THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

A COMMENTARY

EDITED BY
JESSIE HOHMANN
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OXFORD

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To patience – J.H.

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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACommHPR	African Commission on Human and Peoples' Rights
ADB	Asian Development Bank
ARIPO	African Regional Intellectual Property Organization
ASEAN	Association of South-East Asian Nations
AU	African Union
BIE	Bureau of Indian Education
BIT	bilateral investment treaty
CADE	Convention against Discrimination in Education
CAHMIN	Ad Hoc Committee for the Protection of National Minorities
CANZUS	Canada, Australia, New Zealand, and the United States
CBD	Convention on Biological Diversity
CCSI	Colombia Centre on Sustainable Investment
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEOSL	Confederación Ecuatoriana de Organizaciones Sindicales Libres
CEPO	Educational Council of Native Peoples
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CIEL	Center for International Environmental Law
CJ	Chief Justice
CNT	National Confederation of Workers of Paraguay
CommRC	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSCE	Conference on Security and Cooperation in Europe
CUTH	Single Confederation of Workers of Honduras
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECT	Energy Charter Treaty
EFA	Education for All
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
ESC	Economic and Social Council / economic, social, and cultural
ESCOR	Economic and Social Council Official Records
ESF	Environmental and Social Framework
FAO	Food and Agriculture Organization
FCNM	European Framework Convention for the Protection of National Minorities
FET	fair and equitable treatment

FIPA	Foreign Investment Protection and Promotion Agreement
FPIC	free, prior, and informed consent
FTA	Free Trade Agreement
GA	General Assembly
GAOR	General Assembly Official Records
GRULAC	Group of Latin America and Caribbean Countries
GTZ	Gesellschaft für Technische Zusammenarbeit (German Technical Cooperation Agency)
HRA	New Zealand's Human Rights Act
HRC	Human Rights Council
HRComm	Human Rights Committee
HREOC	Human Rights and Equal Opportunity Commission
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IADB	Inter-American Development Bank
ICC	International Criminal Court / Inuit Circumpolar Council
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPWCNH	Intergovernmental Committee for the Protection of the World Cultural and National Heritage
ICRC	International Committee of the Red Cross
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICSID	International Centre for Settlement of Investment Disputes
ICT	information and communication technology
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IFI	international financial institution
IGC	Intergovernmental Committee
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILO	International Labour Organization
IMF	International Monetary Fund
IPC	Indigenous Peoples' Commission
IPRA	Indigenous Peoples' Rights Act
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
ITU	International Telecommunication Union
ITUC	International Trade Union Confederation
IWGIA	International Work Group for Indigenous Affairs
MDGs	Millennium Development Goals
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization

NCLB	No Child Left Behind
NGO	non-governmental organization
NZBORA	New Zealand's Bill of Rights Act
OAS	Organization of American States
OAU	Organization for African Unity
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
RDA	Racial Discrimination Act
SDGs	Sustainable Development Goals
SID	Society for International Development
TKDL	Traditional Knowledge Digital Library
TRC	Truth and Reconciliation Commission of Canada
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN GAOR	UN General Assembly Official Records
UNCHR	UN Commission on Human Rights
UNCITRAL	UN Commission on International Trade Law
UNDP	UN Development Programme
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNESCO	UN Educational, Scientific, and Cultural Organization
UNFAO	UN Food and Agriculture Organization
UNFPA	UN Population Fund
UNHCHR	UN High Commissioner for Human Rights
UNICEF	UN International Children's Emergency Fund
UNIDROIT	International Institute for the Unification of Private Law
UNPFII	UN Permanent Forum on Indigenous Issues
UNTS	UN Treaty Series
UPOV	International Union for the Protection of New Varieties of Plants
VCLT	Vienna Convention on the Law of Treaties
WCIP	World Council of Indigenous Peoples
WGDD	Working Group on the Draft Declaration
WGIP	Working Group on Indigenous Populations
WIPO	World Intellectual Property Organization
WIPO IGC	WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
WSIS	World Summit on the Information Society

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Introduction

Jessie Hohmann and Marc Weller

Sometimes, in international diplomacy, just sometimes, miracles are possible. Admittedly, it took roughly a quarter of a century from the instruction to a UN expert Working Group to start considering standards on the rights of Indigenous peoples to the adoption of the Declaration on the Rights of Indigenous Peoples (UNDRIP, or the Declaration) by the UN General Assembly in 2007.[1] But the draft that emerged in the end was quite surprising. It consisted of forty-six Articles, backed by a lengthy Preamble. The Articles were, in the main, detailed and substantive. Overall, the instrument, while non-binding, had the look and feel of a hard-law treaty. And, it was adopted by what appeared to be an impressive vote of 144 in favour, with only 4 against, and 11 abstentions.

The reception of the instrument ranged from jubilation on the part of many to depression on the part of some. Indigenous peoples had mounted an unprecedented campaign in favour of a standard addressing their rights. They had received very substantial support from national and international NGOs, and had been able to organize themselves into several highly effective coalitions. The drafting process had started out in the hands of independent experts labouring in a Working Group of the Sub-Commission of the then-UN Commission on Human Rights.[2] Governments had contributed from an early stage, but later, as the instrument took more concrete shape, they started to dominate the negotiating process. And yet, the representatives and supporters of Indigenous peoples remained involved in a way that was, at that time, unprecedented for non-governmental actors.

For most, the Declaration seemed a huge achievement—and one that had been reached in the face of considerable obstacles. The key governments who represented States containing Indigenous peoples had mounted a major rear-guard action as the project of the Declaration suddenly appeared to reach fruition after the turn of the Millennium. Suddenly African States awoke to the realization that the Declaration might, after all, also be of relevance to their continent. They delayed adoption of the document for several months, while last-minute fixes were applied to offer them reassurances.[3] To most, the outcome retained the essence of the project and contained an array of substantive, advanced, and meaningful rights. To some, however, the compromises that had to be made were painful, undermining the concept of Indigenous rights and the prospects for their realization. This related in particular to the more limited understanding of the concept of self-determination reflected in the final text.

[1] Economic and Social Council Res 1982/34, Study of the Problem of Discrimination against Indigenous Populations, UN Doc E/RES/1982/34 (7 May 1982).

[2] Established by the Sub-Commission pursuant to the authorization in Economic and Social Council Res 1982/34 (n 1) para 1.

[3] This protracted negotiating history is examined in many of the chapters in this volume. See also M Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 Melbourne J Int'l L 439.

This major commentary investigates the substance of this compromise. It offers an authoritative interpretation of the provisions that were adopted, set against their negotiating history and implementation practice. More than that, it hopes to evaluate the end result in significant detail, attempting to identify to what extent the Declaration managed to reflect or set standards relating to Indigenous peoples that are respectful of their painful history, and that meet their needs and actual or claimed entitlements, while being sufficiently realistic to foster actual implementation by governments.

In addition, in line with its predecessors that covered the rights of minorities,[4] this commentary seeks to identify the relationship between the Declaration and international law. To what extent do the provisions reflect, or advance, international law in the area of the rights of Indigenous peoples? As no general, legally binding instrument has yet emerged in this area, the question is whether the Declaration has fostered or developed international customary law. The fact that there is much overlap between the UN Declaration and its very recent cousin developed by the Organization of American States, the American Declaration on the Rights of Indigenous Peoples,[5] is encouraging in this respect. Still, investigating the existence or otherwise of custom in this area is rather a fraught task. Much depends on domestic implementation practice. And, as Indigenous peoples are not present in all States—and may be present, but their presence unrecognized or their claims not mobilized as yet in others—implementation practice is naturally focused on a fairly narrow range of States as yet.

This commentary confirms that the Declaration has played a very significant role in reshaping domestic legislation since its adoption. Some of the language of its provisions has been restated directly in internal legal instruments. In other instances, the more aspirational provisions of the Declaration have at least been an effective campaigning tool for Indigenous peoples in their dialogue with governments. However, it is not always clear whether this practice reflects political compromise, or an actual or emerging sense of legal obligation that could be translated into *opinio juris* at the international level. In addition to the domestic level, at the international level, treaty monitoring bodies have made frequent references to the Declaration, particularly in the more recent general comments of the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Rights of the Child.[6]

Courts have also started to refer to the substantive obligations reflected in the Declaration. At the regional level, this extends in particular to the Inter-American Court of Human Rights. At the universal level, some particular issue areas, such as land rights, free, prior, and informed consent, and control over membership of Indigenous peoples have been addressed repeatedly, offering an emerging jurisprudence on areas of key concern to Indigenous peoples.

Rather than proceeding Article by Article, the structure and content of the Declaration has made a more thematic approach to the Commentary necessary.

[4] M Weller (ed), *Universal Minority Rights* (Oxford University Press 2007); M Weller (ed), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press 2005).

[5] American Declaration on the Rights of Indigenous Peoples, adopted 15 June 2016, AG/RES.2888 (XLVI-O/16).

[6] CERD, General Recommendation 23: Rights of Indigenous Peoples, UN Doc A/52/18 (18 August 1997) Annex V; UN Committee on the Rights of the Child (CommRC), General Comment 11: Indigenous Children and Their Rights under the Convention, UN Doc CRC/C/GC/11 (12 February 2009).

The chapters in Part I begin by setting the Declaration in the context of the history of the development of standards on Indigenous rights in international law, and assessing it in light of some of the major principles and regimes in international law. Part II gathers together the rights in the UNDRIP that concern self-determination, group identity, and the relationship of Indigenous peoples to the State. The chapters in Parts III to V consider cultural rights, land rights, and those rights generally classed as economic and social in nature, respectively. Part VI then turns to those provisions that provide for international assistance, reparation, and redress.

In Part I, Joshua Castellino and Cathal Doyle begin by considering the question, in Chapter 1, of the people and peoples to whom the UNDRIP applies, tracking the concepts of person, persons, groups, people, and peoples in international law, and the UNDRIP's contribution to these concepts. S James Anaya and Luis Rodríguez-Piñero then set out the development of international standards on Indigenous rights, providing a historical context of normative development in which we should view the Declaration. Chapter 3 then considers how the UNDRIP 'fits' within the broader picture of international legal instruments, with specific reference to related human rights norms. In this chapter, Martin Scheinin and Mattias Åhrén place a particular focus on the boundaries and interrelationships between the broader international legal system and human rights in general, on the one hand, and, on the other, the relationship between Indigenous peoples, communities, and individuals as recognized in the UNDRIP. This chapter also serves to analyse Articles 1, 45, and 46(2) in detail. In Chapter 4, Christina Binder considers the relationship of the UNDRIP to international investment and economic law.

Part II groups together analysis of rights to group identity, self-determination, and relations with States. Marc Weller's Chapter 5 on self-determination considers Articles 3, 4, 5, 18, 23, and 46(1). In Chapter 6, Jessie Hohmann analyses the rights to identity, existence, and non-assimilation in Articles 7(2), 8, and 43, which together enshrine rights to the protection of Indigenous peoples' continued survival and existence, both physically as individuals, and as cultural entities, in accordance with levels of human dignity and well-being. The rights to equality and non-discrimination in Articles 2, 6, and 7(1) are then considered in Kirsty Gover's Chapter 7. Focusing on the relationships between the Indigenous individual and the Indigenous community, group, or nation, the question of the right to select—or deny—membership, and of duties to the community, in Chapter 8 Shin Imai and Kathryn Gunn discuss Articles 9, 33, 35, and 36. The final chapter in Part II tackles the norm of free, prior, and informed consent (FPIC), found in Articles 10, 19, 29(2), and 32(2).

In Part III, the chapters cover rights that can be understood—at least as a starting point for analysis—as rights to culture. In Chapter 10, Alexandra Xanthaki tackles rights to culture head-on, with an analysis of Articles 11(1), 12, 13(1), 15, and 34. Tobias Stoll's Chapter 11 then assesses the specific right to intellectual property and technologies in Article 31, while Daniel Joyce analyses the right to media in Article 16, in Chapter 12. Lorie Graham and Amy Van Zyl-Chavarro then discuss the right to education in Article 14, in the final chapter of this Part.

Rights to land, territory, natural resources, and the environment are covered in the chapters in Part IV. Here, Claire Charters considers land rights and land use, broadly conceived, in Chapter 14, where she assesses Articles 10, 25, 26, and 27. Stefania Errico's chapter turns the attention to Articles 29, 30, and 32, to consider natural resources and the environment.

Economic and social rights are also important in the Declaration. In Part V, Lee Swepston canvasses labour rights under Article 17 of the Declaration (Chapter 16) while Camilo Pérez-Bustillo and Jessie Hohmann's chapter on development, socio-economic rights, and rights for groups with particular vulnerabilities analyses Articles 20, 21, 22, 24, and 44.

The final Part of the Commentary considers those provisions that look forward, to the implementation of the Declaration and to assistance in that endeavour, with Willem van Genugten and Federico Lenzerini writing in Chapter 18 on Articles 37 to 42. Meanwhile, looking both backwards and forwards, Federico Lenzerini considers rights to reparations, restitution, and redress in Articles 8(2), 11(2), 20(2), and 28.

What might at first appear as considerable overlap and repetition among and within the UNDRIP's provisions should rather, as many of the chapters in this volume make clear, be understood as encapsulating a different understanding of the relationships between and among rights, one that better accords with Indigenous experience, world-view, history, and future flourishing as peoples. The organization of the chapters, and the grouping of Articles, seeks to better capture, reflect, and shed light on these understandings.

The editors' decision to capitalize the word 'Indigenous' in the volume was made after discussion with a number of Indigenous individuals, academics and scholars, and the chapter authors. While not uncontentious among the volume's authors, we have chosen to capitalize 'Indigenous' as this is now the practice of a number of Indigenous peoples and individuals themselves, and is also a gesture that seeks to redress the balance between States—who are capitalized as a matter of course—and Indigenous peoples. We do not intend any essentialization of Indigenous individuals or peoples through our choice to capitalize the designation, recognizing their multiple and vibrant identities will not be captured by any one word or descriptor

PART I

THE UNDRIP'S RELATIONSHIP TO EXISTING INTERNATIONAL LAW

Chapter 1. Who Are 'Indigenous Peoples'?

An Examination of Concepts Concerning Group Membership in the UNDRIP

Joshua Castellino and Cathal Doyle

1. Introduction

Judge Dillard famously stated that it is for 'the people to determine the fate of the territory and not the territory the fate of the people'.[1] Articulated in the context of an attempt to determine the fate of the Western Sahara (Rio del Oro and Saket el Hamra), the statement reflected a position in a long-held debate in public international law concerning the entitlement question of who the rights bearer of such an action may be.

This chapter seeks to examine this entitlement question in the context of specific groups which are now identified as Indigenous peoples. To this end, the chapter is divided into two principal sections. The first section will introduce and assess the use of the following terms concerning group rights in international law: 'peoples', 'Indigenous peoples', 'tribal peoples', and 'minorities'. Each of these conceptual classes has its own particular, albeit fluid, meaning under international law, embodying a set of generally accepted group characteristics and a relatively well-defined corpus of group rights. However, rather than constituting hermeneutically sealed categories, to which particular groups exclusively and permanently pertain, the boundaries between these classes can be blurred, porous, and shifting. Addressing the entitlement question in the context of Indigenous peoples necessitates an examination of the concept of 'peoples' which the adjective 'Indigenous' qualifies. It is also fundamental to the debates pertaining to Indigenous peoples' right to self-determination. An examination of the concept of minorities is equally necessary, as most Indigenous peoples are numerically inferior to the rest of the population in which they reside and share certain rights and characteristics with minority groups. In addition, in the absence of an alternative effective channel to address their claims, the minority rights framework has, on occasion, been invoked to uphold Indigenous peoples' cultural rights. However, the application of the label 'minority' to these groups is problematic where its effect is to negate the implicit claims to peoplehood embodied in the concept of 'Indigenous peoples'. Given this context, any effort to identify the main contours distinguishing Indigenous peoples from other contenders for group legitimacy in international law should begin with an exploration of the concepts underpinning the terms 'peoples' and 'minorities'. The first section consequently commences with an introduction to the concept of 'group rights' before exploring each of the aforementioned conceptual categories.

The second section will then seek to focus on the extent to which the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) as a document has made a contribution to the clarity of terminology concerning 'Indigenous peoples'. It needs to be highlighted

[1] *Advisory Opinion on the Western Sahara*, [1975] ICJ Rep 122 (H Dillard, Dissenting Opinion).

here that the UNDRIP has no specific Article or provision that defines Indigenous peoples. As a result, this commentary seeks to provide readers with the contextual background that underpins the definition debate, supporting the drafters' argument that the definitional criteria under customary international law suffice.

The initial public international law debate pertaining to the entitlement question stemmed from statements and attempts made by US President Woodrow Wilson to seek to determine the political future of contested territories in Europe at the end of World War I.[2] He famously stated that, 'peoples may now be dominated and governed by their own consent',[3] and warned statesmen about the 'perils' associated with ignoring these aspirations. While this statement was seen as validating the aspirations of many sub-national groups living within sovereign States, Wilson in the same address did restrict the ambit of its interpretation by suggesting that while 'all national aspirations shall be accorded utmost satisfaction ... [this had to be achieved] ... without introducing new or perpetuating old elements of discord and antagonism'.[4] It is generally accepted that Wilson's vision was informed by his belief that democracy or 'the democratic entitlement' was fundamental to any governmental legitimacy.[5] However, it is equally true that Wilson's Fourteen Point Address raised questions concerning the issue of the entitlement under international law for the right to be considered a 'self' that could then determine its future. This brought to the fore valid questions as to how the 5,000 groups that Gurr tells us exist could be reasonably accommodated in the 200 sovereign States that exist.[6]

As this chapter will demonstrate, the question of such 'entitlement to self-determination' has since arisen regularly in the context of seeking to determine 'who' the people were.[7] This has spanned significant discussion about the nuances of 'peoplehood' and its precise constituents, and while it holds many intrinsic applications for Indigenous peoples, the regime(s) that had developed appeared to forestall Indigenous peoples from using the language of self-determination, in any other manifestation than 'internal' self-determination.[8]

When the underlying purpose of self-determination is examined, it becomes clear that this discourse arose out of the yearning for freedom from oppression and subjugation. The primary argument that drove most movements over history was that for a group, however defined, to retain its culture and identity, they would need to govern themselves, rather than being governed by *The Other*, who failed to respect their mores and values. As various self-determination movements have articulated this concept, it has become a permanent fixture in the firmament of international society. Yet, when it has come to the application of this promise to Indigenous peoples, questions have been raised as to: (a) its applicability; (b) who exactly ought to be entitled to such a right; and (c) the impact that the exercise of such a right would have on State stability. The question of ownership and control of resources has also been an intrinsic element of these questions. As a result,

[2] A Whelan, 'Wilsonian Self-Determination and the Versailles Settlement' (1994) 43 ICLQ 99–115.

[3] RS Baker and WE Dobbs (eds), *The Public Papers of Woodrow Wilson*, vol I: *War and Peace: Presidential Messages and Addresses 1917–1924* (Harper and Brothers 1927) 180.

[4] ibid vol V, 231.

