non-governmental organisations.\textsuperscript{97} During its proceedings, however, it became clear that in order to be meaningful, the WGIP needed to hear directly from Indigenous peoples themselves.\textsuperscript{98} In an unprecedented move, representatives of Indigenous peoples and organisations\textsuperscript{99} participated directly in the debates of the WGIP to provide information on the problems they faced and express their opinion about the wording and content of the Declaration.\textsuperscript{100} This process provided a unique opportunity for Indigenous representatives to voice their concerns to state representatives and to participate in a world that was ‘otherwise impenetrable.’\textsuperscript{101} Mick Dodson, Australia’s then Aboriginal and Torres Strait Islander Social Justice Commissioner, commented that:

The Working Group has become the focal point of our coming together as the world’s indigenous people. In a sense, the Working Group is all about what international law and the
UN have neglected. It is about bringing indigenous people into the UN system where we have been marginalised and unnoticed. It is about forcing the UN system to face its responsibility as the body charged with protecting the rights of all peoples. It is about transforming the UN from a club serving the interests of its members, namely nations and their well-suited diplomats, to a body of peoples.

The growing international concern and status of Indigenous peoples was marked by the UN General Assembly’s proclamation of the International Year, and then the International Decade, of the World’s Indigenous People in the mid-1990s. One of the objectives of the decade was the establishment of the Permanent Forum on Indigenous Issues. The UN Economic and Social Council (‘ECOSOC’) resolved in July 2000 that the Permanent Forum should be established to

provide expert advice on indigenous issues to the Council, as well as to the UN programmes, funds and agencies; to raise awareness and promote the integration and coordination of activities related to indigenous issues within the UN system; and to prepare and disseminate information on indigenous issues.

The Permanent Forum consists of 16 members, 8 nominated by governments and 8 appointed by the President of ECOSOC, and reports directly to ECOSOC, which places it on the same level as the Human Rights Council (formerly the Commission on Human Rights), the highest-level body that can be established at the UN without constitutional reform.

Indigenous peoples’ domestic problems found a voice in the international arena by building strength through ‘co-operative ventures and voluntary associations’ and ‘linking indigenous peoples as a kind of transnational pressure group’. While the international legal system remains positivist, states have recognised the need for Indigenous peoples to participate in the decision-making processes relating to standards that apply to them. Through the development of bodies such as the WGIP and the Permanent Forum within the UN structure, Indigenous peoples have thus emerged ‘as subjects and makers of international law’. This influence manifested, in the first instance, in the replacement of ILO Convention 107 with ILO Convention 169, and culminated in the Declaration on the Rights of Indigenous Peoples.

C ILO Convention 169

The International Labour Organisation Convention on Indigenous and Tribal Peoples, Convention No 169 (1989) (‘ILO Convention 169’) is a central feature of contemporary treatment of Indigenous peoples at international law and remains one of the most significant conventions in the human rights system for Indigenous peoples. As human rights principles evolved and international concern for Indigenous issues developed, the ILO Convention 107 came to be seen as ‘anarchical’ and the application of its principles ‘destructive in the modern world’. ILO Convention 169 thus replaced it with a set of rights more in line with Indigenous peoples’ objectives. As indicated in the preamble, the theme of the Convention is to recognise ‘the aspirations of [Indigenous] peoples to exercise control over their institutions, ways of life and economic development and to maintain and develop their identities, languages and religions.’ It ensures the protection of Indigenous peoples’ cultural integrity, control over their legal status, lands and resources, and right to non-discrimination in social welfare spheres. These rights, however, apply within the framework of the states in which they live, and the right to secede is not, therefore, recognised.

While the ILO Convention 169 embodies much of the discussion that came out of the WGIP at the time, Indigenous peoples and representatives were unhappy about the process used in developing the Convention. Indigenous peoples ‘did not have full access to the discussion, or to decisions about the revision’ and were dissatisfied about some of the substantive results. In fact, Indigenous representatives led a boycott of the Convention asking states not to ratify it. Many of those representatives however, have since changed their views and argue that it should be ratified. Despite these early objections, the ILO Convention 169 remains ‘the most detailed, legally binding instrument on the rights of indigenous peoples’, and although it has only been ratified by a small number of states, its impact extends beyond these states as it is considered indicative of customary international law.