[5] TM Franck, 'The Emerging Right to Democratic Governance' (1998) 92 AJIL 46–91.

[6] T Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflicts* (US Institute of Peace Press 1993).

[7] For classical texts examining these issues, see: A Cassesse, *Self-Determination of Peoples: A Legal Appraisal* (Cambridge University Press 1995); H Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press 1980).

[8] CL Holder and JJ Corntassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights' (2002) 24 HRQ 126.

any commentary on the UNDRIP would need to address the extent to which that document has contributed to greater clarity on the contours of the identity of various groups encompassed by the concept of Indigenous peoples. A segment of this question, namely that concerning self-determination, is addressed by Mark Weller, in Chapter 5 of this book. This particular chapter therefore has two specific aims: (a) a general exposé of the aforementioned terms that are prevalent in international law for identifying groups; and (b) to examine the extent to which the UNDRIP has contributed to greater clarity around these in the specific context of Indigenous peoples' rights and their entitlement to claims of peoplehood.

2. The Quest for International Legal Personality: Peoples, Indigenous Peoples, and Minorities

The Universal Declaration of Human Rights unveiled in 1948 sought to identify a broad category of rights that would be available to protect every individual on the basis of their being part of the human community.[9] The rights envisaged were purported to guarantee each individual's inherent dignity and worth.[10] However, as had been apparent in the centuries prior to the Declaration, there existed and continued to exist a fundamental difference between the *de facto* access to rights and their *de jure* articulation. In the context of the history of international law, the attempt to bridge this difference is visible in the many *lex specialis* regimes that have been created in order to protect specific categories of individuals who are classifiable as members of a definable group.[11] Special regimes have been designed to protect women and children in the context of war[12] and minorities regarded as particularly vulnerable owing to their location within States that did not fully represent them.[13] The aim of such measures was to create an extra layer of protection in a bid to overcome the difficulties of access to rights faced by members of such groups.[14] Despite the re-articulation of the modern agenda of human rights as rights applying *equally* to every individual, the trend towards recognizing *lex specialis* has continued.

[9] For general reading on the Universal Declaration, see J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999); also *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press 2009).

[10] There has been some critique about the individuality (as opposed to collective nature) of the protections enshrined here. See DL Donoho, 'Relativism versus Universalism in Human Rights: The Search for Meaningful Standards' (1990–1991) 27 Stanford JIL 345–92; H Lewis, 'Between Irua and Female Genital Mutilation: Feminist Human Rights Discourses and the Cultural Divide' (1995) 8 *Harv HRJ* 1–56; and A An-Na'im, A Madigan, and G Minkley, 'Cultural Transformations and Human Rights in Africa: A Preliminary Report' (1997) 11 Emory Int'l LR 287–350.

[11] This sub-section on group rights is derived from an article that examines the arguments for the creation of *lex specialis* for whistleblowers as a class in international law. See D Lewis and J Castellino, 'Establishing a Different Dimension on Citizen Security: The Case for Special Protection for Whistleblowers' (2013) 4(4) Beijing LR 185–97.

[12] As discussed by H Durham in 'Women, Armed Conflict and International Law' (2002) 847 Int'l Rev of the Red Cross 655–59. There are forty-two provisions referring to women in the 1949 Geneva Conventions on the Law of Armed Conflict and the 1977 Additional Protocols: see J Gardam and M Jarvis, *Women, Armed Conflict and International Law* (Kluwer Law International 2001). For an articulation of child rights during the League of Nations, see Geneva Declaration of the Rights of the Child of 1924 (adopted 26 September 1924), League of Nations OJ Spec Supp 21, at 43 (1924).

[13] Among the most famous ancient treaties that are cited is The Promise of St Louis of France, 1250. For more, see P Thornberry, *International Law and the Rights of Minorities* (Clarendon Press 1991) esp ch 1.

[14] For more on access to justice, which underpins this issue, see DL Rhode, *Access to Justice* (Oxford University Press 2004) 1–19, 103–20. Also F Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007).

Among the pantheon of such protection are instruments, which in addition to the UNDRIP[15] pertain to minorities,[16] women,[17] children,[18] migrant workers (documented and undocumented),[19] refugees,[20] and disabled people.[21] In every instance, international instruments have been passed, and/or signed and ratified, containing a series of general human rights, a list of specific rights distinct to the class of persons in question, and, in some cases, an additional mechanism designed to overcome the problem of the groups' lack of access to general rights.[22] Most recently, the trend has also included the creation of *lex specialis* at the European level, for human rights defenders, on the grounds that their rights are particularly difficult to guarantee.[23]

Despite this significant recognition of group rights (or more precisely, in most instances, of individual rights identified for a class of individuals), predominantly occurring

[15] See Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No 169), 72 ILO Official Bulletin 59, entered into force 5 September 1991; UN Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/47/1 (2007); Proposed American Declaration on the Rights of Indigenous Peoples (approved by the Inter-American Commission on Human Rights, 26 February 1997), Doc No OEA/Ser/L/V/II.95 Doc 6 (1997).

[16] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, GA Res 47/135, Annex, 47 UN GAOR Supp (No 49) at 210, UN Doc A/47/49 (1993).

[17] Convention on the Elimination of All Forms of Discrimination against Women, GA Res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, GA Res 54/4, Annex, 54 UN GAOR Supp (No 49) at 5, UN Doc A/54/49, vol I (2000), entered into force 22 December 2000; and in the context of war, see Declaration on the Protection of Women and Children in Emergency and Armed Conflict, GA Res 3318 (XXIX), 29 UN GAOR Supp (No 31) at 146, UN Doc A/9631 (1974).

[18] Convention on the Rights of the Child, GA Res 44/25, Annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No 182), 38 ILM 1207 (1999), entered into force 19 November 2000; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, GA Res 54/263, Annex I, 54 UN GAOR Supp (No 49) at 7, UN Doc A/54/49, vol III (2000), entered into force 12 February 2002; and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, GA Res 54/263, Annex II, 54 UN GAOR Supp (No 49) at 6, UN Doc A/54/49, vol III (2000), entered into force 18 January 2002. In addition, there are also guidelines concerning juvenile offenders such as UN Rules for the Protection of Juveniles Deprived of their Liberty, GA Res 45/113, Annex, 45 UN GAOR Supp (No 49A) at 205, UN Doc A/45/49 (1990); UN Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines'), GA Res 45/112, Annex, 45 UN GAOR Supp (No 49A) at 201, UN Doc A/45/49 (1990); and UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), GA Res 40/33, Annex, 40 UN GAOR Supp (No 53) at 207, UN Doc A/40/53 (1985).

[19] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res 45/158, Annex, 45 UN GAOR Supp (No 49A) at 262, UN Doc A/45/49 (1990), entered into force 1 July 2003.

[20] Convention relating to the Status of Refugees, 189 UNTS 150 (entered into force 22 April 1954); Protocol Relating to the Status of Refugees, 606 UNTS 267 (entered into force 4 October 1967); Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2 (1998); Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc OEA/Ser.L/V/II.66/doc.10, rev 1, at 190–3 (1984–1985), 17 April 1998.

[21] Declaration on the Rights of Disabled Persons, GA Res 3447 (XXX), 30 UN GAOR Supp (No 34) at 88, UN Doc A/10034 (1975); International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, GA Res 61/106, Annex I, UN GAOR, 61st Sess, Supp No 49, at 65, UN Doc A/61/49 (2006), entered into force 3 May 2008; First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, GA Res 61/106, Annex II, UN GAOR, 61st Sess, Supp No 49, at 80, UN Doc A/61/49 (2006), entered into force 3 May 2008.

[22] For more on the UN-Treaty-based system, see P Alston (ed), *United Nations Human Rights: A Critical Reappraisal* (Oxford University Press 1996).

[23] See 'Ensuring Protection: EU Guidelines On Human Rights Defenders', <https://eeas.europa.eu/sites/eeas/files/european_union_guidelines_on_human_rights_defenders.pdf> accessed 31 January 2018.

within international human rights law, the persistent focus from the lens of international law that has arisen, mainly in the context of self-determination, are the key differentials among 'peoples', 'Indigenous peoples', sometimes including 'tribal populations', and 'minorities'. It is to these differentiations that this section will now turn. It needs to be acknowledged that it does seem logical that arguments pertaining to Indigenous peoples' rights start from the premise that their self-determination ought to be located within the context of decolonization,[24] since colonial expansion was central to the dispossession of peoples and the measures seeking to gain greater representation were best articulated in the context of decolonization. Further, the 'success' of decolonization has resulted in new States coming to independence with full sovereign rights and an equal bargaining position at the high table of international society. Many minorities, too, argue that the treatment meted out to them necessitates an automatic trigger for the right of self-determination, drawing on a 'right' first expressed by Grotius as *jus secessionis ac resistendi*, or the right to secede as a form of resistance to oppression.[25] While questions concerning the right to resistance remain extremely problematic in international law,[26] elements of this idea can be seen in what some authors label the right to 'remedial self-determination'.[27] However, while many communities may allege that their treatment by an unrepresentative State may be unfair and quasi-colonial, the threshold for gaining the right to self-determination in international law has remained configured on the problematic grounds of 'peoplehood'. The rest of this section will therefore examine three such groups:

(a) peoples, also referred to as 'nations' or 'submerged nations';
(b) minorities, also referred to as 'ethnic, linguistic, or religious minorities' or, more problematically in Europe, as 'national minorities';
(c) Indigenous peoples, also referred to as 'first nations' and 'aborigines', and usually considered to subsume 'tribal peoples'.

2.1 Peoples

The concept of 'Indigenous peoples', and the debates pertaining to it in the drafting of the UNDRIP, cannot be understood without reflecting on the notion of 'peoples' which the adjective 'Indigenous' serves to qualify and contextualize. Defining a 'people' would be extremely difficult and while several efforts have been made to identify the constituent elements of 'peoplehood', these usually involve the conflation of the notion with the concept of 'nationhood'.[28] This interpretation is necessarily subjective and has little normative value in law. Thus, it is hard to see why *Indians* as a category may be considered

[24] See B Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92(2) AJIL 414–57.

[25] See R Higgins, 'Grotius and the Development of International Law During the United Nations Period' in H Bull, B Kingsbury, and A Roberts (eds), *Hugo Grotius and International Relations* (Clarendon Press 1990) 267–80.

[26] See B Rajagopal, 'International Law and Social Movements: Challenges of Theorizing Resistance' (2002–2003) 41 Columbia J Transn'l L 397–434.

[27] For an exploration of this issue in an Indigenous peoples context, see B Kingsbury, 'Reconstructing Self-Determination: A Relational Approach' in P Aikio and M Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Åbo Akademi University 2000) 19–38. For self-determination outside this context, see J Castellino, 'The Secession of Bangladesh in International Law' (2000) 7 Asian YBIL 83–104.

[28] See generally AD Smith, *Nationalism* (Polity Press 2001, repr. 2010).

a 'people', while *Kashmiris* might not; or similarly why the *Chinese* may be a people, but *Tibetans*, *Uighurs*, or *Mongolians* may not.[29] The Chinese use of the term (*shaoshu minzu*), which equates in English to 'minority nationalities', suggests that the fifty-six groups that fall under this category are accepted as 'nations', but since fifty-five of them (ie not the Han, the majority) are numerically inferior to the Han, they are considered 'minority' nationalities.[30] Discussions on the categorization of groups as 'peoples' inevitably involves either aggrandizing or belittling historically significant communities or nations by emphasizing or denying them the right to call themselves 'peoples' in the sense that may generate claims for self-determination. The literature around international law appears to accept the problematic reading of 'peoples' as consisting of 'whole peoples', language that subsumes historical discussions such as the 'Belgian Thesis'[31] and the 1970 Declaration on Friendly Relations between States,[32] accepted by many as articulating codified founding principles of international law.[33] Yet, such a classification of 'whole peoples' pays much greater credence to the drawing of colonial boundaries delimiting entities rather than any congruence of cohesion in the communities that inhabit such a territory.[34]

Thus, to go back and challenge the sentiment expressed by Judge Dillard, it puts the territory ahead of the people.[35] This is another aspect that becomes particularly problematic in seeking to understand the constituent elements of 'peoplehood'. The context of Abyssinia—the precursor to the State of Ethiopia—is a case in point.[36] A portion of this 'State' of undetermined boundaries, namely Eritrea, came under the influence of Italy from 1889 onwards,[37] with Britain gaining the mandate for the territory following World War II. The expansionist Emperor of Ethiopia, Haile Selassie I, attempted to integrate Eritrea back into Ethiopia using the argument that it had always been part of Abysinnia.[38] As a compromise, an Anglo-American-supported federation was formed between Ethiopia and Eritrea, but antagonism grew, as did the self-determination claim

[29] J Castellino and E Dominguez Redondo, *Minority Rights in Asia: A Comparative Legal Analysis* (Oxford University Press 2006) 113–17, noting that the latter is particularly difficult to accept since Mongolians in the State of Mongolia are clearly recognized as a people, while their kin across the border in the Chinese State of Inner Mongolia do not acquire similar treatment. The Chinese context is also complicated by the use in Chinese of a term (*shaoshu minzu*) which equates in English to 'minority nationalities'.

[30] B Sautman, 'Preferential Policies for Ethnic Minorities in China: The Case of Xinjiang' (1998) 4(1/2) Nationalism & Ethnic Politics 86–118.

[31] For a discussion of the 'Belgian Thesis' and its relation to Indigenous peoples, see V Langenhove, 'The Question of Aborigines before the United Nations: The Belgian Thesis' (1954) 89 Rec des Cours 321. Also see UN Doc A/AC.67/2 (8 May 1952) 3–31.

[32] See Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV) (24 October 1970).

[33] P Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 ICLQ 867.

[34] J Castellino and S Allen, *Title to Territory in International Law: An Inter-Temporal Analysis* (Ashgate 2005).

[35] R Higgins, 'Judge Dillard and the Right to Self-Determination' (1983) 23 V J Int'l L 387–94.

[36] See generally R Pankhurst (ed.), *Diary of a Journey to Abysinnia 1868: The Diary and Observations of William Simpson* (Newburyport Press 2002). See also A Sbacchi, *Ethiopia and Fascist Italy 1935–1941* (Red Sea Press 1997). One of the only countries in Africa not to have fallen under serious colonial influence, except for a brief period between 1936 and 1941, Abyssinia is situated over a significant part of North-East Africa between the Maghreb to the west of it and the 'Middle East'.

[37] R Pankhurst, *State and Land in Ethiopian History* (Haile Selassie I University 1966).

[38] S Pankhurst (ed), *Ethiopia and Eritrea: The Last Phase of the Reunion Struggle, 1941–1952* (Lalibela House 1953).

within the Eritrean territory.[39] The dismantling of Eritrean self-governing structures, and the 1970 abolition of the federal structure of the State, led to a fully fledged war of independence.[40] Eritrea finally won that war in 1991 and became a State in 1993 through a UN-sponsored plebiscite. According to the literature, this was an instance of a 'people' successfully claiming the right to self-determination.[41] However, the episode raised more questions than answers about the definition of that 'peoplehood'. It has also enabled many of Gurr's notional 5,000 groups to lay claim to being among the 200 that deserve recognition as a people followed by an entitlement to forge a new State. From the perspective of the two decades of debate that was to follow shortly thereafter in the United Nations with regard to Indigenous peoples' entitlement to the right to self-determination, the mere prospect of any such peoples seeking independent statehood became an intractable issue which served to stall meaningful discussion and agreement on other important dimensions of Indigenous peoples' right to self-determination.[42]

Outside the politics of recognition of claims to peoplehood, there is considerable evidence for the support of the claims to peoplehood of the Palestinians,[43] Tibetans,[44] and Kurds,[45] from State practice, unilateral acts of States, and General Assembly resolutions. The claims of others, such as the Basque, Kashmiris, Tamils, and Chechens, are processed and thought of differently, with the evidence more ambiguous. In any case, it ought to be made clear that the search for such evidence posits a declaratory approach to the recognition of peoplehood, rather than a constitutive one.[46] This in itself is problematic since it brings the politics of vested interests into what, for some, is a more basic question of legitimate existence. In many instances, there are also discrepancies between how two communities or 'nations' within the same State are processed or perceived, such as the treatment of Uighurs and Tibetans. This inevitably highlights the subjective and highly politicized nature of the determination of 'peoples', and the extent to which claims made under this banner gain credence from the international community.

2.2 Minorities

The second category that it is necessary to consider before discussing the concept of 'Indigenous peoples' is that of 'minorities' and the international rights regime which has developed to protect those groups who fall within this category. Indigenous peoples are frequently numerically inferior to the populations of the societies in which they reside and consequently share certain characteristics with minorities. The international minority rights regime preceded the contemporary international Indigenous peoples' rights

[39] PB Henze, *Ethiopia and Eritrea in Transition: The Impact of Ethnicity on Politics and Development* (Rand Press 1996).

[40] See E Gayim, *The Eritrean Question: The Conflict between the Right of Self-Determination and the Interests of States* (Iustus Forlag 1993).

[41] ibid.

[42] C Doyle and J Gilbert, 'Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development"' (2009) European YB Minority Issues 219, 243–4.

[43] See J Castellino and K Cavanaugh, 'The Role of Law in the Minority Discourse in the Middle East' (2013) European YB Minority Issues 5–20.

[44] See R McCorquodale and N Orosz (eds), *Tibet: The Position in International Law* (Serindia Publications 1994).

[45] D Romano, *The Kurdish National Movement: Opportunity, Mobilization and Identity* (Cambridge University Press 2006).

[46] See generally J Dugard, *Recognition and the United Nations* (Grotius Publications 1987).

discourse. In some cases, the minority rights regime therefore provided the only effective opening into the UN human rights system in the context of petitions addressing violations of Indigenous peoples' collective culturally based rights. Despite its utility in certain contexts for raising claims around abuses of Indigenous rights, the application of a minority rights framework to those groups who self-identify as Indigenous peoples remains contentious and potentially counterproductive. Definitional distinctions between the concepts of 'minorities' and 'peoples' have meant that the former label is regarded as highly problematic by Indigenous peoples if its usage serves to demote their entitlement to claim the status and rights embodied in the latter. An appreciation of the history, objectives, and limitations of the minority rights regime is consequently necessary in order to contextualize the discussion in relation to the concept of Indigenous peoples and how it was addressed during the drafting of the UNDRIP.

The idea of protecting the weak from the strong is a powerful concept that has inspired many sentiments and movements in human history. While much of this history can be defined in socio-legal terms as quests through which the powerful have erected structures to protect their own interests, there is a rich trend detectable of those who have sought to agitate for the interests of the weak in what was otherwise a relentless push for total dominance.[47] The growth of minority rights as a discipline owes its heritage to those who struggled to create adequate standards of protection to safeguard the numerically inferior and non-dominant communities from the excesses and dominance of the majority. Minority rights issues provided an important axis along which public international law itself evolved, with early treaties such as the Promise of St Louis of France 1250 being instrumental in highlighting the condition of the Maronites as a legitimate concern of international society and not merely the territorial entity within which this community lived.[48]

The growth of the minority rights discourse as a collection of documents and various types of writings can be tracked back to a range of bilateral treaties throughout the seventeenth and eighteenth centuries, as regional rivals such as Greece and Turkey, Austria and Russia, and Austria and Turkey came to terms with how to address divided loyalties arising from populations swearing allegiance to one entity, but living as a numerically inferior population within the territory of another.[49] These concerns paint a sophisticated perspective of minority rights within Europe, but also signal antagonisms between West and East, and clashes between Christianity and Islam, with the latter represented in the form of the Ottoman Empire.

The minority rights discourse sits at a tangent from the processes of colonization: while Europe was evolving modes of minority protection to look after specific communities which may have come under the aegis of another due to changing boundaries, this process remained hermeneutically sealed from Europe's quest for dominance of non-European

[47] For a historical source that focuses on this and reflects the heritage of the discourse, see OI Janowsky, *Nationalities and National Minorities* (Macmillan 1945). See also C Macartney, *National States and National Minorities* (Oxford University Press 1934).

[48] General background information on St Louis and the Treaty can be found on the website of the *Encyclopaedia Britannica*, <original.britannica.com> accessed 25 July 2012.

[49] See the Convention of the Settlement of the Frontier between Greece and Turkey, 1881, available in M Hurst (ed), *Key Treaties of the Great Powers*, vol 2 (David & Charles 1972) 592; eg the Treaty of Carlowitz, 1699, available in J Fouques-Duparc, *La Protection des Minorités de Race, de Langue et de Religion* (Dalloz 1922) 79; and the Convention of Constantinople, 1879, available in Hurst, *Key Treaties of the Great Powers*, vol 2, 583.

land and resources. Thus, evolving standards of minority rights protection, driven by the need to protect communities who were non-dominant, were not viewed as transferrable to the context of protecting those who came under European jurisdictions as a result of colonization. Colonial activities of European States were beyond the scrutiny of evolving standards at home, and are today often foreclosed by the inter-temporal rule of law.[50] As a consequence, little was brought to bear on the manner in which territory was illegally acquired and demarcated in Latin America, Africa, Asia, and the Middle East.[51]

The dominance of European perspectives within the minority rights discourse is striking, even though in reality one of the most sophisticated early sources of minority rights protection actually existed in the Ottoman Empire's demarcation of religious autonomy.[52] Yet, modern 'minority rights' as a concept, or 'the rights of national minorities' as it was more commonly written about, developed its conceptual bases in the experiences of communities that were affected by the break-up of the Austro-Hungarian Empire and the reconfiguration of 'nation-States' in Europe.[53] By the time the League of Nations was established, minority rights had taken a relatively central position in Central European politics, as reflected in its prominence within the heart of that institution's mandate.[54] The palpable failure of the League of Nations' regime to deliver protection against and resistance to the Nazis, coupled with its failure to tackle Europe's invidious discrimination against minorities, highlighted the paucity of commitment to enshrine protection. The events of World War II signalled its ultimate defeat, with the League unable to prevent the genocide of Jews and other minorities.

Under the UN auspices, protection of minorities is subject to two seemingly conflicting trends. First, the UN Charter placed emphasis on the prevention of inter-State conflict; and second, human rights were enshrined as part of the 'hard-wiring' of the new system. The former signalled that attention had moved away from how States behave toward their populations. The principle of State sovereignty, expressed as Article 2(7) of the Charter, drew a protective veil over issues considered as occurring within the domestic jurisdiction of States.[55] Six decades of State practice under the UN era reveals that States avoid scrutiny of their records with regard to minorities by seeking refuge under the principle expressed in Article 2(7). This protects the State when faced with self-determination movements such as those of the Palestinians, Kurds, and Baluchis, who perceive themselves as submerged nations living as *de facto* minorities on their own lands. The second trend emphasizes the inherent dignity and worth of all individuals, and began a process through which States were required to imbibe human rights protection within domestic law to uphold this tenet. With such all-encompassing protection, a *lex specialis* for minorities or other groups became redundant.

While these developments at the United Nations stalled the development of 'international' minority rights law, its influence grew steadily as a range of post-colonial

[50] TO Elias, 'The Doctrine of Intertemporal Law' (1980) 74(2) AJIL 185–307.

[51] S Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Clarendon Press 1996).

[52] K Hashemi, 'The Right of Minorities to Identity and the Challenge of Non-Discrimination: A Study on the Effects of Traditional Muslims' Dhimmah on Current State Practices' (2006) 13(1) Int'l J Minority & Group Rights 1–26.

[53] M Mazower, 'Minorities and the League of Nations in Interwar Europe' (1997) 126 Daedalus 47–63.

[54] J Stone, 'Procedure under the Minority Treaties' (1932) 26(3) AJIL 502–13.

[55] For more on the drafting history and interpretation of Art 2(7), see B Simma, *The United Nations Charter: A Commentary* (2nd edn, Oxford University Press 2002).

countries arrived at independence, as within the Middle East, with inherited populations that were the result of vested colonial boundary-line demarcations, rather than group cohesion.[56] It soon became apparent that such boundary demarcations within post-colonial entities would ultimately determine whether a group existed as a minority or a majority within any given State.[57] The extent to which the typical post-colonial State, consisting of competing nations and identities, could arrive at an inclusive model of protections brought minority issues to the forefront.

The literature that widely tackles the issues under consideration here is dominated by discussions as to the precise nature of 'who' a 'minority' or an 'Indigenous people' are.[58] A working definition of who a minority is remains important, but rather than seeking to discuss the merits of such definition, it is proposed that the definition of Francesco Capotorti, framed in 1977, be accepted with all its conceptual weaknesses.[59] Thus, for the purpose of this work a minority can be considered:

> [a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, religion or language.[60]

Two caveats of this definition need to be briefly addressed with regard to its suitability for this particular exercise. First, in the context of the issue of nationality, the restrictive approach of law would require that 'minorities' be nationals of a State. Thus, the prime focus of international minority rights law has often been concern regarding the treatment by a State of minority groups within it, based on the accepted principle that distinguishing between nationals and non-nationals is a prerogative of State sovereignty. The allowable differentiation of a State's treatment of citizen and non-citizen is reflected in human rights law,[61] but has subsequently been constricted.[62] Further, the traditional definition of 'national' minorities has not been useful beyond the borders of Europe, since this only accords status to groups living in one State with the nationality of another. While 'national' minorities are often as vulnerable as non-national minorities, the approach taken here is for a broader reading, to include non-national groups. This is particularly important since in the Middle Eastern context there are many individuals and communities

[56] J Castellino, 'Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools' (2008) 33(2) Brooklyn JIL 503–68, 503.

[57] This issue is addressed in an article by LFE Goldie, 'The Critical Date' (1963) 12 *ICLQ* 1251–284. See also JA Andrews, 'The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century' (1978) 94 LQR 408–27.

[58] J Pejic, 'Minority Rights in International Law' (1997) 19 HRQ 666; PV Ramaga, 'The Group Concept in Minority Protection' (1993) 15 HRQ 575; NS Rodley, 'Conceptual Problems in the Protection of Minorities: International Legal Developments' (1995) 17 HRQ 48; J Packer, 'On the Definition of Minorities' in J Packer and K Muntti (eds), *The Protection of Ethnic and Linguistic Minorities in Europe* (Åbo Akademi Institute of Human Rights 1993) 23; O Andrysek, 'Report on the Definition of Minorities' (Netherlands Institute of Human Rights, SIM Special No 8 1989).

[59] MJ Aukerman, 'Definitions and Justifications: Minority and Indigenous Rights in a Central/Eastern European Context' (2000) 22 HRQ 1011.

[60] F Capotorti, Special Rapporteur, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc E/CN.4/Sub.2/384/Rev.1 (1977).

[61] The International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (opened for signature 7 March 1966) Art 1(2).

[62] The Committee on the Elimination of Racial Discrimination (CERD) is the monitoring body for the Race Convention. See: CERD, General Recommendation XI: Non-Citizens UN Doc A/46/18 (19 March 1993); General Recommendation 30: Discrimination against Non-Citizens CERD/C/64/Misc.11/Rev.3 (10 January 2004).

who are either stateless due to a political motive, or who, as migrant workers, have no rights to nationality in the country in which they reside. Under the strict definition of 'minority', these groups could not be considered, even though the claim of the first is significantly stronger than that of the latter, who are treated in law as temporary workers with no rights to dominion.

Second, rather than validate this definition, it is re-articulated here to enable a basic understanding of the groups that would ostensibly come under the umbrella of protection afforded by international human rights law. The distinction between minority and majority, whether Indigenous or not, is better understood, in addition to a numerical aspect, as the distance between a community and sites of power.[63]

The academic writing on global minority rights law reflects its Western origins, and subsumes rich and complex discussions concerning nationalism,[64] electoral reform,[65] multiculturalism,[66] accommodation,[67] the role of the individual,[68] and questions of individual versus collective protection.[69] Such discussions are often underpinned by questions concerning ownership of resources.[70] The literature includes models for 'protection-oriented' rights with great relevance derived in the recent growth of international criminal law and the codification of crimes against humanity, war crimes, and genocide as punishable under the Rome Statute of the International Criminal Court.

2.3 Indigenous Peoples

At a theoretical level, in contemporary society Indigenous peoples appear best placed for engaging the decolonization rhetoric and gaining tangible rights to self-determination. Indigenous peoples in general have had their territory occupied by settlers and, in many circumstances, have lived as quasi colonial subjects on their own land.[71] In discussing the constituents of 'Indigenous peoples', one immediate question that arises is the value of the term 'Indigenous' itself. In other words, if the category of 'peoples' exists, why is it necessary to have a separate category of 'Indigenous peoples'? This is particularly true when the notion of peoplehood is assessed against the hallmarks of 'nationhood'. Waldron engages this issue when assessing the value of 'first occupancy', which seems to lie at the heart of the claim for 'Indigenous' status. While he accepts that the concept of indigeneity could be called upon to condemn colonization, he suggests that it ought not to be used to justify any revision to the *status quo ante*.[72] Such a focus would, he argues, legitimise,

[63] T Makonen, *Identity, Difference and Otherness: The Concepts of 'People', 'Indigenous People' and 'Minority' in International Law* (Erik Castren Institute, University of Helsinki 2000); see also JR Valentine, 'Toward a Definition of National Minority' (2004) 32 Denver JIL & P 445–74.

[64] M Keating and J McGarry (eds), *Minority Nationalism and the Changing International Order* (Oxford University Press 2001).

[65] W Rule, JF Zimmerman, and BK Johnpoll (eds), *Electoral Systems in Comparative Perspective: Their Impact on Women and Minorities* (Greenwood Press 1994).

[66] W Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford University Press 2001).

[67] A Reynolds, *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford University Press 2002).

[68] JE Oestreich, 'Liberal Theory and Minority Group Rights' (1999) 21(1) HRQ 108–32.

[69] V Van Dyke, 'Human Rights and the Rights of Groups' (1974) 18(4) AJPS 725–41.

[70] I Bannon and P Collier, *Natural Resources and Violent Conflict: Options and Actions* (World Bank 2003).

[71] C Doyle, *Indigenous Peoples, Title to Territory, Rights & Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge 2015) 3–70, where the author explores the Regalian Doctrine and its role in dispossessing Indigenous peoples.

[72] J Waldron, 'Indigeneity? First Peoples and Last Occupancy' (2003) 1 NZJPIL 56–82.

occupancy which is not disruptive of anyone else's occupancy, but it puts too much weight on history and is insufficiently sensitive to subsequent change in circumstance and to the conditions that face us today.[73]

Of course, this sentiment would defeat many of the objectives of the Indigenous peoples' movement, which are less geared towards returning to a *status quo ante*, but which rely on the fact that this *status quo* was achieved through subterfuge as a rallying call for a better and more sophisticated rights framework.[74] In the context of such questions, it also needs to be asserted that had Indigenous peoples been treated as subjects rather than objects of law from the start,[75] their general rights, and most specifically the rights to the territories on which they lived, would not have been abrogated in the dramatic manner that came to pass.[76]

In terms of the politics of international law, a question thus arises as to why Indigenous peoples are put into a separate category from peoples. To be able to address this, the constituents of what are deemed to be 'Indigenous' peoples need to be assessed closely. The most widely cited, albeit flawed, definition of 'Indigenous peoples' is as good a starting point as any other:

> 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 on 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 system.
>
> 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 in certain parts of the country, or in certain regions of the world;
> (f) other relevant factors.[77]

In articulating this definition as part of one of the first major UN studies of Indigenous peoples' issues, José Martínez Cobo spent considerable time clarifying the importance of

[73] ibid 56.

[74] B Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2001) 34 NYUJIL & P 189.

[75] RL Barsch, 'Indigenous Peoples in the 1990s: From Subject to Object in International Law' (1994) 7 Harvard HRLJ 33.

[76] Castellino (n 56).

[77] J Martínez Cobo (Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities), Study on the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1986/Add.4 (1986).

'self-identification' or Indigenous group consciousness, a theme reflected years later in the approach taken by Committee on the Elimination of Racial Discrimination (CERD),[78] the monitoring body for the International Convention on the Elimination of All Forms of Racial Discrimination.[79] In more recent years, acceptance of groups as Indigenous peoples by other Indigenous peoples has inevitably become a crucial subjective factor in the definition. This facet is not merely a question of an individual's right to determine their own status, but rather recognition of the sovereignty of the peoples in much the way that States' recognition of each other plays a crucial role in fostering relations between them.[80] Thus, it could be argued that contemporary practice among Indigenous peoples/nations operates in a guise similar to the declaratory principle of the recognition of States by their peers. Despite various objections, it could be argued that this Martínez Cobo working definition, in addition to the element of recognition by other Indigenous peoples and a more nuanced conception of the requirement for historical continuity, reflects the customary practice vis-à-vis an understanding of the term 'Indigenous peoples', something germane to understand in the context of the failure to include a definition within the UNDRIP, as discussed in more detail in the final section of this chapter.

Two other institutions' interpretations of the definition question are worth dwelling upon briefly, both because of the tremendous impact the organizations have had on the lives of Indigenous peoples. The International Labour Organization (ILO) could justifiably be called the first intergovernmental institution to focus on Indigenous peoples' issues,[81] though its first focused legal instrument on the issue in 1957 was deeply flawed.[82] The ILO was concerned about the treatment of Indigenous peoples in a labour context, and began engaging this issue as early as 1936 when the notions of 'Indigenous workers' and 'descendants of aborigines' were used by the ILO in the context of culturally distinct groups in the Americas. By 1949, the ILO had published a report on the 'Conditions of Life and Work of Indigenous Populations in Latin American Countries', and in 1953 it published the report 'Indigenous Peoples', which focused on the Andean region and would form the basis of much of its subsequent work on Indigenous issues.[83] In its 1956 report 'Living and Working Conditions of Aboriginal Peoples in Independent Countries', the ILO office expanded on the 'Indigenous Peoples' report, using information collected from research conducted in a subset of countries outside of the Americas.[84]

The 1956 report therefore reflected the ILO's move towards a more universal approach to Indigenous peoples' issues. Together with government responses to an ILO

[78] For an assessment of the CERD regime, especially its development of group rights, see J Castellino, 'A Re-Examination of the International Convention for the Elimination of All Forms of Racial Discrimination' (2006) 2 Revista Iberoamericana de Derechos Humanos 1–29.

[79] The International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (opened for signature 7 March 1966).

[80] Martínez Cobo (n 77).

[81] L Swepston, 'Indigenous Peoples in International Law and Organizations' in J Castellino and N Walsh (eds), *Indigenous Law and Indigenous Peoples* (Brill 2005) 53.

[82] For a detailed examination of the work of multilateral organizations, including a comment on the ILO on Indigenous peoples, see V Gonzalez Gonzalez, *'Lo Indigena' tratado por las organizaciones internacionales: Los Casos de la UNESCO y de la FAO (1945–2012)* [*Thèse de doctorat en Sociologie. Institut des Hautes Etudes en Amérique latine*] (Ecole des Hautes Etudes en Sciences Sociales 2014).

[83] ILO, *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries* (ILO 1953); Swepston (n 81) 53.

[84] L Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919–1989)* (Oxford University Press 2005) 121–22.

questionnaire, it constituted the primary input for the discussions around the drafting of a new Convention addressing Indigenous peoples, and included a proposed definition of the category 'Indigenous populations' defined as 'peoples' with tribal or sub-tribal existence and structures. In response to concerns raised by Syria, Egypt, and Iran during the 1956 ILO session, the category 'Indigenous populations' was transformed into 'Indigenous, tribal and semi-tribal populations'.[85] A further proposal by India saw the term 'peoples' removed from the draft Convention text and replaced by 'populations', as reflected in the final Indigenous and Tribal Populations Convention, 1957 (No 107).[86] The Convention's distinction between 'Indigenous' and 'tribal' was grounded on the former's descent from pre-colonial populations, while the distinction between 'tribal' and 'semi-tribal' hinged on the degree to which 'tribal populations' had been integrated into the national community.[87] This concern with Indigenous peoples in independent countries emerged from the ILO's focus on 'Indigenous workers' in dependent countries, and built on what is termed the ILO's fundamental human rights standard, its Convention on Forced Labour (No 29), which also focused on what were termed 'native populations'. As Lee Swepston puts it, this 1930 standard sought to build on the *Slavery Convention of 1926* and signalled:

> [the] beginning of the ILO's long-standing task of adopting international law concerning the situation of dependent peoples faced with pressure and even assimilation from external cultures. Before the Second World War, the ILO adopted several conventions (now considered outdated) relating to indigenous workers, all of them essentially focused on problems relating to labour contracting, or with issues synonymous to conditions of work on plantations.[88]

Keeping in mind this history, the ILO's significantly more diffused historical requirement is included in its own legal definition, which encompasses the addition of 'tribal peoples'.

In 1989, ILO Convention 107 was revised by ILO Convention 169, which in Article 1(1)—establishing the scope of the Convention concerning Indigenous and Tribal Peoples in Independent Countries—stipulates that it applies 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.

This definition differed from that of ILO Convention 107 in four important ways, all of which were reflective of the shift in anthropological thinking which had occurred in the intervening decades. First, the category of 'semi-tribal' was removed on the grounds of its racist connotations and assumption that Indigenous and tribal peoples were on a trajectory towards integration into the national community. Second, it replaced the term 'populations' with 'peoples', albeit with a qualification with regard to the implications of this term under international law. Third, ILO Convention 169 introduced the

[85] ibid 161. [86] ibid 163. [87] ILO Convention 107 Art 1. [88] Swepston (n 81) 54.

fundamental definitional criterion of self-identification. Finally, the problematic aspects of ILO Convention 107's controversial notion of a requirement for historical continuity were addressed, with a significantly less stringent requirement introduced in ILO Convention 169.[89]

By contrast, the World Bank avoids naming criteria based on 'historical continuity' or 'anti-colonialism', taking instead what Kingsbury describes as 'a functional view' of Indigenous peoples, as 'groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged'.[90] Contained in a 1989 document meant to facilitate the operations of the Bank, its Indigenous Peoples Policy (Operational Directive 4.20) stated:

> The terms 'indigenous peoples,' 'indigenous ethnic minorities ... tribal groups,' and 'scheduled tribes' describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, 'indigenous peoples' is the term that will be used to refer to these groups.