The ILO Convention 169 is important, as Catherine Iorns Magallanes states, for confirming the international legal commitment to indigenous cultural self-determination, indigenous peoples’ participation in the making of national decisions affecting them, and indigenous peoples’ rights to their traditional lands and territories.
By articulating the collective character of rights for the benefit of ‘historically grounded communities’, *ILO Convention 169* has challenged the individual–state ‘perceptual dichotomy’ that has dominated conceptions of human society and shaped international legal standards. It embodies the movement toward ‘responsiveness to indigenous peoples’ demands through international law and, at the same time, the tension inherent in that movement.

**D Declaration on the Rights of Indigenous Peoples**

While the WGIP had important impacts on the development of the *ILO Convention 169*, the Convention in turn ‘established a generally agreed law or minimum set of rights’ upon which the *Declaration on the Rights of Indigenous Peoples* (‘DRIP’) was built. Adopted by the General Assembly in September 2007 after 20 years in the making, the DRIP provides a document that Indigenous peoples can use in their political advocacy with all levels of government. The text creates no new rights in international law as it is a non-binding aspirational document, but provides a framework ‘for human rights based dialogue between indigenous peoples and states.’

Contained in the DRIP is an array of tailor-made collective rights, recognising general principles and rights to nationality, self-determination, equality and freedom from adverse discrimination; rights to culture, spirituality, education and language; as well as participatory rights in development and other economic and social rights. The DRIP guarantees rights relating to land, territories and resources and the right to conclude treaties and agreements with states. It also outlines that states shall take legislative measures to achieve the rights encompassed in the DRIP’s implementation procedures.

The value of the DRIP as a human rights instrument rests on its recognition and acceptance by a large number of states. The extensive deliberations leading to the DRIP have enhanced its authoritativeness and legitimacy for Indigenous peoples as they played a leading role in that process. Gina Cosentino states that, in practical terms, the provisions of the declaration can influence political priorities, programs and outputs of various UN agencies. In the domestic context, the DRIP can shape indigenous politics, policy, public opinion and jurisprudence, and can be referenced by indigenous peoples to bolster political leverage at the domestic, regional and international levels.

The potential of the DRIP is that, as an authoritative statement on norms and practices concerning Indigenous peoples widely accepted by states, it may be elevated to the level of customary international law.

While there are criticisms that the DRIP does not go far enough, others have stressed the unique, even revolutionary, nature of the document. Thornberry, in reference to the then draft declaration, suggested that

> There is no more ‘radical’ document in the field of international human rights. In the spectrum from reform to revolution, the text reaches towards the upper revolutionary end, among the passionate colours.

In its acknowledgement of collective rights and self-determination, the DRIP ‘takes the international community to the “outer limits of principle”. In recognising the specialised needs of indigenous societies, it has challenged the capacity of human rights enterprise to cope with radical diversity.’ The seemingly impossible task of securing Indigenous peoples’ rights in the international arena has proven possible, yet some contentious issues remain.

**VI Contentious Issues**

Recognition of the legal status and rights of Indigenous peoples within the contemporary human rights framework developed significantly as a result of *ILO Convention 169*, the DRIP and associated human rights fora. Arguably, many elements of this recognition have ‘matured and crystallized into customary international law’. A number of contentious issues, however, continue to unsettle, to some extent, the relevant institutions and instruments discussed. These include debate over the definition and identification of Indigenous peoples; the collective nature of Indigenous rights; and the application of the principle of self-determination. In the following sections of the paper I will look at the issues involved in each of these debates and see how, and to what extent, they have been dealt with in the human rights framework.

**A Defining Indigenous Peoples**

Despite the elaborate nature of the UN system, there remains no clear definition of the term ‘Indigenous peoples’. The controversies relate not only to the identification of who is Indigenous, but to whether the terms ‘people’ or ‘population’
should be used instead of ‘peoples’ (the later tension is explored in the following section on self-determination). There is even debate about whether defining the term is useful or necessary.