Operational Directive 4.20 was replaced by Operational Policy 4.10 in 2005. The instrumental and pragmatic nature of this document is confirmed in its approach to how staff are required to identify the groups to whom the Policy is meant to apply. The document states:

> Because of the varied and changing contexts in which Indigenous Peoples live and because there is no universally accepted definition of 'Indigenous Peoples,' this policy does not define the term. Indigenous Peoples may be referred to in different countries by such terms as 'Indigenous ethnic minorities,' 'aboriginals,' 'hill tribes,' 'minority nationalities,' 'scheduled tribes,' or 'tribal groups.'[91]
>
> For the purposes of this policy, the term 'Indigenous Peoples' is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees:
>
> (a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
> (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
> (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
> (d) an indigenous language, often different from the official language of the country or region.[92]

A group that has lost 'collective attachment to geographically distinct habitats or ancestral territories in the project area' (paragraph 4(b)) because of forced severance remains eligible for coverage under this policy.

The Policy document notes that a 'technical judgment' may be necessary in ascertaining if Indigenous peoples fall under the mandate of the policy. In this regard, it calls for the Bank to undertake a screening in which it 'seeks the technical judgment of qualified social

[89] Doyle (n 71).

[90] Kingsbury (n 24) 420. Kingsbury notes that the Martínez Cobo working definition's historical continuity requirement is controversial and potentially limiting.

[91] Operational Directive 4.10, para 3. [92] ibid para 4.

scientists with expertise on the social and cultural groups in the project area' and requires it to consult with the Indigenous peoples concerned. This more than anything indicates the nature of the flexibility needed in understanding the definition of Indigenous peoples.

In seeking to create a cohesive understanding and global framework for Indigenous rights which included activism around the articulation of the UNDRIP, former Special Rapporteur on Indigenous Peoples Erica-Irene Daes sent out questionnaires to the 194 States that were members of the United Nations. She received very few responses, with African and Asian States insisting that the category 'Indigenous peoples' was inappropriate to their context, and that all the people who made up the decolonized State were 'Indigenous' to the territory.[93] Despite this recalcitrance, Indigenous peoples have successfully agitated for a greater emphasis on issues that affect them. As Kingsbury states:

> Over a very short period, the few decades since the early 1970s, 'indigenous peoples' has been transformed from a prosaic description without much significance in international law and politics, into a concept with considerable power as a basis for group mobilization, international standard setting, transnational networks and programmatic activity of intergovernmental and nongovernmental organizations.[94]

While accepting the inherent difficulties in gaining international consensus, Kingsbury attempted to substantiate some of the elements that were fundamental to understanding the concept through the lens of international law. He advocates for a 'constructivist approach' to understanding the concept, despite its drawbacks, describing this approach as taking the concept of Indigenous peoples:

> not as one sharply defined by universally applicable criteria, but as embodying a continuous process in which claims and practices in numerous specific cases are abstracted in the wider institutions of international society, then made specific again at the moment of application in the political, legal and social processes of particular cases and societies.[95]

In addressing how the discussions around the framing of the UNDRIP also sought to incorporate a definition, Kingsbury stated:

> It will be argued that the constructivist approach to the concept better captures its functions and significance in global international institutions and normative instruments. In most cases the terminology and indicative definitions in global or regional instruments are too abstract and remote to provide a sufficient basis to resolve the infinite variety of questions that arise in specific cases, and it is misguided to expect that these global instruments can even purport to resolve all such detailed problems. These instruments often contain relevant principles and criteria abstracted from the specifics of past cases and debates, and each has stimulated a body of practice concerning its scope of application and the meaning of concepts it employs. But many specific problems as to the meaning of 'indigenous peoples' and related concepts can be solved only in accordance with processes and criteria that vary among different societies and institutions.[96]

As indicated, questions arose over the extent to which the concept of 'Indigenous peoples' is applicable in Africa and Asia. Kingsbury's analysis focuses solely on Asia, eschewing Africa as having a distinct approach. His justification for including Asia, however, is in response to a phenomenon wherein:

[93] E-I Daes, 'Equality of Peoples under the Auspices of the United Nations Draft Declaration on the Rights of Indigenous Peoples' (1995) 7 St Thomas L Rev 493.

[94] Kingsbury (n 24) 415. [95] ibid. [96] ibid.

Following the pattern of group mobilization established in states dominated by European settlement—in the Americas, Australasia and the Nordic countries—groups based in different Asian states have more recently begun to participate in international institutions and gatherings of 'indigenous peoples', and transnational networks have been formed in Asia under the rubric 'indigenous peoples'.[97]

As a result of this willingness to use the concept of 'Indigenous peoples', 'or its local cognates', transnational activist networks have been forged that have linked groups that were only marginally connected, and has resulted in 'politically unorganized' access 'to transnational sources of ideas, information, support, legitimacy and money'.[98] Notable among these are policies framed and implemented by bodies such as the World Bank, referred to above, and also the Asian Development Bank.[99]

Against this is the oft-cited quote from the Chinese Government made in the context of its participation in the drafting of the UNDRIP. This captures a sentiment on the notion of Indigenous peoples, which many would have considered almost Asia-wide, and as discussed in the final section also found echo in subsequent similar African objections, namely:

> The Chinese Government believes that the question of indigenous peoples is the product of European countries' recent pursuit of colonial policies in other parts of the world. Because of these policies, many indigenous peoples were dispossessed of their ancestral homes and lands, brutally oppressed, exploited and murdered, and in some cases even deliberately exterminated. To this day, many indigenous peoples still suffer from discrimination and diminished status ... As in the majority of Asian countries, the various nationalities in China have all lived for eons on Chinese territory. Although there is no indigenous peoples' question in China, the Chinese Government and people have every sympathy with indigenous peoples' historical woes and historical plight. China believes it absolutely essential to draft an international instrument to protect their rights and interests ... The special historical misfortunes of indigenous peoples set them apart from minority nationalities and ethnic groups in the ordinary sense. For this reason, the draft declaration must clearly define what indigenous peoples are, in order to guarantee that the special rights it establishes are accurately targeted at genuine communities of indigenous people and are not distorted, arbitrarily extended or muddled.[100]

If one of the fundamental difficulties with Indigenous peoples' treatment in international law is the fact that they have been treated as 'objects' and not 'subjects' of law, it would be remiss not to include a perspective from Indigenous peoples themselves on the question of definition. While it is clear that self-identification, participation, and acceptance by Indigenous peoples is probably the most compelling evidence of 'Indigenous' status, two historic documents can be called upon to demonstrate the gap between the multilateral view of Indigenous peoples and their own view of themselves. Kingsbury analyses one

[97] ibid 416. [98] ibid 417.

[99] Asian Development Bank, 'The Bank's Policy on Indigenous Peoples' (April 1998), <https://www.adb.org/documents/policy-Indigenous-peoples>. This policy was superceeded by the Asian Development Bank Safeguard Policy Statement (June 2009), <https://www.adb.org/documents/safeguard-policy-statement?ref=site/safeguards/main>.

[100] Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/WG.15/2 (1995). For an overview of the concept of Indigenous peoples in Asia, see C Erni (ed), *The Concept of Indigenous Peoples in Asia: A Resource Book* (IWGIA and Highland Peoples Taskforce 2008); for the nomenclature used by Asian States to identify these groups, see Report of the Special Rapporteur on the Rights of Indigenous Peoples: Consultations on the Situation of Indigenous Peoples in Asia, UN Doc A/HRC/24/41/Add.3 (2013).

approach to definition, drawn from a preparatory meeting in 1974 to plan a conference in 1975 which established the World Council of Indigenous Peoples (WCIP). The purpose of the definition at that stage was to determine who would qualify to attend the conference as a delegate. The working definition stated:

> The term indigenous people refers to people living in countries which have a population composed of differing ethnic or racial groups who are descendants of the earliest populations living in the area and who do not as a group control the national government of the countries within which they live.

This view was refined by 1984, by which point the Martínez Cobo working definition, discussed above, had also been framed and accepted. This definition incorporates an emerging 'collective political consciousness and confidence'[101] and was meant to be reflected in the draft International Covenant on the Rights of Indigenous Peoples which, however, was never passed. According to this definition:

> An indigenous people is one:
>
> (a) who lived in a territory before the entry of a colonizing population, which colonizing population has created a new state or states or extended the jurisdiction of an existing state or states to include the territory, and
> (b) who continue to live in the territory and who do not control the national government of the state or states within which they live.

This particular construction places heavy emphasis on the treatment of the territory of Indigenous peoples and on their exclusion from sites of power, seeking collective self-representation as a means to challenge conceptions around the State and nation of particular relevance to the earlier discussion concerning 'peoples'.

3. The United Nations Declaration on the Rights of Indigenous Peoples and the Definition Question

Those studying the burgeoning importance of human rights and international human rights law justifiably feel that the discourse has become central to international law and politics and has faced an upward trajectory ever since the passage of the Universal Declaration of Human Rights (UDHR) in 1948. After steady growth over decades, the challenges posed by the events of 9/11 led to an over-emphasis on security which could have eroded human rights gains. Yet, the movement effectively challenged this emphasis on 'State security', and, despite failures such as Guantanamo Bay, the international human rights regime has, by and large, managed to dent the hysteria that followed the events of 9/11. The framing of principles of accountability through the growth in international criminal law is evidence of the progress made towards guaranteeing the dignity and worth of every individual, even in times of conflict.[102] The relative incremental successes of the UN human rights treaty monitoring bodies working in tandem with UN Special Procedures coordinated by the Office of the High Commissioner for Human Rights, and the establishment of the Permanent Forum on Indigenous Issues, suggest a

[101] Kingsbury (n 24) 417.

[102] For a work that frames this challenge against its historical backdrop, see WA Schabas, *Unimaginable Atrocities* (Oxford University Press 2012).

brighter outlook for the future of the human rights regime, especially for its more vulnerable members. The lack of an instrument with global reach to protect Indigenous peoples and minorities has thus exercised many minds in the last few decades.

More recently, the onus appears to have moved away from codification of regimes to more pressing questions of implementation and monitoring. The laboured passage of the UNDRIP[103] indicates the difficulties around gaining consensus, and, now that it is a living document, emphasis has to move to where it is most merited, namely on the implementation and the monitoring of the extent to which international law is able to accommodate and protect the rights of Indigenous peoples. UN systems have, in general, been less concerned with groups in vulnerable positions (emphasizing protection of individual rights). The regimes promoting the rights of women and children remain the exception and compare favourably to the lack of such treaties to protect minority and Indigenous rights.[104]

From a political perspective, the global discourse of Indigeneity, when articulated clearly, has many advantages. It draws attention to the status of the 'original discoverers' of the land with inherent rights to it under natural law principles of occupation and *usus* and public international law principles concerning the occupation of *terra nullius* (unoccupied territory).[105] Yet, discussions around Indigeneity inevitably raise complex questions of history that are difficult to unravel from this distance. Martínez Cobo's loose definition continues to be problematic (as with Caportorti),[106] but many accept this as the starting point. The negotiations for the UNDRIP were set against the general consensus that Indigenous peoples have all the rights that minorities have, but in addition may have the right to self-determination, with its attendant problems of interpretation and application.[107] Prior to Martínez Cobo's important study, little attention was paid within the emerging human rights regime to Indigenous rights issues, and in previous periods 'Indigenous peoples' have been subsumed under the general conceptual banner of 'minorities', problematic as this may be. It is also true that there are instances where the distinction between minority and Indigenous peoples is blurred or where the minority rights regime may prove effective in articulating claims to certain rights. Non-sedentary peoples such as the Bedou and Saharawis, who reside far from sites of power, continue to traverse deserts in relatively unchanged lifestyles, show striking similarities to Indigenous peoples around the world, yet the minority rights framework could be more useful in instilling a platform for the articulation of their particular rights. Thus, negotiating a modern global document and including a definition within it which could tackle this diversity was always going to be a difficult, if not impossible, proposition. The failure to include such a definition should not detract from the UNDRIP. It has gained ringing endorsements from people such as Daes, who agitated for a global instrument for Indigenous rights for decades. She states:

> The Declaration now constitutes a normative instrument of the UN that memorializes, and simultaneously extends, international consensus regarding individual and collective rights of

[103] For a general reading of the drafting process, see C Charters and R Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Doc No 127) (IWGIA, Transaction 2009).

[104] J Castellino, 'The Protection of Minorities and Indigenous Peoples in International Law: A Comparative Temporal Analysis' (2009) 15(4) Int'l J Minority & Group Rights 393–422.

[105] Waldron (n 72). [106] Martínez Cobo (n 77).

[107] A Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture, Land* (Cambridge University Press 2007) 131–95.

indigenous peoples as previously set out in several international instruments, including, first and foremost, ILO Convention 169.[108]

In outlining its normative substance, she emphasizes that Indigenous peoples are clearly 'peoples' within the meaning attributed under Article 1 of the Human Rights Covenants and suggests that:

> International law can recognize a new subset of collective human rights that do not trump international individual human rights. In any event, once adopted, international collective rights supersede domestic law.[109]

The general challenges over drafting the document, especially with regard to self-determination, have been alluded to elsewhere, but there were equally fraught discussions concerning a definition to be included. As narrated above, the meaning of peoplehood has arisen at every attempt to agree universal standards guaranteeing Indigenous rights.[110] The question of the inclusion, and the subsequent exclusion, of a definition of Indigenous peoples within the Declaration is symptomatic of one of the problematic strands responsible for its difficult passage through the UN system. The objections raised through the long drafting history eventually made it easier to avoid such pitfalls altogether. This is not to suggest that the scope of the Declaration is open, rather that there is a degree of confidence that Indigenous peoples are relatively well defined, as this section will seek to demonstrate. In order to do this, the first sub-section will cast some light on the process resulting in its exclusion from the final document, drawing on writings of individuals material to its framing. The second sub-section will seek to demonstrate that the lack of a definition is relatively normal in this genre of document, drawing on four other precedents. The final sub-section argues that there is sufficient clarity in the text of the Declaration to enable key attributes of a definition to be extrapolated from the document, and that in addition the text also indicates reliance on definitions discussed in the previous section of this chapter.

3.1 The Declaration and the Definition Question

The question of who ought to be covered within the Declaration did exercise considerable influence over the process of drafting.[111] It is equally clear that one of the major impediments to agreeing a definition was the clear emphasis on the word 'peoples' and its implications for self-determination, which States were keen to avoid. One insight, provided by Erica-Irene Daes, is revealing of how during the discussions one member explained his hesitance in using the term 'Indigenous peoples':

> Toševski ... expressed ... some hesitation in using the term 'indigenous peoples'. He said that the term 'peoples', as used in the UN Charter, related to all peoples, and new criteria establishing two different kinds of peoples should preferably not be introduced into international law. The political and legal use of the concept of 'indigenousness' would only cause confusion. With a unified

[108] E-I Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' in S Allen and A Xanthanki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011) 11–40, 39.

[109] ibid.

[110] A Erueti, 'The International Labour Organization and the Internationalisation of the Concept of Indigenous Peoples' in Allen and Xanthanki, ibid 93–120.

[111] Charters and Stavenhagen (n 103).

approach to the term 'people', there was no need to specify special rights for indigenous peoples. Most indigenous peoples could be treated as minorities, and any attempted distinction between the two was nothing more than an artificial dilemma. He continued to state that the minority concept was a well-known quantitative concept in constitutional and international law. Taking into account the reality and historical political processes, it would be illusory to expect from the WGIP any recognition and definition in this regard.[112]

While the previous section has hopefully demonstrated the long-lasting legacy in international law for the term 'minority', most Indigenous peoples would struggle to accept this as a descriptor for themselves, mainly due to the fact that minorities are determined in law not to have the right to self-determination,[113] but also because their link to territorial rights would be questioned. The same delegate, however, in arguing against special rights for Indigenous peoples also tackled this second objection:

Likewise, according to Tošev ski, the right to land was important for every human being and group, and emphasis on indigenous peoples' land rights was a misunderstanding as there was no specific need for ownership of land by cultural or ethnic identities. It was more important to clarify the functions of land in different societies. He concluded by saying the WGIP needed more time for further clarification of concepts before it could begin a drafting process of standards in this field.[114]

The strong presence of land rights in the document will merit comment elsewhere, but from the context of definition it is instructive to note that this too was a facet against codification. Some governments, however, feared that the failure to codify would be dangerous, as narrated by Daes in the context of her own interventions in the discussion:

The observers for some ... governments reiterated that the draft Declaration in its present form did not contain a definition of 'indigenous peoples'. In particular the representative of Japan expressed the concern that this might give rise to subjective interpretations as to which groups were entitled to the rights contained in the Declaration. In this respect, I replied that for the purposes of the draft Declaration, the working definition of 'indigenous peoples' contained in the study by Martínez Cobo should be applied. Further, several representatives of indigenous peoples commented on the need to use the term 'peoples' in the plural, both in the draft Declaration and in other documents, because the singular form was perceived by indigenous peoples as discriminatory, denying them rights available to other peoples.[115]

Another significant stream of thought that impacted the inclusion of a definition was the fact that there was no necessity for it. This is also Daes's recollection of the process:

another member of the WGIP pointed out that the UN had managed 40 years without a definition of the term 'people' and that a definition of 'indigenous peoples' was unnecessary, at least for the purposes of the present standard-setting activities, especially as there were ample international precedents of the usage of the latter term.[116]

Irrespective of whether governments were in favour of or against the inclusion of a definition, the notion of attributing a specific definition or attributes to the concept of

[112] E-I Daes, 'The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples' in Charters and Stavenhagen (n 103) 48–77, 54.

[113] CERD, General Recommendation XXI: Self-Determination UN Doc A/51/18 (23 August 1996); UN HRComm, CCPR General Comment 12: Article 1: Right to Self-Determination UN Doc HRI/GEN/1/Rev.6 (13 March 1984).

[114] Daes (n 112) 54. [115] ibid 68. [116] ibid 55.

'Indigenous peoples' caused significant difficulties. Unsurprisingly, much emphasis was placed on these issues by African and Asian governments. As Henriksen writes:

> The concept of 'indigenous peoples' was a significant hurdle for many governments to overcome in the early stages of the negotiations. African and Asian governments generally held the view that a definition of the term 'indigenous peoples' should be included in the text in order to identify the beneficiaries. It was clear that some of these states were more interested in obtaining a definition which would exclude indigenous peoples in their own countries from becoming beneficiaries of the Declaration. It was frequently stated by African and Asian states that they did not have any indigenous peoples in their countries and that everyone there was indigenous.[117]

Three specific views appeared to dominate the discussion and were in the ascendancy at various points in the long drafting process. One concerned the idea, expressed in the statements above by Daes, that the existing Martínez Cobo working definition was adequate for these purposes and did not merit repeating. The second was the view that a strict definition would establish contours which could then be used to include/exclude certain groups, as indicated by Henriksen above. A third view which gained significant consensus and which by implication found its way into the Declaration (as discussed below) was the notion of self-identification. As stated by Willemsen-Diaz, another of the members of the WGIP, 'the right to self-definition was claimed, combining subjective elements of self-identification and its complement, community acceptance'.[118] With this in mind, an early draft of the Declaration even expressed self-identification as a route to the definitional question. However, as Chávez corroborates, this met with serious resistance from States, concerned that it would open up the discussion to a number of groups.[119]

At the last minute, when the discussion on the definitional question appeared to have subsided, the African Group of States became agitated with the issue (along the lines of the Chinese governmental attitude described in the previous section), raising a host of concerns which commenced from the self-identification point, but also took into account concerns over self-determination, the creation of institutions, consent, and land rights.[120] Many African States submitted a position paper entitled 'Aide Memoire on the United Nations Declaration on the Rights of Indigenous Peoples' in 2006 which articulated these concerns alongside procedural elements such as the failure to adequately represent African perspectives in the discussion.[121] At the root of the discussions were, as alluded to above by Henriksen, that the issue of State sovereignty was coming under question in view of both the procedural and substantive elements of the Declaration. This Aide Memoire drew a strong response from an African group of experts. Elaborating on the African Commission's 2003 Working Group report on Indigenous populations, and the Commission's 2007 Advisory opinion on the UNDRIP, the experts stated:

[117] JB Henriksen, 'The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process' in Charters and Stavenhagen (n 103) 78–85, 79.

[118] A Willemsen-Diaz, 'How Indigenous Peoples' Rights Reached the UN' in Charters and Stavenhagen (n 103) 16–31, 30.

[119] L Enrique Chávez, 'The Declaration on the Rights of Indigenous Peoples, Breaking the *Impasse*: The Middle Ground' in Charters and Stavenhagen (n 103) 96–107, 103.

[120] For a detailed discussion on the African perspective towards the UNDRIP, see A. Barume, 'Responding to the Concerns of the African States' in Charters and Stavenhagen (n 103) 170–83.

[121] Aide Memoire on the United Nations Declaration on the Rights of Indigenous Peoples (New York, 9 November 2007).

in Africa, the term 'indigenous peoples or communities' is not aimed at protecting the rights of the 'first inhabitants that were invaded by foreigners'. Nor does the concept aim to create hierarchy among national communities or set aside special rights for certain people. On the contrary, within the African context the term 'indigenous peoples' aims to guarantee equal enjoyment of rights and freedoms to some communities that have been left behind. This particular feature of the African continent explains why the term 'indigenous peoples' cannot be at the root of ethnic conflicts or of any breakdown of the Nation State.[122]

The African Commission had also tried to engage the discussion by seeking to identify groups that would fall within the remit of the term 'Indigenous peoples' in Africa. Thus:

The following, for example, are considered indigenous peoples: the Pygmies of the Great Lakes Region, the San of South Africa, the Hadzabe of Tanzania and the Ogiek, Sengwer and Yakuu of Kenya, all hunter-gatherer peoples. Nomadic pastoralists include the Pokot of Kenya and Uganda, the Barabaig of Tanzania, the Masai of Kenya and Tanzania, the Samburu, Turkana, Rendille, Endorois and Borana of Kenya, the Karamajong of Uganda, the Hinda of Namibia and the Tuareg, Fulani and Toubou of Mali, Burkina Faso and Niger, along with the Amazigh of North Africa.[123]

While not exhaustive, this list also indicated the vast difficulties in seeking to generalize the elements of the definition. It led Regino Montes and Torres Cisnero to conclude:

As the African Commission on Human and Peoples' Rights indicates (... also perhaps applicable to Asian realities), a rigid definition of indigenous peoples is not possible, and perhaps neither necessary nor desirable. African indigenous peoples practise diverse economic systems that range from hunter-gathering to small-scale farming, not forgetting nomadic pastoralists. They are distinguished by their cultures, their social institutions and their religious systems. Their way of life differs considerably from that of the dominant society, and their culture is under threat, if not on the verge of extinction. A key feature of these peoples is that their specific means of subsistence depends directly on access and related rights to their traditional territories and the natural resources found therein. It is not the issue of 'aboriginality', who came first, that is a fundamental aspect of the definition of indigenous peoples, as suggested by the states, but rather the current relations of oppression within those African societies. Self-identification thus plays an essential role in defining indigenous peoples.[124]

With so many difficulties raised on the definition, it became clear that no consensus would be reached. Thus, as Chávez, the last chairperson of the Working Group on the Draft Declaration, narrates:

a debate that started off as an impassioned one became watered down over time, to the point where—in the final sessions—nobody even raised the issue, thereby sending a clear message: attempts to find a definition were succumbing to the complexity of the issue, and precedent indicated that a

[122] Response Note to 'The Draft Aide Memoire of the African Group on the UN Declaration on the Rights of Indigenous Peoples', presented by an African group of experts (21 March 2007); see also African Commission on Human and Peoples' Rights (ACommHPR), *Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples*, Forty-First Ordinary Session, Accra, Ghana (May 2007); and 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities in Africa 2003' (IWGIA 2005), adopted by the ACommHPR in November 2003.

[123] ACommHPR, *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's Work on Indigenous Peoples in Africa* (IWGIA 2006) 10.

[124] A Regino Montes and G Torres Cisneros, 'The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship between Indigenous Peoples, States and Societies' in Charters and Stavenhagen (n 103) 138–69, 150.

declaration of this kind was possible without a definition. The natural solution was therefore to remove this definitional article [article 8, as referred to above] from the draft.[125]

With the document passed without a definition, S James Anaya reminds us that:

[T]he Declaration does not itself define 'indigenous peoples' but it makes clear who they are by emphasizing the common pattern of human rights violations they have suffered.[126]

As will be argued in the third sub-section below, despite this omission there are clear elements that can be extrapolated from the text that indicate who and what is covered under the Declaration. This is consistent with the understanding of the drafters, as Mattias Åhrén emphasizes:

The indigenous rights discourse operates with a few working definitions of the term 'indigenous peoples' ... it is sufficient to note that, regardless of the definition used, particular emphasis is always placed on the requirement that a group—in order to constitute an indigenous people—must have occupied and used a fairly definable territory before present day state borders in the area were drawn. Indigenous peoples' cultures are further marked by an intrinsic spiritual connection to that very territory, and the natural resources situated in such.[127]

Having explored why the issue of definition was excluded, it is time to briefly examine three other documents that in similar contexts also omitted a definition.

3.2 Of Declarations and Definitions in International Law

It could be considered normal in law to clearly articulate the mandate and focus of a particular document. This gives it clarity, guarantees legal certainty, and prevents expansionism that could undermine the intent of the drafters and the common understanding of the signatories. It is also true that within international law there have been examples of Declarations that have failed to come into existence due to a failure to agree a definition.[128] However, in the context of identity-oriented questions, especially those concerning group rights, there is clear precedent to articulate standards while leaving the question of who is covered to the variables of customary international law and national interpretation. Three Declarations which have attempted to enshrine similar kinds of protection in relatively similar contexts show this trend. They have been selected as each one touches on an element that could be considered to underpin the questions that have faced Indigenous peoples. The three also touch on the subject matter of this chapter, namely the configuration of 'peoples', 'Indigenous peoples', and 'minorities'.

The Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960,[129] is worth highlighting in the context of the earlier discussions concerning peoples. The objective of the Declaration was to ensure that the process of decolonization would have a clear basis, yet the definition of who 'colonial country and peoples' were was left open-ended. The failure to codify who fell under the rubric of the Declaration had a

[125] Enrique Chávez (n 119) 103.

[126] SJ Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Charters and Stavenhagen (n 103) 184–99, 190–1.

[127] M Åhrén, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction' in Charters and Stavenhagen (n 103) 200–15, 204.

[128] See the UN Declaration on the Definition of Aggression, UN Doc/A/Res/29/3314 (14 December 1974). For commentary including hope that such a document could be passed, see B Ferencz, 'Defining Aggression—the Last Mile' (1973) 12 CJTL 430–63.

[129] GA Res 1514 (XV), 15 UN GAOR Supp (No 16) at 66, UN Doc A/4684 (1961).

negative impact on Indigenous peoples, whose strong claims to inclusion within this rubric were ignored. When questions were raised, notably by Portugal, as to why its 'overseas territories' came within this Declaration,[130] the United Nations was quick to clarify what self-determination was,[131] while not tackling the question of what constituted 'colonial'. The failure to codify in this context had the advantages of drawing attention to colonization and facilitating the process of UN decolonization to unfold across the globe.[132] Against this it left several questions open at the time which continue to reverberate today, namely the status of Indigenous peoples' access to self-determination as discussed, the relevance of self-determination to those subsumed within those already deemed peoples,[133] the emphasis as to whether self-determination was a one-off right to be exercised,[134] and questions over how self-determination relates to the territorial integrity of States.[135] This failure to codify has generated much academic writing, making this issue probably one of the most explored in the annals of public international law.[136] On the other hand, it is not clear how any codification and definition could be achieved, keeping in mind States' interests.

A similar difficulty that has since been overcome in the Race Convention referred to earlier is prevalent in the UN Declaration on the Elimination of All Forms of Racial Discrimination.[137] Passed in the context of rising xenophobia in Europe, and with the support of many States keen to make a statement against apartheid South Africa and others determined to complain about the treatment of their nationals in States like the United States of America and the United Kingdom, this Declaration was adopted without any definition of what constituted 'racial discrimination'. At the time of its passage, UNESCO was engaged in discussions concerning race which were not cross-referenced into the Declaration's discussion.[138] Only two years after the passage of the Declaration, the first UN human rights treaty on Racial Discrimination was passed, and contained a clear definition of what constituted 'racial discrimination',[139] while the question of race, as a problematic term, has continued to go undefined, even in later UNESCO documents such as the Declaration on Race and Racial Prejudice, 1982.[140] Interestingly, despite a clear definition of the 'grounds' of racial discrimination being defined in Article 1(1) of the International Convention for the Elimination of All Forms of Racial Discrimination, questions have nonetheless persisted concerning scope and reach, as most clearly demonstrated by the furore over the Committee's use of 'descent-based discrimination' to cover the prevalence of caste.[141]

[130] G Martelli, 'Portugal and the United Nations' (1964) 40 Int Aff 453–65.

[131] GA Res 1541 (XV), 15 UN GAOR Supp (No 16).

[132] R Sureda, *The Evolution of the Right to Self-Determination: A Study of United Nations Practice* (Sijhoff 1973).

[133] J Castellino, 'Conceptual Difficulties and the Right to Indigenous Self-Determination' in A Xanthaki and N Ghanea (eds), *Minorities, Peoples and Self-Determination* (Martinus Nijhoff 2005) 55–74.

[134] K Nayar, 'Self-Determination beyond the Colonial Context: Biafra in Retrospect' (1975) 10 Texas ILJ 321–45.

[135] L Brilmeyer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 Yale JIL 177–202.

[136] For a general reading on the issue of self-determination, see: Cassesse (n 7); Hannum (n 7); M Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 ICLQ 857.

[137] UN GAOR 1904 (XVIII), UN Doc A/RES/18/1904 (20 November 1963).

[138] D Keane, *Caste-Based Discrimination in International Human Rights Law* (Ashgate 2007) 159–211.

[139] International Convention for the Elimination of All Forms of Racial Discrimination 1965, Art 1(1).

[140] UN Doc E/CN.4/Sub.2/1982/2/Add.1 (1982) Annex V.

[141] Keane (n 138) 213–51.

The experience over the passage of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[142] presents an example in a similar vein. In that document, 'religion' or 'belief' is not defined, which would seem crucial to understanding questions as to what constitutes a religion and whether, for instance, this only applies to 'traditional religions' or belief systems. It would also help clarify whether the Falun Gong (China) fit within the protection afforded. In the context of this Declaration, there are definitions included. For instance, Article 2(2) defines what 'intolerance and discrimination based on religion or belief' constitutes,[143] but this falls significantly short of identifying what a religion or belief is.

The document with which the UNDRIP probably merits closest comparison is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.[144] Passed in 1993, there was much hope that it would eventually become a Convention. Unlike the UNDRIP, its passage was not as fraught, but the definition question there too was left vague. As indicated above, there is a relatively well-established, though problematic, definition of a minority, yet there was no reference made to this, and like in the UNDRIP there was a general understanding that this may be the framework that could be applied.[145] The impact of the failure to include a definition is minimal, though it could be argued that the Declaration as a whole has had minimal impact. The discourse has instead moved forward at programme and operational level through the instruments passed by the Council of Europe and the Organisation of Security and Cooperation in Europe,[146] which constitute regional rather than international documents.

From these brief explorations, it could be concluded that the decision not to include a definition of Indigenous peoples within the UNDRIP has precedents. Seeking consensus would clearly have slowed the process down further, since many of the objections addressed in the previous sub-sections would not be easy to overcome. In any case, even had a definition been included, it is not clear that the document would have any greater salience since its implementation would still be dependent on States' willingness to extend the letter and spirit of its principles to achieve legislative, administrative, and judicial changes to uphold the sentiments in the document.

3.3 The UNDRIP and the Definition Question: A Textual Interpretation

Putting all of these issues aside and looking at the plain meaning of the text, this final sub-section would like to argue that a definition of who Indigenous peoples are is intrinsic within the document. In order to draw this out, this final sub-section will focus on six elements in the Preamble and two specific Articles, which identify key attributes of Indigenous peoples as discussed below.

[142] GA Res 36/55, 36 UN GAOR Supp (No 51) at 171, UN Doc A/36/684 (1981).

[143] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), Art 2(2).

[144] GA Res 47/135, Annex, 47 UN GAOR Supp (No 49) at 210, UN Doc A/47/49 (1993).

[145] A Eide, Final Text of the Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc E/CN.4/Sub.2/AC.5/2005/2 (4 April 2005).

[146] For an overview, see P Thornberry and MA Martín Estébanez, *Minority Rights in Europe* (Council of Europe 2004).

In any attempt to interpret a treaty in international law, much emphasis is placed on the teleological interpretation implicit in the document. Thus, the plain meaning of the words in conjunction with the intention of the drafters remains the best gauge to interpreting a treaty. It is important to note that Preambles to treaties can be considered an intrinsic part of the treaty since they lay the foundational context within which a treaty can be interpreted. A similar interpretive logic can be applied to other international legal instruments such as the UNDRIP. This is important since there are several key elements of the UNDRIP that on careful reading reveal the parameters for what constitute Indigenous peoples. For instance:

> Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such ...

This indicates a clear statement not only of equality, which could be argued is an underlying principle of law, but in addition this clause identifies the right to a different identity from the mainstream or other population that may reside within a State. This, then, provides the first ground for any definition, the recognition in law, or the right to personality, coupled with the guarantee that such collective personality is availed of on the same basis with 'all peoples'. In addition to the frequent references to 'self-determination', this equation of Indigenous peoples to peoples is significant if not conclusive. Therefore, a first attribute of Indigenous peoples which is implicit in the UNDRIP is that they have a distinct identity and are vested with a right to a collective legal personality on a par with all other peoples.

Further,

> Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.[147]

In identifying the value of 'Indigenous' identity as constituting part of the civilizational and cultural common heritage, an intrinsic value is attached to this identity, that elevates membership of the category to a plane higher than membership of other groups who may have as much legitimacy as a group, but who in their collective identity may not have contributed in such a manner to human history.

In articulating the standard clause concerning a statement over racial superiority, and in attaching a list of grounds on which such doctrine, policies, or practice may be based, the Declaration also gives what could be considered the 'four corners' of such identity.[148] Thus:

> Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.

The second attribute therefore reflects the inherent value of their distinctive identities, and the fact that a failure to recognize their cultures as contributing to the common heritage of mankind represents a moral failing of the societies of which they form a part.

[147] UNDRIP, Preamble.

[148] Derived from Schabas's discussion concerning the 'four corners' of an ethnic group. See WA Schabas, *Genocide in International Law* (2nd edn, Cambridge University Press 2009) 129–31.

The issue of historical injustice and oppression that is reflected widely in all the definitions examined in the previous section also finds echo in the preamble with the following text:

> Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

This third attribute is particularly rich, as not only does it embody the historical context of injustice and disposition, but it also contextualizes the interdependency between these and the group's possession of lands, territories, and resources and their contemporary exercise of the right to development.

There are two elements that are common to the various definitions, which are clearly reflected in the two clauses below, but which also find echo in many different Articles within the text, namely with regard to ownership and control over land, territory, and resources which manifest themselves in distinct forms of property (including intellectual property) rights. These two elements, one tangible and the other intangible, form the legs on which Indigenous identity rests, but also form the basis for their progress in the future. The two elements are reflected in the preamble in the following text:

> Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,
>
> Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment ...

This fourth attribute is therefore the distinctive form and content of Indigenous identity, which is inseparable from the tangible and intangible resources through which it manifests itself and from which it emerges.

Another element that was identified in the general discussion around the term 'Indigenous peoples' in the previous section also finds an echo, namely the issue of self-identification coupled with an element of declaratory recognition afforded by Indigenous peoples of other aspirants to this category. Thus,

> Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur ...

While not explicit in the form of words above, it can be regarded as recognition of a form of organization with the objective of bringing about the end of all forms of discrimination. Recognition by Indigenous peoples collectively of other Indigenous peoples is clearly a key element to ensuring that the discrimination and oppression of the group can be overcome, by virtue of the rights contained within the UNDRIP.

Inherent in this fifth attribute of self-identification is the dynamic nature of Indigenous peoples, their interrelatedness, and their activities across spheres ranging from the local to the transnational.

A final clause from the preamble that is material to the extrapolation of a definition of Indigenous peoples lies in the final clause contained in this part of the UNDRIP:

> Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law ...

The substantive provisions of the UNDRIP contain many elements on self-determination and other Indigenous rights, including the associated duty to consult in order to obtain free, prior, and informed consent and the requirement to respect Indigenous peoples' legal systems and their governing institutions, all of which provide a flavour of the protection needed, and in this sense explain and substantiate the existing Indigenous experience around the world.

Combined, these provisions could be regarded as corresponding to a sixth attribute, namely the manifestation of a particular *sui generis* mode of exercising the universal right of all peoples to self-determination. This aspect of Indigenous peoples goes to the core of the UNDRIP and helps explain, at least in part, why a static constraining definition of Indigenous peoples would have been at odds with an instrument which aims to breathe renewed life and vitality into a dynamic multifaceted concept, the precise meaning of which has to be decided by self-determining peoples.

In addition to these attributes which emerge from the preamble, there are two other Articles which could be specifically drawn into a discussion concerning definition, namely, Articles 37(1) and 46(3).

Article 37(1)

> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

This particular Article does not show the expanded scope of Indigenous peoples, but it does clearly identify a long-standing group that are unquestionably covered, namely those that have been named by previous laws and agreements as constituting Indigenous peoples. While these groups are clearly deemed to exist in States such as the United States of America, Canada, New Zealand, and Australia, when interpreted more widely similar treaties and agreements could be found in Latin America and in contemporary discussions that are ongoing in several States in Africa (eg Kenya, Uganda, Mali, Botswana, South Africa, Nigeria) and Asia (India, Malaysia, Philippines).[149] The Article in any case could be used as a call to research the nature of administrative agreements that have been made at the national level with groups that may be deemed 'Indigenous'. The breadth of the scope identified is instructive, since rather than relying exclusively on treaties, it also includes agreements and 'constructive arrangements'. Rather than being declaratory, this element of the definition could be deemed to be constitutive.