The working definition of Indigenous peoples, originally proposed by Special Rapporteur Martinez Cobo in his Study on the Problem of Discrimination Against Indigenous Populations, links Indigenous peoples to colonialism:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined 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.\textsuperscript{135}

While Cobo’s definition is the most widely used, there are some shortcomings, as Wiessner and others point out. Firstly, the definition links Indigeneity to a history of suffering, through colonisation or invasion, which could disregard Indigenous peoples in Africa or Asia where oppression has occurred by dominant neighbouring societies.\textsuperscript{136} Secondly, preserving ancestral lands could be read to exclude those who have been forcibly removed from their lands and are living in urban areas.\textsuperscript{137} Thirdly, ‘non-dominant sectors of society’ could exclude those peoples who have achieved prominence in their nation-state.\textsuperscript{138}

In its definition, the ILO Convention 169 included the word ‘tribal’ as well as ‘Indigenous’ to target as wide a group as possible and to include those people whose lands were not colonised but dominated by neighbouring societies or states, many of which have claimed that Indigenous peoples only exist in former European colonies.\textsuperscript{139} Under art 1(1) of the ILO Convention 169, its principles apply to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) 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 colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.\textsuperscript{140}

The World Bank’s definition of ‘indigenous peoples’ dispenses with criteria based on colonialism and continuity altogether, suggesting that Indigenous peoples are ‘social groups with identities that are often distinct from dominant groups in their national societies’, which puts them ‘among the most marginalized and vulnerable segments of the population.’\textsuperscript{141}

In contrast, Indigenous peoples have consistently denied the need for formal definition. Self-definition or self-identification has been promoted as the most appropriate approach as the ‘concept of “indigenous” is not considered capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world.’\textsuperscript{142} Opposition to self-identification, argued by some states, is predicated on the ‘alleged lack of objectivity inherent in such an approach or because it would allow a wide range of groups to claim certain rights and benefits on the basis of defining themselves as indigenous.’\textsuperscript{143} While a formal definition might provide some certainty about the scope of who might come within the ambit of applicable international laws,\textsuperscript{144} it must be noted that neither ‘minorities’ nor ‘peoples’ has ever warranted definition by the UN.\textsuperscript{145}

The WGIP elucidated the debate about whether ‘Indigenous’ should be formally defined. On the whole Indigenous peoples in the WGIP expressed a preference for delineations that relied on self-identification, and over time, many states came to be supportive of this view.\textsuperscript{146} In 1993, the WGIP’s draft Declaration on the Rights of Indigenous Peoples omitted any definition. Instead, Professor Erica-Irene Daes offered a set of relevant factors to understanding the term ‘Indigenous’ including:

(a) Priority in time, with respect to the occupation and use of a specific territory;

(b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
(c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
(d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.\textsuperscript{147}

In the final version of the DRIP, self-identification was adopted and outlined in the following way: ‘Indigenous peoples have the right to determine their own identity or membership in accordance with their own customs and traditions.’\textsuperscript{148} Martinez Cobo elaborates on the boundaries of self-definition, placing emphasis on the role of the group, suggesting that

on an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by group).\textsuperscript{149}

He goes on to add that ‘this preserves for these communities the sovereign right and power to decide who belongs to them, without external interference’.\textsuperscript{150} This understanding of Indigenous peoples’ group consciousness brings us to the next issue, that of collective rights.

B Collective vs Individual Rights

Collective or group rights do not fit easily into the international legal framework where central importance is placed on the individual and the state. As Marek Piechowiak states: ‘respect for [the individual’s] dignity prevails over the good of a group and over that of the State … The State and the law exist for the individual living in a society.’\textsuperscript{151} Indigenous rights, based on a collective set of rights, are considerably removed from these notions of ‘individualism’.\textsuperscript{152} The relationship between the UN system and group claims has, therefore, been ‘problematic, sharply contested, [and] complex’.\textsuperscript{153} However, it is rapidly evolving, and the demand for treating group rights as a truly collective concept is increasing under what is now understood as the ‘third’ generation of human rights based upon a sense of group solidarity.\textsuperscript{154}

The difficulty is, if groups have rights, then how are the rights of individual group members to be protected?\textsuperscript{155} Kymlicka regards the collective–individual rights debate as ambiguous. He suggests that what matters is how rights are differentiated towards groups in society, not who holds the right, ‘the individual’ or ‘the collective’.\textsuperscript{156} Thornberry, by contrast, considers that the issue has been ‘raised with fair consistency throughout the canon of human rights, and appears to matter very much’.\textsuperscript{157} Views about the way in which collectives or groups can hold rights have been argued within the liberal–individualism versus corporatism framework.\textsuperscript{158} That is, collective rights might be ‘held jointly by those who make up a group’, or the group ‘isanalysed to a right-bearing individual’.\textsuperscript{159} Holder and Comtassel believe that these theories should not necessarily be applied to Indigenous peoples as their collective rights and individual rights are generally recognised as ‘mutually interactive rather than in competition’,\textsuperscript{160} as ‘one’s relations with others are primarily defined by social or kinship networks.’\textsuperscript{161}

Wiessner summarises the nature of Indigenous peoples’ rights as somewhat different to traditional Western rights:

One’s clan, kinship and family identities are integral parts of one’s personal identity; rights and responsibilities exist only within these networks. Indian society, thus, is horizontal, not vertical; it consists of a network of personal relationships. In the mind of indigenous people, their ‘nations’ are not, like a Western nation-state, entities with distinct Hegelian existence separate and apart from their individual members. Members of tribal communities are existentially tied to each other in a network of deeply committed horizontal relationships. Still, there are structures of authority within tribal groups, and there is a process of formation of a common will. This process of decision-making and its cultural, geographic, social and economic environment is what the ensemble of collective rights of indigenous peoples is designed to protect.\textsuperscript{162}

Group rights, in this context, are necessary complements to the individual rights of their members. As Weissner states, they ‘are properly not conceived of as exclusive of, or displacing, individual rights, but as supplementing individuals’ rights in pursuit of the common goal of a public order of human dignity.’\textsuperscript{163}

The recognition of group rights for Indigenous peoples is then essential to establishing an effective instrument for the protection of Indigenous ways of life. A representative of the Grand Council of the Crees states that when Indigenous people are attacked, for instance, the ‘individual suffers pain … [b]ut they suffer because they are perceived by their attackers as members of a group’.\textsuperscript{164} Further Lowitja
O'Donoghue acknowledges the necessary recognition of collective rights in that:

It is precisely because the collective rights have not been acknowledged that the individual rights of indigenous persons, for example the right to equality of opportunity in the provision of education, employment and health care – have not been realised in any nation in the world. Only when our collective identities have been recognised will the appalling disadvantages that we suffer as individuals be redressed.165

Despite the low initial expectation for the recognition of group claims within the UN system, a number of factors have led to the acknowledgment of such claims by several UN organs.166 While the 1948 Universal Declaration of Human Rights is ‘overwhelmingly’ individualistic,167 the later 1978 UNESCO Declaration on Race and Racial Prejudice deals with several aspects related to group rights placing strong emphasis on the need to protect the identity and the development of groups, affirming the ‘right to be different’, prohibiting forced assimilation and stressing the need for affirmative action as far as disadvantaged groups are concerned.168

Further, the two 1966 Covenants provided the foundations for basic claims of Indigenous peoples’ group rights, with common art 1 asserting that the right of self-determination belongs to ‘[a]ll peoples’.169 The DRIP acknowledges both the collective and individual. The preamble and art 1 read as follows:

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples ...

... Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.171

Within the realm of Western thought, rights have been articulated mostly in terms of the ‘individual’s demands of freedom, equality, participation, and economic and physical security vis-à-vis the state, or in terms of the state’s sovereign prerogatives.172 While statism and individualism continue to prevail, human rights discourse has become increasingly attentive to and supportive of human beings’ ‘associational and cultural patterns that exist independently of state structures.’173 Accordingly, group or collective rights have begun to take hold as a concept ‘in the articulation of human rights norms and in adjudicative or quasi-adjudicative procedures of international human rights organs.’174 This in turn has influenced the understanding and acceptance of the collective nature of Indigenous rights. Integral to the struggle for the recognition of collective rights is the pursuit of self-determination.

C Self-Determination

Self-determination has been characterised as a ‘world order principle ... that must be a basis of social and political organization globally if we are to progress along the road toward a peaceful and humane world.’175 It is upheld in the UN Charter and is well established in a number of major international treaties, applying to ‘all peoples’ and enabling free determination of their political status, pursuit of economic, social and cultural development, and disposal of natural wealth and resources.176