Should all of these textual interpretations prove unconvincing, the presence of Article 46(3) brings us back to the opinion attributed to Daes in the opening section, namely that a specific definition was unnecessary because the current understanding in customary law could be substituted. In the words of the Article:

> The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

[149] For a commentary on the significance of Indigenous perspectives on treaties, see RA Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace 1600–1800* (Routledge 1999); see also B Clavero, *Tratados con otros Pueblos y Derechos de otras Gentes en la Constitución de Estados por América* (Centro de Estudios Políticos y Constitucionales. Mº de la Presidencia 2005).

Questions have already been raised as to the extent to which the human rights regime is able to fully accommodate the aspirations of Indigenous peoples.[150] The sentiments raised above make important points vis-à-vis Indigenous peoples, their innate equality, their right to be different and to determine how that difference manifests itself in the future, the complex relationship between their identity and their tangible and intangible resources, and the richness their existence brings to civilizations as a whole, to be valued and enjoyed as common heritage. For these reasons, it could be argued that the text of the Declaration gives a clear steer not only as to what Indigenous entitlements are and how they are to be realized, but also as to the identity of the Indigenous 'self' to whom those entitlements pertain.

4. Conclusion

The duration of time spent on attempting to frame and adopt the UNDRIP is a direct result of some fundamental difficulties in gaining agreement over key elements required to ensure robust protection and promotion of Indigenous rights. While much writing has focused on the difficulties of gaining clear direction on the issue of self-determination, one of the battlegrounds on which this conflict was conducted was in determining 'who' Indigenous peoples are. A salient standard of law ought to have a clear articulation of its ambit and in this sense the UNDRIP has failed to provide a clear route through these difficulties of scope. This chapter has sought to demonstrate the reason for this, by shedding light on the fault-lines that exist between the categories 'peoples', 'Indigenous peoples', and minorities. The opening section aimed to illustrate that the status of Indigenous peoples in customary international law stands closer to peoples in the continuum between minorities and peoples. Minorities, while gaining the right to protection and promotion of their group identity, do not automatically gain the right to self-determination. Indigenous peoples ought to, but their rights towards this are constrained by State interests. The most cited definition among a range of others explored here is that of Martínez Cobo, which while not without its weaknesses, is still referred to in many contexts. The UNDRIP could have clarified the situation by articulating a specific definition; however, due to difficulties discussed in the second part of this chapter, that aspect of the Declaration drafting project was shelved early on in the process. The second section sought to demonstrate, however, that this failure to include a definition is not critical, with other similar Declarations also avoiding such questions. The second section also argued that when the plain meaning of the text is assessed, a definition of who is covered within the Declaration becomes relatively clear. In addition, there is clear guidance in the intention of the drafters and some of the text that the category 'Indigenous peoples' for the purposes of the Declaration is to be understood as that recognized in customary international law. On the latter point, this chapter has argued that the definition that has emerged concerning Indigenous peoples today, and on which the UNDRIP has also made a contribution, is that it includes the groups covered by a constructive interpretation of the Martínez Cobo working definition, with growing emphasis on the recognition of Indigenous status by other Indigenous nations. This common understanding is

[150] Kingsbury (n 24).

also reflected in the discussions that have been engaged upon within the International Law Association (ILA), which in a report from 2011 stated:

the indicia that should be used in order to ascertain whether or not a given community may be considered as an indigenous people are the following:

- *self-identification*: self-identification as both indigenous and as a people;
- *historical continuity*: common ancestry and historical continuity with pre-colonial and/or pre-settler societies;
- *special relationship with ancestral lands*: having a strong and special link with the territories occupied by their ancestors before colonial domination and surrounding natural resources. Such a link will *usually* form the basis of the cultural distinctiveness of indigenous peoples;
- *distinctiveness*: having distinct social, economic or political systems; having distinct language, culture, beliefs and customary law;
- *non-dominance*: forming non-dominant groups within the society;
- *perpetuation*: perseverance to maintain and reproduce their ancestral environments, social and legal systems and culture as distinct peoples and communities.[151]

'Most of these elements cannot be considered as absolutely indispensable to qualify a group as an "Indigenous people"'[152], and hence there remains a need for a relatively flexible approach. It would seem, however, that one way of ensuring that Indigenous rights thrive is to challenge the sole right of States to determine who the Indigenous peoples within their territory are, since very often the establishment of the formal State has come at the cost of sacrificing Indigenous rights and identity. It could be argued that the Declaration in its final form, intentionally bereft of an explicit definition, is well placed to play such a constructive role.

[151] ILA, Report of the Sofia Conference (2012) on the Rights of Indigenous Peoples, available as 'Final_Report_Sofia_2012_1354632615751_1-1.pdf' at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> accessed 13 February 2014.

[152] ibid.

Chapter 2. The Making of the UNDRIP

S James Anaya and Luis Rodríguez-Piñero

1. Introduction

The articulation and recognition of Indigenous peoples' rights in the last three decades represents one of the most astonishing developments in the history of modern international human rights law. The adoption of the UN Declaration on the Rights of Indigenous Peoples (Declaration),[1] along with the development of other relevant international instruments and the gradual recognition of Indigenous rights in the jurisprudence and practice of international human rights bodies and mechanisms, have introduced lasting changes in the conceptual, political, and moral underpinnings of international human rights law and policy.

The development of Indigenous rights standards at the turn of the twenty-first century, including the affirmation of Indigenous peoples' right to self-determination, self-government and jurisdiction, reinforced participatory rights, as well as collective rights over lands and natural resources, has boosted the accommodation of multicultural models within the rigid dichotomy of individual and State rights prevailing in international law until only a few decades ago.[2] As an urgent response to the serious abuses endured by Indigenous groups all over the world, the affirmation of Indigenous rights has further contributed to a drastic redefinition of the dominant development model in a way that seeks to incorporate the rights of local communities to maintain their traditional ways of life and decide their own priorities over the development process.[3] Moreover, the unprecedented involvement of Indigenous peoples and organizations in the actual drafting of Indigenous rights instruments and in other international decision-making fora has decidedly contributed to a participatory culture in the international human rights system.[4]

While rooted in centuries-long dynamics of colonial dispossession and normative debates in Western legal thought, the development of the international Indigenous rights regime is an historically recent process catalysed by the emergence of Indigenous peoples as political actors in the international area, and the successful re-articulation of their historical demands and strategies to fit, while creatively transforming, the logics and mechanisms of the late-twentieth-century human rights machinery. The achievements of this process, as well as the tensions inherent in it, are present in a new generation

[1] UN Declaration on the Rights of Indigenous Peoples, GA Res 61-295, Annex, 17 September 2004, 61 UN GAOR 16, UN Doc A/61/49 (2007) vol III.

[2] See SJ Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State' (2004) 21 Az J Int'l Comp L 13; W Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press 2009) 27–60.

[3] See L Rodríguez-Piñero, 'Las agresiones del desarrollo pueblos indígenas, industrias extractivas y derechos humanos' (2009) 11 Relaciones Internacionales, <http://www.relacionesinternacionales.info/ojs/article/view/156.html> accessed 10 October 2017.

[4] See L Rodríguez-Piñero, 'La participation internacional de los pueblos indígenas: una lectura crítica' in F Gómez Isa and S Ardanaz Iriarte (eds), *La plasmación política de la diversidad: autonomía y participación política indígena en América Latina* (Universidad de Deusto 2013).

of international standards, now authoritatively captured in the UN Declaration on the Rights of Indigenous Peoples.

2. Background

2.1 Historical Antecedents

Debates on the legal status of Indigenous peoples are as old as international law itself. Indeed, as modern researchers have aptly demonstrated, colonization and imperialism were some of the most powerful forces for the historical articulation of standards for the conduct among nations. From the debates of the Spanish school of international law to the Grotian natural law model, from Hobbes's and Locke's classical contract tradition to Vattel's reconfiguration of the law of nations, the status of Indigenous peoples in the face of the colonial encounter has been a central topic of international legal theory through history.[5]

Despite its remote origins, the first distinct international legal regime regarding Indigenous peoples started to take shape only by the second half of the nineteenth century, when the efforts of the positivist school of international law for the codification of international standards collided with the interests of colonial empires.[6] The international approach to Indigenous peoples under the positivist school was expressed in two interwoven doctrines. On the one hand, the trusteeship doctrine ('the sacred trust of civilization', as famously put in the League of Nations's covenant in relation to mandated territories) advocated the protection of the native populations of the territories conquered by Western powers, amalgamating humanitarian concerns emanating from metropolitan civil societies with arguments favouring colonial and religious expansion.[7] The trusteeship doctrine's protective thrust operated against the backdrop of the 'standard of civilization' which, based on the prevailing assumptions of the time, reserved all rights and privileges under international law to the members of the 'family of civilized nations'.[8] The standard deprived Indigenous peoples, deemed as 'savages' or 'uncivilized', of any entitlements in the face of the forceful dispossession of their traditional territories, considered by international operators as '*terra nullius*' until recent times.[9] Within the Eurocentric and racist assumptions underpinning these legal constructions, the actual international status of the countries in which Indigenous peoples were found—be it the formal status of colonial territories or postcolonial independent States—bore little significance.[10]

[5] For an analysis of the status of Indigenous peoples' international legal history, see generally B Clavero, *Derecho indígena y cultura constitucional en América* (Siglo XXI Editores 1993); P Keal, *The European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press 2003); R Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press 1992).

[6] SJ Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004) 26–48; L Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime* (Oxford University Press 2005) 18–22.

[7] ibid.

[8] GW Gong, *The Standard of Civilization in International Society* (Oxford University Press 1984).

[9] See LG Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford University Press 2007); R Miller Jr, J Ruru, and T Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press 2012); Williams (n 5).

[10] Rodríguez-Piñero (n 6) 38–52.

The League's trusteeship approach proved inhospitable to efforts by Indigenous peoples to assert robust rights of sovereignty or self-government within the international system that was taking shape in the early twentieth century. In the most well-known of these efforts, Deskaheh, speaker of the Grand Council of the Iroquois Confederacy, led an attempt to have the League of Nations recognize his people's right to live by their own laws within their own lands, free from interference by Canada. Although Deskaheh found sympathy among some League members, the League ultimately closed its door to the Iroquois, yielding to the position that the Iroquois's claims were not a matter of its concern, but rather a matter to be addressed by Canada within the exercise of its presumed trusteeship over the Iroquois.[11]

The trusteeship doctrine constituted the normative entry point for the adoption of the first international instruments specifically dealing with 'Indigenous' groups. Established under the League of Nations, the International Labour Organization (ILO) was the locus for these initial developments, in the context of the international efforts to proscribe slavery and analogous practices. In 1926, the ILO established a Committee of Experts on Native Labour, whose work led to the adoption of the Forced Labour Convention.[12] Adopted in 1936, the ILO Recruiting of Indigenous Workers Convention was the first international treaty to specifically address the situation of 'Indigenous' groups.[13] It was followed by an important number of international labour conventions and recommendations that gradually shaped the ILO's 'Colonial Code', a set of norms that ran parallel to the emerging international labour code and lowered the applicable standards to meet the conditions of the colonial workforce.[14] The English neologism 'Indigenous' replaced 'native' under the influence of French, the prevailing diplomatic language of the time.[15]

The norms enshrined in the ILO's 'Colonial Code' were primarily aimed at disciplining the living and working conditions of the local workforce in colonial territories under European control. With the end of World War II, however, attempts to discipline colonial practice were gradually, but decisively, replaced by the project of ending colonialism itself. The principles underpinning the decolonization process implied the exclusion of Indigenous peoples clustered within independent States' boundaries from the scope of application of the principle of self-determination of peoples as affirmed in the UN Charter. Notably, the 'blue water' or 'salt water' doctrine, codified in the UN decolonization documents, formally linked self-determination to Western overseas colonial dominions.[16] This exclusion lies at the heart of Indigenous peoples' expression of their demands in terms of self-determination, the normative cornerstone of the modern international Indigenous rights regime. Moreover, from a wider historical perspective, decolonization transformed the earlier international regime on Indigenous peoples that was developed during the late nineteenth and early twentieth centuries. This transformation affected the implications of the term 'Indigenous', which definitively came to refer to the descendants of the early inhabitants of a territory before foreign conquest or colonial

[11] Anaya (n 6) 57.

[12] International Labour Convention (ILO), Convention concerning Forced or Compulsory Labour, 1930 (ILO No 29), 39 UNTS 55 (entered into force 1 May 1932).

[13] ILO, Convention concerning the Regulation of Certain Special Systems of Recruiting Workers (ILO No 50), 40 UNTS 109 (entered into force 8 September 1939).

[14] L Rodríguez-Piñero, 'El Código Colonial: La Organización Internacional del Trabajo y los "Trabajadores Indígenas" (1919–1957)' (2004–2005) 33–34 Quaderni Fiorentini per la Storia del Pensiero Giuridico 259.

[15] Rodríguez-Piñero (n 6) 30. [16] Anaya (n 6) 54–55.

settlement and now living within the boundaries of an independent State.[17] Due to its historical mandate concerning the protection of 'Indigenous workers', the ILO became the institutional setting for this transformation, leading the process towards the adoption of the first international standards on Indigenous groups 'in independent countries'.

2.2 Convention 107 and the Birth of the Modern Indigenous Peoples' Regime

Against the backdrop of the evolution of post-war international law, the emergence of the international regime on Indigenous peoples—in the modern sense—is inextricably connected to one international organization, the ILO, and to one region, the Americas. This connection was facilitated by the so-called 'indigenist' movement, a political, cultural, and social science movement that transformed State legal and policy approaches to Indigenous peoples in the Americas during the 1920s and 1930s.[18] Inspired by theoretical developments of applied anthropology and the policies of the 'Indian New Deal' in the United States, indigenism conceptualized the existence of an 'Indian problem' and advocated for a comprehensive, 'scientific' solution to this problem through the 'integration' of Indigenous groups within 'national society'.[19]

Embracing the indigenist agenda, the ILO built upon its existing programming concerning Indigenous groups to eventually develop its Convention 107 concerning Indigenous and Tribal Populations in Independent Countries, along with its accompanying Recommendation 104 on the same subject.[20] Adopted in 1957, Convention 107 reflects the premise of assimilation operative among dominant actors at the national and international levels at the time of the Convention's adoption. Consistent with mid-twentieth-century indigenist thinking, the thrust of Convention 107 was to promote improved social and economic conditions for Indigenous populations generally, but within a perceptual scheme that did not envisage a place in the long term for robust, politically significant cultural and associational patterns of Indigenous groups.[21] Convention 107,

[17] Rodríguez-Piñero (n 6) 50–52. On the changing definition of Indigenous peoples in modern international law, see A Erueti, 'The International Labour Organisation and the Internationalisation of the Concept of Indigenous Peoples' in S Allen and A Xanthaki (eds), *Reflections of the UN Declaration on Indigenous Peoples* (Hart 2009) 934. The 'modern' definition of Indigenousness was authoritatively captured in the Martínez Cobo report, in the following terms:

> ... 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 on 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 system.

Study of the Problem of Discrimination against Indigenous Populations. Final Report presented by the Special Rapporteur, José R Martínez Cobo, UN Doc E./CN.4/Sub.2/1986/7/Add.4 (1986) para 379.

[18] Rodríguez-Piñero (n 6) 50–52.

[19] See C Sánchez, *Pueblos indígenas en México: del indigenismo a la autonomía* (Siglo XXI Editores 1999); MM Marzal, *Historia de la antropología indigenista: México y Perú* (Anthropos 1993); L Villoro, *Los grandes momentos del indigenismo en México* (Fondo de Cultura Económica 1997).

[20] ILO, Convention concerning the Protection and Integration of Indigenous and other, Tribal and Semi-Tribal Populations in Independent Countries (ILO No 107) (1957), 328 UNTS 247 (entered into force 2 June 1959); ILO, Recommendation concerning the Protection and Integration of Indigenous, Tribal and Semi-Tribal Populations in Independent Countries (ILO No 104) (1957), International Labour Conference, 26 June 1957.

[21] For legal analyses of the Convention, see Anaya (n 6) 41–44; Rodríguez-Piñero (n 6) 173–213. For an analysis of the implementation of the Convention, see ibid 215–56.

which remains in force for a number of countries that ratified it, eventually came to be maligned for its assimilationist elements, just as the indigenist movement with which it is associated fell out of favour. Nonetheless, the Convention consolidated a foothold for the 'Indigenous' rubric within the international system and in particular within the burgeoning international machinery for the protection of human rights.

2.3 The Indigenous Rights Movement and Its Inclusion on the UN Human Rights Agenda

The international legal and policy framework as it now concerns Indigenous peoples began to take shape as Indigenous peoples themselves inserted their own voices into relevant international processes and as the UN human rights machinery beyond the ILO widened its concern for the modern-day manifestations of racial discrimination.

As the international human rights agenda began to take hold in the middle part of the twentieth century, Indigenous peoples ceased to be mere objects of the discussion of their rights and became effective protagonists in those discussions. By the 1960s, armed with a new generation of men and women educated in the ways of the societies that encroached upon them, Indigenous peoples in various parts of the Americas and elsewhere were drawing increased attention to demands for their continued survival as distinct communities with historically based cultures, political institutions, and entitlements to lands, along with attention to their disadvantaged social and economic conditions. In the 1970s, they extended their efforts internationally through a series of international conferences and direct appeals to UN and regional intergovernmental institutions. These efforts coalesced into a quickly broadening and ever-more discernible and influential social movement constituted by groups identifying as Indigenous, aided by concerned international non-governmental organizations and a growing body of supportive scholarly and popular literature.

While Indigenous peoples articulated their aspirations in terms quite different from the assimilationist paradigm previously advanced and acted upon by dominant actors, their demands resonated within what had become a central component of the UN human rights agenda, the campaign against racial discrimination in all its forms. The anti-discrimination focus was the grounding for the 1971 Resolution of the UN Economic and Social Council (ECOSOC) authorizing a study on the 'Problem of Discrimination against Indigenous Populations'.[22] The resulting multi-volume work by Special Rapporteur José Martínez Cobo was originally issued as a series of partial reports from 1981 to 1983. It compiled extensive information on Indigenous peoples worldwide and made a series of findings and recommendations generally supportive of Indigenous peoples' demands.

Marking a major UN programmatic priority was the UN General Assembly's designation of a Decade to Combat Racism and Racial Discrimination beginning in 1973.[23] Among the activities that the Decade helped to generate was the International Non-Governmental Organization Conference on Discrimination against Indigenous Populations in the Americas, which was held at the United Nations' Palais des Nations in Geneva in 1977. This conference, attended by Indigenous peoples' representatives from throughout the Western Hemisphere, contributed to forging a transnational Indigenous

[22] UN ECOSOC Res 1589(L) (21 May 1971) UN Doc E/5044.
[23] See A/RES/2919 (XXVII) (15 November 1972).

identity that would later expand to embrace Indigenous peoples from other parts of the world. Moreover, the 1977 conference, along with the Martínez Cobo study, would serve to ensure specific and sustained attention within the UN human rights machinery on Indigenous peoples' concerns.