There has been endless debate about the nature of self-determination at international law, and about what constitutes ‘a people’ entitled to that right.177 When the right is applied to Indigenous peoples, it becomes even more complex. The major objection to recognising the right as applying to Indigenous ‘peoples’ goes to the debate about collective rights – voiced largely by states born from conquest – that the right is an individual right that cannot be extended to groups, and if the right is applied to groups it might give rise to the right of secession.178 Under international law, the term ‘peoples’ implies that a group has a right to self-determination because the right is one that is exercised by a ‘people’.179 This is why the Working Group on Indigenous Populations was named as such and why the ILO Convention 107 also used the word ‘populations’. The ILO Convention 169, in contrast, applies to ‘indigenous peoples’180 although the use of the term is qualified to apply without any ‘implications as regards the rights which may attach to the term under international law’.181

Anaya outlines the debate about what constitutes ‘a people’, concluding that the overall assumption has been that ‘a
people’ is an entity that ‘a priori has actual or putative attributes of sovereignty or statehood and that has a legal existence distinct from that of human beings who otherwise enjoy human rights’. He suggests however, that:

More in keeping with the human rights character of self-determination is to see the reference to ‘peoples’ as designating rights that human beings hold and exercise collectively in relation to the bonds of community or solidarity that typify human existence.

Self-determination universally applies the idea that ‘all segments of humanity, individually and as groups, have the right to pursue their own destinies in freedom and under conditions of equality’. The norm implicit in this discourse, Anaya suggests, ‘provides the standard by which institutions of government and their attributes are measured, and by which many are found to be illegitimate or in need of reform in relation to particular groups’. Self-determination is then ‘a human rights norm that broadly benefits human beings in relation to the constitution and functioning of the government structures under which they live.’

The prescription of the values of the norm, as understood by Anaya, vary in that there are both distinct substantive and remedial aspects of the right:

the substance of the right of self-determination is not the same as the particular remedial prescriptions that follow violations of the right, such as those remedial measures developed to undo colonization, apartheid, and oppression against indigenous peoples.

Therefore, applying self-determination to the entitlement of statehood is misguided and obscures the nature of the right. Indigenous peoples’ claims to self-determination, then, fall within the right for remedial measures that ‘points towards context specific arrangements to ensure the survival of these peoples’ own historically rooted cultures and institutions within the framework of the states in which they live.’

Wiessner’s concept of internal (as opposed to external) self-determination accords with Anaya’s views:

(1) ‘external’ self-determination, ie, the right of peoples to freely determine their international status, including the option of political independence;
(2) ‘internal’ self-determination, the right to determine freely their form of government and their individual participation in the processes of power.

While some Indigenous advocates seek rights to external self-determination, most Indigenous peoples have little desire for secession, but are concerned more with internal self-determination and the right to evaluate and influence ‘the nature and levels of interactions with the non-indigenous world’. In most cases complete separation from the state would not be optimal or practical. In essence, Falk suggests that ‘this amounts to a desired arrangement for autonomy that is given constitutional status within a state and that enjoys international backing, including some international legal process that provides remedies.’ In discussions of the drafting of the DRIP, self-determination was referred to as the full participation of Indigenous peoples in decisions concerning them, and Indigenous peoples making decisions about their own affairs, or having some form of territorial autonomy. Article 3 of the DRIP states that:

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

Article 4 provides that one way of exercising the right is through some form of autonomy or self-government for Indigenous peoples in their internal affairs:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

To counter secession arguments put by some states, even though the Declaration is subject to all existing international law, explicit reference was made in Article 46 to safeguarding territorial unity:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
While most states have accepted the right of self-determination for Indigenous peoples provided that it does not threaten the territorial integrity of the state, countries including the United States, Australia, Canada and New Zealand, which voted against the DRIP, have continued to voice concern about the right of self-determination.\(^\text{196}\) It must be noted, however, that the Rudd Labor Government of Australia has since reversed Australia’s position and endorsed the DRIP.\(^\text{197}\)

Returning to Anaya’s notion of remedial reform, current practice for states with Indigenous peoples is to adopt reforms in favour of those groups on the basis of negotiations or consultations.\(^\text{198}\) Professor Erica-Irene Daes described the optimal practice in this regard as entailing

> a kind of State-building, through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion.\(^\text{199}\)

This accords with Falk’s assertion that ‘[i]n many states, the existential reality is one of multinationality even if the legal reality is one of a unified nationality conferred by the sovereign centre of state power.’\(^\text{200}\)

D Toward a Multicultural State

Although the issues of identification, collective rights and self-determination still run up against Western legal and social concepts and institutions, Indigenous peoples have continued to develop their rights by utilising the existing international framework. Even though some demands are inherently at odds with the positivist legal framework, human rights have proved to a large extent to be flexible and accommodating to those concerns. Anaya, in accordance with Kymlicka, suggests that the gradual inclusion of Indigenous rights into international human rights demonstrates the emergence of a ‘multicultural model of political ordering and incorporation of indigenous peoples into the fabric of the state.’\(^\text{201}\) Under this model, the basis for equality for Indigenous peoples includes the acknowledgement and acceptance of cultural identity as well as individual citizenship.\(^\text{202}\)

This dual thrust reflects the view that indigenous peoples are entitled to be different but are not necessarily to be considered \textit{a priori} unconnected from larger social and political structures ... These ideals challenge previously dominant Western conceptions of the culturally homogeneous and legally monolithic state, and they hold out hope for political ordering that simultaneously embraces unity and diversity on the basis of equality. Such is the multicultural model and its challenge for the modern state.\(^\text{203}\)

VII Conclusion

International law has struggled to position Indigenous, non-European ‘others’ in relation to the set of ‘European-derived assumptions, principles and practices’ that emerged in the positivist era of the 18\textsuperscript{th} and 19\textsuperscript{th} centuries.\(^\text{204}\) However, as international law evolved with the introduction of human rights and the expanding community of states, including non-European cultures and perspectives, Eurocentric precepts were increasingly being undermined in global decision-making.\(^\text{205}\) The enhanced role of non-state actors further worked to re-shape the content and scope of international law. This evolution necessitated the re-surfacing of the naturalist framework raised by early classical theorists to ‘enjoin sovereigns with regard to the treatment of indigenous peoples’ and in so doing, formed the basis for international law to ‘revisit the subject of indigenous peoples and eventually become re-formulated into a force in aid of indigenous peoples’ own designs and aspirations’.\(^\text{206}\) While international law remains state-centred, it is now heavily influenced by the concerns of individuals as well as groups and is increasingly ‘determined on the basis of visions of what ought to be, rather than simply on the basis of what is.’\(^\text{207}\) The state in this context is ‘as an instrument of humankind rather than its master.’\(^\text{208}\) Although the incorporation of Indigenous rights has been slow and imperfect, and still falls short of expectations, the ‘mere achievement of visibility has seemed a tangible gain.’\(^\text{209}\)

While the virtually impossible was deemed possible through the inclusion of Indigenous peoples’ rights within the human rights framework, domestic legal systems remain the main engines of enforcing international law.\(^\text{210}\) As Scott Leckie states: ‘Translating the provisions and positive dictums of human rights law into concrete actions ... remains one of the greatest challenges facing the human rights movement and the community of nations.’\(^\text{211}\) International law does, however, provide an important vehicle for setting standards and fostering awareness, and can be seen as influential in changing societal attitudes.\(^\text{212}\) It is, therefore, an important mechanism through which the special rights of Indigenous peoples can be voiced.
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3 Ibid.


5 For more of a discussion on this see Paul Havemann (ed), Indigenous Peoples’ Rights in Australia, Canada and New Zealand (1999).


10 Marks, above n 6, 8. See also Lindley, above n 7.

11 Marks, above n 6, 8.

12 Iorns Magallanes above n 9, 236.


16 Iorns Magallanes, above n 9, 236.


18 See Thornberry, Indigenous Peoples and Human Rights, above n 1, 85.

19 Island of Palmas (United States v Netherlands) 2 RIAA 829 (1928); Charters, above n 4, 23.

20 Cayuga Indians (Great Britain v United States) 6 RIAA 173 (1926). The Court considered the Cayuga Nation as an entity of New York: ‘So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law within whose territory the tribe occupies the land, and so far only as that law recognizes it. Before the Revolution all the lands of the six Nations in New York had been put under the Crown as “appendant to the Colony of New York,,” and that colony had dealt with those tribes exclusively as under its protection…New York, not the United States, succeeded to the British Crown in this respect at the Revolution. Hence the “Cayuga Nation”, with which the state of New York contracted in 1789, 1790 and 1795, so far as it was a legal unit, was a legal unit of New York law’: at 176–7. See Charters, above n 4, 24.