A singularly significant catalyst for the Indigenous rights movement and for consolidating its place on the UN human rights agenda was the creation of the UN Working Group on Indigenous Populations (WGIP). Upon recommendation of the Martínez Cobo study and representatives of Indigenous groups, the UN Commission on Human Rights and the UN Economic and Social Council approved in 1982 the establishment of the WGIP as a five-member expert body within the Commission's Sub-Commission on Prevention of Discrimination and Protection of Minorities. The mandate established for the Working Group upon its creation was twofold: '(a) to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations ... [and] (b) give special attention to the evolution of standards concerning the rights of indigenous populations'.[24] The standard-setting mandate provided an effective conduit for Indigenous peoples to advance their initiatives for a new international instrument that would affirm and protect their rights, and responding to these initiatives the Working Group went about producing a draft of what would eventually develop into the UN Declaration.[25]

Through its standard-setting work and review of development, the WGIP, meeting annually in Geneva in one- or two-week sessions, engaged Indigenous peoples, States, and others in an extended multilateral dialogue on the specific concerns of Indigenous peoples and on the content of their rights. The Working Group broke new ground within the UN system when it opened its sessions to and allowed oral and written submissions by all Indigenous peoples and organizations, without the formal UN accreditation usually required for non-governmental organizations or other non-State actors to participate in official meetings of UN organs. By the late 1980s, the Working Group had become a major platform for Indigenous peoples from across the globe to forge and express common positions, and a major factor in establishing crucial momentum for the international Indigenous rights movement.

2.4 ILO Convention 169

As the Indigenous rights movement began to gain momentum in the mid-1980s, its goals came into ever-greater contrast with ILO Convention 107, the most significant international instrument specifically concerning Indigenous peoples at the time. This contrast was marked by a growing condemnation of the early ILO Indigenous peoples regime, which had an ironic impact on this organization. By the point in time that Indigenous issues had started to pave its way through the UN human rights machinery, Convention 107—foreign as it was to the organization's traditional mandate, expertise, and operational activities—had long fallen out from the ILO's priorities.[26]

The ILO's lack of interest on Indigenous issues changed drastically at the moment in which it became apparent that the UN Working Group on Indigenous Populations was moving the United Nations towards the adoption of new international standards. Craftily

[24] ESC Res 1982/34 (7 May 1982). [25] See Section 3, below.

[26] The context that gave rise to the revision of Convention 107 is explored in Rodríguez-Piñero (n 6) 264–90.

orchestrated by the ILO's secretariat, the revision of Convention 107 was undertaken by the International Labour Conference in the biennium 1988–1989. It ended up with the adoption of a whole new instrument, with the formal denomination of the ILO Convention on Indigenous Peoples and Tribal Peoples in Independent Countries 169.[27]

The fact that the revision of Convention 107 responded more to the secretariat's initiative than to a genuine thrust from the organization's constituents (States, employers, and workers), with little or no initial involvement from the international Indigenous rights movement and other actors active in the UN discussion, coupled with the hasty pace imposed on the revision process, left a decisive imprint on the final outcome of the process. The dominant posture of representatives and advocates of Indigenous groups active at the international level was initially one of rejection of the new ILO Convention 169, and this would contribute to a dynamic by which ratifications of the Convention would be slow and few to come for some time. Indigenous representatives expressed dissatisfaction with the ILO procedures that precluded them from fully participating in the development of the new text and were critical of the content of the text.[28]

Whatever the shortcomings in the process for the adoption of Convention 169 or in the content of its text, it is undeniable that the Convention represents a marked departure from the philosophy reflected in the earlier Convention 107 of promoting the assimilation of Indigenous peoples into majority societies. This paradigm shift, no doubt influenced by the Indigenous rights movement and the contemporaneous UN developments, is indicated by the Convention's Preamble, which recognizes 'the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live'.[29] Upon this premise, the Convention includes provisions advancing Indigenous cultural integrity, land and resource rights, and non-discrimination in social welfare spheres; and it generally enjoins States to respect Indigenous peoples' aspirations in all decisions affecting them.

Given this reality, it is not surprising that Indigenous peoples and organizations increasingly have taken a pragmatic view and expressed support for the ratification of Convention 169. Indigenous peoples' organizations from Latin America have been especially active in pressing for ratification, such that most of the countries in that region are now parties to the Convention, in addition to two Nordic countries with Indigenous Sami or Inuit populations.[30] The Convention's impact was particularly tangible in the wave of legal and constitutional reform that led to the recognition of Indigenous peoples in Latin America through the 1990s and early 2000s.[31]

[27] ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (ILO No 169), 72 ILO Official Bull 59; 28 ILM 1382 (1989) (entered into force 5 September 1991).

[28] Anaya (n 6) 58–61; Rodríguez-Piñero (n 6) 291–331; L Swepston, 'New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989' (1990) 15 Okla City UL Rev 677; A Yupsanis, 'ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview' (2010) 79 Nordic J Int'l L 433–56.

[29] ILO Convention 169 (n 27) preambular para 5.

[30] As of 2016, the parties to the Convention include Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela.

[31] On the constitutional recognition of Indigenous peoples' rights in Latin America, see B Clavero, *Geografía jurídica de América Latina: pueblos indígenas entre constituciones mestizas* (Siglo XXI Editores 2008); CG Barié, *Pueblos Indígenas y derechos constitucionales en América Latina: un panorama* (2nd edn, Comisión Nacional de Desarrollo de los Pueblos Indígenas 2003); R Sieder, *Multiculturalism in Latin America: Indigenous Peoples,*

In the end, Convention 169 can be seen as one of the single most influential events in the process of drafting and leading to the eventual adoption of the UN Declaration. The relatively short time frame for the negotiation and adoption of the text of the Convention accelerated the discussion among States about Indigenous peoples' rights within a reformed frame of thinking influenced by the Indigenous rights movement, and set a minimum set of standards below which the proposed UN Declaration could not go.

The content of the UN Declaration is replete with textual evidence of the influence from various provisions of Convention 169. Even the scope of both instruments is remarkably similar, with the exception of a handful of key Articles of the Convention concerning labour conditions for Indigenous workers. But, most importantly, Convention 169 proved to be, despite the initial reaction from the Indigenous rights movement, absolutely crucial in the crystallization of baseline normative consensus that drove discussions towards the adoption of the UN Declaration.

2.5 The Mainstreaming of Indigenous Peoples' Rights in International Human Rights Law and Practice

As discussion about Indigenous peoples and their rights proceeded within the UN Working Group on Indigenous Populations, that discussion spilled over into other UN processes related to human rights. Several written instruments that were developed within these other processes prior to the adoption of the Declaration on the Rights of Indigenous Peoples include specific provisions addressing Indigenous issues. Among these instruments are Resolutions adopted at the 1992 UN Conference on Environment and Development in Rio de Janeiro. The Rio Declaration,[32] and the more detailed environmental programme and policy statement known as Agenda 21,[33] reiterate precepts of Indigenous peoples' rights and seek to incorporate them within the larger agenda of global environmentalism and sustainable development.[34] In the same vein, Article 8(j) of the 1992 Convention on Biodiversity affirms the value of traditional Indigenous knowledge in connection with conservation, sustainable development, and intellectual property regimes.[35]

Resolutions adopted at subsequent major UN conferences prior to the Declaration's adoption—the 1993 World Conference on Human Rights, the 1994 UN Conference

Diversity and Democracy (Palgrave MacMillan 2002); DL van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (University of Pittsburgh Press 2000).

[32] Rio Declaration on Environment and Development, UN Conference on Environment and Development, Rio de Janeiro, 13 June 1992, UN Doc A/CONF.151/26 (1992) vol 1, Annex 1, Principle 22.

[33] Agenda 21, UN Conference on Environment and Development, Rio de Janeiro, 13 June 1992, UN Doc A/CONF.151/26 (1992) vols 1, 2, 3, Annex 2.

[34] Especially pertinent is Chapter 26 of Agenda 21, ibid vol 3, 16. Chapter 26 is phrased in non-mandatory terms; nonetheless, it carries forward normative precepts concerning Indigenous peoples and hence contributes to the crystallization of consensus on Indigenous peoples' rights. Chapter 26 emphasizes Indigenous peoples' 'historical relationship with their lands' and advocates international and national efforts to 'recognize, accommodate, promote and strengthen' the role of Indigenous peoples in development activities (ibid Art 26(1)).

[35] Convention on Biological Diversity, 5 June 1992, UN Doc UNEP/BIO.Div/N7-INC.5/4 (1992) 31 ILM 818, Art 8(j). Implementation of the Convention includes periodic meetings of State Parties (Conferences of the Parties), and a number of technical committees and working groups on specific issues covered by the Convention. The issue of Indigenous traditional knowledge has been the object of a specific focus by the Conference of the Parties. See, eg, Decision III/14 (Implementation of Article 8(j), Report of the Third Meeting of Conference of the Parties to the Convention on Biological Diversity, UN Doc UNEP/CBD/COP/3/38 (1997) Annex 2, 90–93).

on Population and Development, the World Summit on Social Development of 1995, the Fourth World Conference on Women of 1995, and the World Conference Against Racism of 2001—similarly include provisions that affirm or are consistent with prevailing normative assumptions in this regard.[36] Further still, the 1989 Convention on the Rights of the Child, a UN-sponsored treaty that has been ratified by almost all of the world's States, affirms in Article 30 the right of Indigenous children to culture, religion, and language.[37]

A new generation of international standards concerning Indigenous peoples also came to be reflected prior to the Declaration's adoption in the interpretation and application of already existing, widely ratified human rights treaties of general applicability. The work of the UN treaty-monitoring bodies, especially that of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination (CERD), is especially noteworthy in this regard. The Human Rights Committee, which is charged with monitoring the International Covenant on Civil and Political Rights, began addressing Indigenous peoples' concerns mostly through its application of the Covenant's Article 27, which affirms the right of minorities to culture, religion, and language. While linking Indigenous peoples with the rubric of minorities, the Committee identified Indigenous peoples as having a distinct set of characteristics and rights arising from those characteristics. In its General Comment on Article 27 of 1994, the Committee held this provision of the Covenant to establish affirmative obligations on the part of States with regard to Indigenous peoples in particular, and it interpreted Article 27 as covering all aspects of an Indigenous group's survival as a distinct culture, understanding culture to include economic or political institutions and land-use patterns, as well as language and religious practices.[38] This interpretation of Article 27 was confirmed in the Committee's adjudication of complaints submitted to it by representatives of Indigenous groups pursuant to the Optional Protocol to the Covenant.[39]

The Committee also began addressing Indigenous peoples' concerns in connection with the right of self-determination, which is affirmed for 'All peoples' in Article 1 of the Covenant. It did this initially in commenting upon Canada's 1999 report

[36] See, eg, UN General Assembly, Vienna Declaration and Programme of Action, A/CONF.157/23 (12 July 1993) paras 20 (Declaration) and 28–32 (programme of action); Programme of Action adopted at the International Conference on Population and Development (Cairo, 5–13 September 1994), UN Doc ST/ESA/SER.A/149 (1995) paras 6.21–6.27, UN Sales No E.95.XIII.7; Copenhagen Declaration on Social Development, in Report of the World Summit for Social Development (Copenhagen, 6–12 March 1995), UN Doc A/CONF.166/9 (1995) ch 1, Res 1, Annex I, paras 26(m), 29, commitments 5(b), 4(f), 6(g); Programme of Action of the World Summit for Social Development, ibid Annex II, paras 12(i), 19, 26(m), 32(f) and (h), 35(e), 38(g), 54(c), 61, 67, 74(h), 75(g); Beijing Declaration, in Report of the Fourth World Conference on Women (Beijing, 4–15 September 1995), UN Doc A/CONF.177/20 (1985) ch 1, Res 1, Annex I, para 32; Platform of Action, ibid Annex II, paras 8, 32, 34, 58(q), 60(a), 61(c), 83(m), (n), and (o), 89, 106(c) and (y), 109(b) and (j), 116, 167(c), 175(f). It should be noted that, from the point of view of the Indigenous representatives participating in these conferences, the provisions of these Resolutions have not provided sufficient affirmation of rights of the Indigenous people.

[37] Convention on the Rights of the Child, GA Res 44/25, Annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989) (entered into force 2 September 1990). For a discussion of the Convention and relevant UN procedures, see P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002) 225–41.

[38] ICCPR, General Comment 23: Article 27: The Rights of Minorities, UN Doc A/49/40 (Fiftieth Session, 1994) vol I, 107, para 7.

[39] Optional Protocol to the International Covenant on Civil and Political Rights, 999 UNTS 302 (entered into force 23 March 1976).

under the Covenant, stating that the right of self-determination of Article 1 protects Indigenous peoples, inter alia, in their enjoyment of rights over traditional lands, and it recommended that, in relation to the aboriginal people of Canada, 'the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant'.[40] Other provisions of the Covenant applied by the Committee to address Indigenous issues include Articles 17 (privacy), 23 (integrity of the family), and 25 (political participation).

For its part the CERD, the treaty-monitoring body that promotes compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, began regularly considering issues of Indigenous peoples within the general framework of the non-discrimination norm running throughout that Convention, rather than in connection with any particular Article of the Convention, which like other relevant human rights treaties nowhere specifically mentions Indigenous groups or individuals. In 1997, the CERD issued its General Recommendation on Indigenous Peoples, which identifies Indigenous peoples as vulnerable to patterns of discrimination that have deprived them, as groups, of the enjoyment of their property and distinct ways of life, and hence calls upon State Parties to take special measures to protect Indigenous cultural patterns and traditional land tenure.[41] The CERD applied its understanding of the non-discrimination norm in examining a number of cases involving Indigenous peoples' claims over land and resources, under its 'early warning/urgent action' procedure.[42]

At the regional level, the 2001 decision by the Inter-American Court of Human Rights in the *Awas Tingni* case was a watershed in the process of normative construction around Indigenous peoples' demands and its linkage to human rights principles of general applicability.[43] This case, which marked the definitive assumption of the modern Indigenous rights discourse within the inter-American human rights system, was the first legally binding decision by an international tribunal upholding Indigenous collective rights, and it became a model for strategic litigation in favour of Indigenous peoples in the American region and even beyond. But surely the most influential dimension of the *Awas Tingni* decision was the Court's international legal construction by which it accepted that Indigenous peoples' traditional land tenure constitutes property that is protected by Article 21 of the American Convention on Human Rights, which protects private property generally. According to the Court's 'evolutionary' interpretation in *Awas Tingni* of the scope of right to property, '[i]ndigenous groups, by the fact of their very existence, have the right to live freely on their own territory; the close ties of Indigenous people with the land must be recognized'.[44]

[40] Concluding Observations and Recommendations of the Human Rights Committee: Canada, UN Doc CCPR/C/79/Add.105 (7 April 1999) para 8.

[41] CERD, General Recommendation 23: Indigenous Peoples, UN Doc A/52/18 (18 August 1997).

[42] For an explanation of the function and procedures of the early-warning measures of the CERD, see A Tanaka with Y Nagamine, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Guide for NGOs* (IMA and Minority Rights Group 2001) 364–66.

[43] *Awas Tingni Mayagna (Sumo) Indigenous Community v Nicaragua* (Merits, Reparations, and Costs), Judgment (31 August 2001), IACtHR Series C No 79 (2001).

[44] ibid para 149. For analyses of the case, see SJ Anaya and C Grossman, 'Case of Awas Tingni v. Nicaragua: A Step in the International Law of Indigenous Peoples' (2002) 19 Ariz J Int'l & Comp L 1; SJ Anaya and M Campbell, 'Gaining Legal Recognition of Indigenous Land Rights: The Story of the Awas Tingni Case in Nicaragua' in DR Hurwitz and ML Satterthwaite (eds), *Human Rights Advocacy Stories* (Thomson Reuters/Foundation Press 2009) 117–53.

Building on the *Awas Tingni* precedent, the inter-American human rights bodies pioneered, in the early 2000s, a rich body of jurisprudence that defined the contours of Indigenous land and resource rights, and other rights of Indigenous peoples protected under the American Convention.[45] This jurisprudence relied widely on a perceived normative consensus on the content of Indigenous peoples' rights in the Americas and beyond, and was clearly informed by the provisions of ILO Convention 169 (even in relation to countries that were not a party to the Convention), the draft of the UN Declaration that had been developed by the Working Group on Indigenous Populations, and the practice of UN human rights bodies and mechanisms.[46]

The influential jurisprudence of the inter-American human rights system, along with the other developments just described, placed Indigenous issues within the mainstream of the international human rights agenda, advanced the understanding that the specific rights of Indigenous peoples being articulated are derivative of human rights principles of general applicability, and catalysed the ongoing discussions on a UN Declaration that would proclaim standards to uphold those specific rights.

3. The UN Declaration: Drafting and Negotiation

The progressive affirmation of Indigenous rights in international instruments, including notably ILO Convention 169, as well as in the evolving interpretation of existing standards of general applicability by international and regional human rights bodies and mechanisms, constituted the normative and political context in which the Declaration was initially framed, negotiated, and, eventually, adopted.

This context influenced the drafting of the Declaration in at least two fundamental ways. First, the label of 'Indigenous' had already become a distinctive item on the human rights agenda, precluding (at least to the very last phase of the debate) any substantive discussion regarding the desirability or justification of specific Indigenous rights standards. By the late 1990s, Indigenous peoples had become naturalized in international law and practice, and so implicitly had the need for adopting an international instrument affirming the rights of these peoples—as constantly reaffirmed by international fora and mechanisms. Second, the actual content of the Declaration was 'tested' in the practice of international human rights bodies and mechanisms, with the text of the draft Declaration (already in circulation since 1994) playing an influential role in this regard. As a result, some of the most controversial issues tackled in the negotiations concerning the text of the Declaration, from Indigenous peoples' self-determination to collective land and resource rights, had already been affirmed by authoritative voices such as the Human Rights Committee.[47] The normative convergence between the text of the draft Declaration and that of ILO Convention 169 further facilitated the Declaration's drafting process, at least

[45] On the normative practice of the inter-American human rights system, see J Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System' (2006) 6(2) Human Rights LJ 281.

[46] See L Rodríguez-Piñero, 'The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement' in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011) 457–83.