21 Legal Status of Eastern Greenland (Norway v Denmark) PCIJ (Ser A/B) No 53 (1933).

22 See Thornberry, Indigenous Peoples and Human Rights, above n 1, 84. See also comment in Miguel Alfonso Martinez, Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations: Third Progress Report, [181]–[182], UN Doc E/CN.4/Sub.2/1996/23 (1996).


24 Ibid 31.

25 Lindley, above n 7, 329, cited in Thornberry, Indigenous Peoples and Human Rights, above n 1, 76.

26 General Act of the Conference of Berlin, signed on 26 February 1885, art VI, cited in Thornberry, Indigenous Peoples and Human Rights, above n 1, 76.


28 Ibid.

29 Ibid 7.

30 Wiessner, above n 13, 98.

31 Iorns Magallanes, above n 9, 237 (citations omitted).

32 Hersch 1969, cited in Marek Piechowiak, ‘What are Human Rights?’

33 *Charter of the United Nations*, arts 1(2)–(3), 55, 56, 73.


35 *Charter of the United Nations*, art 71. The UN Economic and Social Council is the parent body of the UN’s human rights and social policy organs. The *Universal Declaration of Human Rights*, GA Res 1514 (XV), UN GAOR, 15th sess, 67th plen mtg, UN Doc A/810 (III) (1948) further articulated the rights in the UN *Charter*.


40 Thornberry, *Indigenous Peoples and Human Rights*, above n 1, 92–3. The thesis is set out in *Replies of Governments Indicating their Views on the Factors to be Taken into Account in Deciding Whether a Territory is or is not a Territory Whose People Have not yet Attained a Full Measure of Self-Government to the Ad Hoc Committee on Factors (Non-Self-Governing Territories)*, UN Doc A/Ac.67/2 (8 May 1953) 3–31.

41 lorns Magallanes, above n 9, 237.


43 GA Res 1541 (XV), UN GAOR, 15th sess, 948th plen mtg, 29, principle IV, UN Doc A/4651 (1960).

44 Wiessner, above n 13, 102 (note 308).


46 Ibid 56.

47 *International Labour Organization Convention Concerning Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (No 107), opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) (‘ILO Convention 107’).


49 The preamble states that there ‘exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community’. See also lorns Magallanes, above n 9, 238.

50 *ILO Convention 107*, art 1(1).

51 ‘To the extent the international community valued cultural diversity, it was largely the diversity existing among the different states and colonial territories, not the diversity that might exist wholly within them’. See Anaya, *Indigenous Peoples in International Law 2nd Edition*, above n 23, 55.


53 ICCPR, art 1.

54 The Human Rights Committee is the treaty-based body established to supervise the obligations of state parties to the Covenant.


56 The Human Rights Committee initially refused to hear communications from Indigenous people with regard to alleged state breaches of the right to self-determination, maintaining that as self-determination is a collective right, only collectives can bring claims. However, collectives do not have standing to bring communications under the First Optional Protocol (see *Ominayak and Lubicon Lake Band v Canada*, UN Human Rights Committee, 38th sess, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (1984)).

57 UN Human Rights Committee, *General Comment 23: The Rights of Minorities*, 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5. See also lorns Magallanes, above n 9, 238.

58 ICCPR, art 2.


63 *International Covenant on Economic, Social and Cultural Rights*,
opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘ICESCR’).

64 Pritchard and Heindow-Dolman, above n 54,15.


66 Article 4 of CERD requires states to adopt legislation to protect ‘races’ or ‘groups of persons of one colour or ethnic origin’ against racist activities, including the promotion of racial hatred.

67 Charters, above n 4, 39. See also Natan Lerner, ‘The Evolution of Minority Rights in International Law’ in Catherine Brolmann, Rene Lefeber and Marjoline Zieck (eds), Peoples and Minorities in International Law (1993) 77, 94–5. The early warning action and urgent procedures have been utilised by Indigenous peoples; for example, the CERD Committee found that Australia’s 1998 amendments to the Native Title Act 1993 (Cth) breached the Convention and requested Australia to suspend the amendments: CERD Committee, Decision 2(54) on Australia, UN Doc A/53/18 (11 August 1998).


69 Genocide Convention, art 2. See also Lerner, above n 67, 93.


71 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).


73 Wiessner, above n 13, 98.

74 Thornberry, Indigenous Peoples and Human Rights, above n 1, 4.


78 Wiessner, above n 13, 98–9.

79 See paragraphs above.


82 Wiessner, above n 13, 99. See also Kingsbury, above n 81.


85 Ibid, 56.

86 This study was recommended in Hernan Santa Cruz, Racial Discrimination, ch 9, UN Doc E/CN.4/Sub.2/476/Add.5, annex 4 (1981). The UN Economic and Social Council then requested that the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a sub-organ of the Commission on Human Rights) prepare the Report.

87 Iorns Magallanes, above n 9, 239.


90 Thornberry, Indigenous Peoples and Human Rights, above n 1, 21.


92 Ibid 86–7.


94 Thornberry, Indigenous Peoples and Human Rights, above n 1, 20.

95 States refused to allow the use of the word ‘peoples’ in the title for fear of implying rights to secession. A discussion of this follows later in the paper. The WGIP is made up of five independent experts elected every two years by the Sub-Commission.


98 Ibid.

99 Even those not fulfilling the formal requirement of ‘consultative status with the Economic and Social Council’ as per ESC Res 1296 (XLIV), UN ESCOR, 44th sess, annex, UN Doc E/4485 (1968) were enabled to participate.

100 Stamatopoulou, above n 38, 63.
112 Iorns Magallanes, above n 9, 241.
114 Ibid, 59.
115 Iorns Magallanes, above n 9, 241.
117 Ibid.
120 Gina Cosentino, ‘Canada Brings its Fight Against Indigenous Rights to the UN’ (2007) 41 Canadian Dimension 19, 21.
121 Ibid. See also Davis, above n 124, 7.
122 Thornberry, Indigenous Peoples and Human Rights, above n 1, 375.
123 Ibid 396.
124 Wiessner, above n 13, 109.
126 Wiessner, above n 13, 111; see also Thornberry, Indigenous Peoples and Human Rights, above n 1, 47–50
127 This might include the Wayúu from Venezuela for instance: see Wiessner, above n 13, 111.
128 See Kingsbury, above n 81.
minority rights ... in international law is not the same story as for indigenous peoples, nor is the rights’ content’: Thornberry, *Indigenous Peoples and Human Rights*, above n 1, 34 (citations omitted). For more on this discussion see Lerner, above n 67; and for the development and content of minority rights see Patrick Thornberry, *International Law and the Rights of Minorities* (1991).

146 Daes, *Standard-Setting Activities*, above n 142, [35].
147 Ibid [69].
148 DRIP, art 33(1).
149 Cobo, above n 135, [381].
150 Ibid [382].
151 Piechoiwak, above n 32, 7.
157 Thornberry, *Indigenous Peoples and Human Rights*, above n 1, 6. See also Kymlicka, above n 156.
159 Thornberry, *Indigenous Peoples and Human Rights*, above n 1, 6. See also Jones, above n 158.
160 Holder and Corntassel, above n 158, 129.
161 Ibid 146.
162 Wiessner, above n 13, 121 (citations omitted).
163 Ibid 122.
166 Falk, *Human Rights Horizons*, above n 153, 133.
167 See ibid 133.
168 Lerner, above n 67, 96.
170 DRIP, preamble.
171 Ibid, art 1.
173 Ibid 52 (citations omitted).
178 Wiessner, above n 13, 116.
180 *ILO Convention 169*, art 12.
181 Ibid, art 1(3); Quane, above n 118, 658.
182 Anaya, ‘Self-Determination as a Collective Human Right Under Contemporary International Law’, above n 175, 5.
183 Ibid.
184 Ibid 8.
185 Ibid 9.
186 Ibid 15.
187 Ibid 12.
188 Ibid 13-14.
189 Wiessner, above n 13, 116.
190 Thornberry, *Indigenous Peoples and Human Rights*, above n 1, 9. See also Quane, above n 118, 660.
194 Quane, above n 118, 665.
195 The clause is similar to that found in the 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations, GA Res 2625 (XXV), UN GAOR, 25th sess, Supp

196 See Davis, above n 124, 8.


200 Falk, Human Rights Horizons, above n 153, 127.


204 Thornberry, Indigenous Peoples and Human Rights, above n 1, 85.


206 Ibid 53.

207 Ibid 50 (emphasis in original).

208 Ibid (citations omitted).

209 Falk, Human Rights Horizons, above n 153, 141.

210 Wiessner, above n 13, 116–17.


212 Falk, Human Rights Horizons, above n 153, 141.