[47] B Kingsbury, 'Reconstructing Self-Determination: A Relational Approach' in P Aikio and M Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self Determination* (Åbo Akademi University 2000) 19–37, 31–33.

in relation to Latin American countries, where the ILO convention had proved to be particularly influential.[48]

The direct involvement of Indigenous peoples was an undeniable driving force in all phases of the drafting process. The early experience of the Working Group on Indigenous Populations, which actually contributed to changing the conventional rules of participation by non-governmental entities in UN human rights bodies, became a precedent for subsequent negotiations. By the late 1990s, when the Human Rights Commission decided to establish an ad hoc working group to formally open up negotiations regarding the Declaration's text, it was already evident that Indigenous peoples' organizations ought to be somehow represented in that working group, which subsequently started to operate as a *de facto* bipartite body. Moreover, individual Indigenous leaders and experts, together with Indigenous peoples' advocates, became ingrained in the work of UN bodies and inter-State political negotiations, and their influence was key in specific conjunctures—from the composition of the Declaration's first draft to the last-minute negotiations within the General Assembly. While the assertion that the UN Declaration was the outcome of equal negotiations between States and Indigenous peoples—or even an 'international treaty' between them—is surely an exaggeration,[49] neither the Declaration nor its actual contents could be explained without Indigenous peoples' participation in the international arena.[50]

The drafting history of the Declaration can be traced back to as early as 1982, with the establishment of the Working Group on Indigenous Populations. From this moment to its final adoption by the General Assembly in 2007, the debates about the text of the Declaration elapsed for a period of almost a quarter of a century, and the process faced breakdown in several phases. The unprecedented length of the debates, which exceeds by far that of any other previous UN human rights standard-setting process, is in itself telling of the deeply entrenched normative and political tensions arising from the recognition of Indigenous peoples' rights.

3.1. Early Debates at the Working Group on Indigenous Populations

Adopted by the ECOSOC in 1982, the original mandate of the Working Group on Indigenous Populations requested the Working Group to give 'special attention to the evolution of standards concerning the rights of indigenous populations'.[51] This willingly ambiguous phrasing was a reflection of already existing demands within the emerging international Indigenous movement for the international affirmation of Indigenous

[48] On the impact and relevance of the international Indigenous rights regime in the Latin American region, particularly with regard to ILO Convention 169, see L Rodríguez-Piñero, 'La internacionalización de los derechos indígenas en América Latina: ¿el fin de un ciclo?' in S Martí (ed), *Pueblos indígenas y política en América Latina: el reconocimiento de sus derechos y el impacto de sus demandas a inicios del siglo XXI* (Fundación CIDOB 2007) 181–99.

[49] For an authoritative statement of this position, see B Clavero, 'Cometido del Foro Permanente para las Cuestiones Indígenas a la Luz del Valor Vinculante y con Vistas a la Mayor Eficacia del Derecho Internacional de los Derechos Humanos', International Expert Group Meeting on the Role of the United Nations Permanent Forum on Indigenous Issues in the Implementation of Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples (New York, 14–16 January 2009), UN Doc PFII/2009/EGM1/4 (2009).

[50] On an analysis of the participatory dynamics of the international Indigenous movement, see LA Miranda, 'Indigenous Peoples as International Law Makers' (2010) 32(1) U Pa J Int'l L 203; A Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America* (Stanford University Press 2009).

[51] ECOSOC Res 1982-34 on the Study of the Problem of Discrimination against Indigenous Populations (7 May 1982) UN Doc E/Res/1982/34 (1982) para 2.

peoples' rights. In 1983, when the final part of the Martínez Cobo report was issued, it recommended the Working Group to 'formulate a body of basic principles, based on those to be duly formulated in the text of a draft Declaration, and propose in due course a draft convention'.[52]

Specific texts came also originally from the Indigenous movement. The land mark 1977 non-governmental organization (NGO) meeting on discrimination against Indigenous peoples in the Americas concluded with the adoption of a 'Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere'.[53] The first proposal for a comprehensive instrumental instrument—initially conceived as a draft convention—on the rights of Indigenous peoples has been attributed to the World Council of Indigenous Peoples (WCIP), one of the most influential international Indigenous organizations at that time, as early as 1981.[54] A revised version of this document was adopted by the fourth general assembly of the WCIP in 1984, in the form of seventeen principles constituting the 'minimum standards which States shall respect and implement' regarding the rights of Indigenous peoples.[55] This influential document set the basis for a proposed 'Declaration of Principles', which galvanized the consensus of the major Indigenous organizations participating in the Working Group's early phases.[56]

These early initiatives were decisive in the Working Group's decision, in 1985, to embark on the drafting of a new international instrument in accordance with its standard-setting mandate.[57] The idea of a draft Declaration, to be eventually adopted by the General Assembly as an initial step towards a future binding instrument, was also strategically decided at that moment.[58] In this decision, as well as in the future standard-setting process, the Working Group's chairperson, Erica-Irene Daes, took an influential leadership role, and her work was permeated by the influence of Indigenous representatives, individual experts, and the UN Secretariat.[59]

[52] Third Part of the United Nations Economic and Social Council Study of the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1983/21/Add.8 (30 September 1983) para 312.

[53] See RT Coulter, 'Commentary on the UN Draft Declaration on the Rights of Indigenous Peoples' (1994) 18(1) *Cultural Survival Quarterly Magazine*, <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/united-states/commentary-un-draft-declaration-rights-indige> accessed 10 October 2017 (Coulter is considered to be the author of the 1977 Declaration of Principles).

[54] The origins of the Principles are to be traced to a proposal prepared in 1981 by Douglas Sanders, special adviser for the WCIP, for an international covenant on the rights of Indigenous peoples. See H Minde, 'The Destination and the Journey, Indigenous Peoples and the United Nations from the 1960s through 1985' (2007) 4 Gáldu Čála—J Indigenous Peoples' Rights 10, 27–28.

[55] World Council of Indigenous Peoples, 'Declaration of Principles', ratified by the IV General Assembly of the World Council of Indigenous Peoples, Panama, 23–30 September 1984, reproduced in Report of the Working Group on Indigenous Populations on Its Fourth Session, UN Doc E/CN.4/Sub.2/1985/22 (1985) Annex III.

[56] Draft Declaration of Principles proposed by the Indian Law Resource Center, Four Directions Council, National Aboriginal and Islander Legal Service, National Indian Youth Council, Inuit Circumpolar Conference, and the International Indian Treaty Council, reproduced in Report of the Working Group, 4th Sess (n 55) Annex IV.

[57] Report of the Working Group, 4th Sess (n 55) 57–70. The Working Group's proposal was subsequently endorsed by its parent bodies. See Sub-Commission on the Prevention of Discrimination and Protection of Minorities Res 1985-22 (1985); Commission on Human Rights Res 1986-27 (1986); Commission on Human Rights Res 1987-34 (1987).

[58] See E-I Daes, 'The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples' in C Charters and R Stavenhagen, *Making the Declaration Work: The United Nations Declartion on the Rights of Indigenous Peoples* (IWGIA 2009) 48–76, 59.

[59] ibid 63.

From that moment until 1993, when the first draft of the Declaration was adopted, the Working Group became the locus of international debates regarding the scope of Indigenous peoples' rights, involving an ever-growing number of observer States, Indigenous representatives, and individual experts.[60] The thematic discussions in the Working Group's annual sessions, along with the myriad of studies prepared by Working Group members, Indigenous organizations, and NGOs, further fuelled those debates and anchored them in the wider context of the international human rights regime.

In the context of the heightened international political environment of the late Cold War,[61] the first decade of discussions around the content of the future Declaration was characterized by deeply entrenched controversies around some of the key demands for recognition voiced by the Indigenous movement. The debates around the Declaration tackled, in a single package: basic notions of State sovereignty (eg sovereignty over lands and natural resources); structural principles of international law (eg self-determination); and even basic assumptions of the modern international human rights regime (eg individual versus collective human rights).[62]

Under the headship of the Working Group's chairperson, the draft Declaration was prepared in three main steps. In 1985, Daes tabled a preliminary version of seven draft principles, built up around the protection of cultural identity and collective existence.[63] In 1988, Daes presented to the WGIP a first draft of the instrument, entitled 'Draft Universal Declaration on Indigenous Rights', which used, for the first time, the term 'peoples', and affirmed collective autonomy rights.[64] After several rounds of consultations, a new version of this document was debated by the Working Group in 1992,[65] and eventually adopted in 1993.[66] In line with Indigenous peoples' demands, this last draft expressly affirmed Indigenous peoples' unqualified right to self-determination. The Draft Declaration, as adopted by the Working Group on Indigenous Populations, was

[60] The open rules for the participation of Indigenous organizations—advanced by the first WGIP chairperson, Asbjørn Eide, beyond conventional ECOSOC rules—as well as the establishment in 1985 of a voluntary fund, multiplied Indigenous participation. See A Eide, 'The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples' in Charters and Stavenhagen (n 58) 46, at 34. The open rules for Indigenous participation were agreed by the Working Group on Its First Session, Report of the Working Group on Indigenous Populations on Its First Session, UN Doc E/CN.4/Sub.2/1982/33 (1982) paras 111–12. The Voluntary Fund for Indigenous Populations was originally established to foster the participation of Indigenous representatives at the Working Group's annual sessions. UNGA Res 40/131 (1985).

[61] See SJ Anaya, 'Superpower Attitudes towards Indigenous Peoples and Group Rights' (1999) 93 Proceedings of the American Society Int'l L 251.

[62] Daes (n 58) 60–72. [63] Report of the Working Group, 4th Sess (n 55) paras 71–84.

[64] Draft Universal Declaration on Indigenous Rights, reproduced in Report of the Working Group on Its Sixth Session, UN Doc E/CN.4/Sub.2/1988/24 (1988) Annex II.

[65] See Draft Declaration on the Rights of Indigenous Peoples, Revised Working Paper submitted by the Chairperson-Rapporteur, Mrs. Erica-Irene Daes, UN Doc E/CN.4/Sub.2/1992/28 (1992). A first set of draft paragraphs were adopted by the Working Group in 1992. See 'Preambular and operative paragraphs as agreed upon by the members of the Working Group at first reading', reproduced in Report of the Working Group on Indigenous Populations on Its Tenth Session, UN Doc E/CN.4/Sub.2/1993/33 (1993) Annex I. See also Draft Declaration on the Rights of Indigenous Peoples, Revised Working Paper Submitted by the Chairperson-Rapporteur, Ms. Erica-Irene A. Daes, UN Doc E/CN.4/Sub.2/1993/26 (1993); Explanatory Note Concerning the Draft Declaration by the Chairperson-Rapporteur, UN Doc E/CN.4/Sub.2/1993/26/Add.1 (1993).

[66] See Draft Declaration as Agreed upon by the Members of the Working Group at Its Eleventh Session, reproduced in Report of the Working Group on Indigenous Populations on Its Eleventh Session, UN Doc E/CN.4/Sub.2/1993/29 (1993) Annex I. The text was subsequently subject to a technical review by the UN Centre for Human Rights. See Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/Sub.2/2 (1994) and Add.1.

endorsed by its parent body, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in 1994.[67]

The text of the 1994 draft was the essence, both in terms of content and in terms of form, of the future Declaration. The actual involvement of Indigenous representatives in the Working Group's debates on the Draft Declaration—whose enthusiasm surely silenced States' initial reservations to the text—granted the text with a quasi-mystical aura. Moreover, during the lengthy period in which it lingered unaltered until its formal adoption, the Draft Declaration became the authoritative expression of the emerging international consensus on the rights of Indigenous peoples and, as such, contributed to the mainstreaming of Indigenous rights through international law and practice.[68]

3.2. Negotiations at the Working Group on the Draft Declaration

Following the pattern of previous standard-setting processes, the UN Commission on Human Rights remitted the text of the Draft Declaration to an ad hoc working group for inter-State negotiations: an 'open-ended inter-sessional' working group 'with the sole purpose of elaborating a draft declaration'.[69] The Commission identified the end of the International Decade on Indigenous People (2004) as the symbolic deadline for the negotiations.[70]

The Commission's Working Group on the Draft Declaration departed from previous standard-setting experiences in its flexibility regarding the participation of Indigenous peoples as observer organizations, which followed the pattern of open participation already in operation at the Sub-Commission's Working Group. While the Working Group on the Draft Declaration never formally evolved into anything but a UN official intergovernmental negotiation roundtable, the influence of Indigenous organizations and advocacy NGOs in the Working Group's discussions was remarkable, and became somewhat institutionalized through informal consultations between the Indigenous caucus and key governments and other informal procedural agreements.[71]

The drafting process of the Declaration within the Working Group on the Draft Declaration can be divided into phases. During the first phase, ranging from the Working Group's First Session in late 1995 to 2005, the process was characterized by the stalemate in the negotiations. In the Working Group's First Session, the Indigenous caucus called for the outright adoption of the text of the Declaration adopted by the Sub-Commission, based on the argument that 'as such', the text 'reflected minimum standards for the survival of indigenous peoples';[72] this would later become known as the 'no-change' position.[73] The Working Group's annual sessions, coupled with a number of special sessions and expert seminars, witnessed the constant reopening of the normative and political

[67] Sub-Commission on the Prevention of Discrimination and Protection of Minorities Res 1994-45 (26 August 1994) Annex.

[68] See Section 5, below. [69] Commission on Human Rights Res 1995-32 (3 March 1995).

[70] ibid para 2 ('for consideration and adoption by the General Assembly within the International Decade of the World's Indigenous People'). The International Decade was launched by the General Assembly for the period 1994–2004. See UNGA Res 48/163 (21 December 1993). The decade followed the celebration of 1993 as International Year of the World's Indigenous Peoples. See UNGA Res 48/133 (20 December 1993).

[71] See JB Henriksen, 'The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process' in Charters and Stavenhagen (n 58) 79.

[72] Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, UN Doc E/CN.4/1996/84 (1996) para 25.

[73] Henriksen (n 71) 79.

debates around key aspects of the Draft Declaration. While very few States were ready to adopt the Sub-Commission's text,[74] a number of key States, particularly from the American and Asian regions, consistently opposed essential aspects and provisions of the Draft Declaration, including its lack of definition of Indigenous peoples and the collective character of Indigenous rights, as well as its specific provisions regarding self-determination and land and resources.[75]

By the early 2000s, it had become crystal clear that the negotiations on the Declaration had led to a point of total blockage. When the First International Decade on Indigenous Populations came to a formal end in 2004, only two of the forty-five provisions included in the Draft Declaration had been *provisionally* adopted.[76] This lack of progress generated a general sense of frustration among all actors concerned, including Indigenous organizations, and some started to forecast the ending of the process. Writing in that mood, an Indigenous observer described the Working Group to be 'as alive as a fossil'.[77]

The appalling failure of the negotiations of the Declaration contrasted with the momentum gained by Indigenous issues in the wider human rights framework. This period was also concomitant to the definitive institutional backing of Indigenous issues within the United Nations, with the almost simultaneous establishment of the Permanent Forum on Indigenous Issues, subsidiary to the ECOSOC,[78] and of the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, as part of the special procedures machinery of the Commission on Human Rights.[79] Both the Permanent Forum and the Special Rapporteur added to other voices calling in favour of the rapid conclusion of the negotiations on the Declaration.[80] In a context of generalized exhaustion of all actors involved, a second phase in the negotiations starting, however, can be discerned from the mid-2000s, leading to an eventual breakthrough in the process. The change in the dynamics can be partly explained, on the one hand, by the changes in the negotiation strategies of the Indigenous movement, which slowly started to depart from the previously uncontested 'no-change position'.[81]

[74] According to Henriksen, only three States supported the adoption of the Sub-Commission's text: namely, Bolivia, Fiji, and Denmark (ibid).

[75] ibid 79–81; M Åhrén, 'The UN Declaration on the Rights of Indigenous Peoples: How Was It Adopted and Why It Is Significant' (2007) 4 Gáldu Čala 87; LE Chávez, 'The Declaration on the Rights of Indigenous Peoples, Breaking the *Impasse*: The Middle Ground' in Charters and Stavenhagen (n 58) 96–106, 98–100. On the negotiations regarding the land and resources provisions, see M Åhrén, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction' in Charters and Stavenhagen (n 58) 200–15.

[76] See Indigenous Issues, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Chairperson's Summary of Proposals (Mr. Luis-Enrique Chávez), UN Doc E/CN.4/2004/WG.15/CRP.4 (14 October 2004). The two Articles that were formally agreed upon during the Working Group's first ten years relate to the right to nationality, UN Declaration (n 1) Art 6, and the principle of non-discrimination between Indigenous men and women, ibid Art 44.

[77] S Chakma, 'The WG: As Alive As Fossil' (2005) 101(5) ACHR Rev.

[78] ECOSOC Res 2000-22 on Establishment of a Permanent Forum on Indigenous Issues E/Res/2000 (28 July 2000)

[79] Commission on Human Rights Res 2001/57 (24 April 2001).

[80] Permanent Forum on Indigenous Issues, Report on the First Session (13–24 May 2002), ECOSOC Official Record Supp (No 23) (2002), UN Docs E/2002/43/Rev.1, E/CN.19/2002/3/Rev.1 (2002) para 18 (calling upon States to 'adopt the draft United Nations declaration on the rights of Indigenous peoples before the end of the decade'); Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, UN Doc E/CN.4/2002/97 (4 February 2002) para 15 (describing the Draft Declaration as 'undoubtedly the most important human rights document for indigenous peoples', and calling for its adoption 'before the end of the International Decade').

[81] The tensions within the Indigenous movement regarding the 'no-change position' started to become evident during the Working Group's Sixth Session in 2000. Meeting at the Indigenous Caucus during session,

Gradually, a number of key Indigenous organizations and actors started to approach supportive governments expressing their willingness to agree to changes to the Declaration's text in exchange for their political support.[82]

In parallel to the abandonment of the 'no-change position', a number of governments started to step forward with more or less open positions in favour of the adoption of the Draft Declaration. Norway broke the ice in the first instance,[83] soon joined by other Nordic States.[84] The initial group of 'friends of the Declaration' succeeded in having Mexico and Guatemala play a renovated, constructive role in the negotiations,[85] paving the way to Latin American support.

Crystallized by the pressure of time, the change in the negotiations' dynamics became evident during the Working Group's Tenth Session (2004), which, based on the engagement between governments and Indigenous organizations, witnessed tangible progress in the negotiations.[86] This paved the way for a second, clearly differentiated phase of the process.

two influential Indigenous organizations, the Inuit Circumpolar Conference and the Sami Council, expressed their preparedness to transcend the 'no-change position' and negotiate changes to the Sub-Commission's text. According to one observer, the two organizations were 'literally attacked by adherents of the no-change position' and accused of being 'sell-outs' (Åhrén (n 75) 88).

[82] The evolution in the Indigenous movement's negotiation strategies consolidated in May 2003, prior to the Working Group's Ninth Session. That year, the International Work Group for Indigenous Affairs (IWGIA) facilitated a meeting in Copenhagen, which created 'an informal core group of relatively like-minded Indigenous representatives that would from then on convene, network, consult and strategize on the Declaration process' (ibid 91). The so-called 'Copenhagen group' played a key role in abandoning the 'no-change position', approaching specific States for their political support. A similar meeting took place in Montreal, Canada, in 2006, organized by Rights & Democracy (ibid 100). The Copenhagen group gradually gained supporters within the Indigenous Caucus. By the Working Group's Tenth Session, only a small number of Indigenous representatives—mostly from North America—continued to adhere to the 'no-change position' (ibid 97).

[83] Åhrén (n 75) 92–93; Henriksen (n 71) 82–83. During the Working Group's Eighth Session, in 2002, the Norwegian delegation tabled a proposal (the Norwegian proposal) in search of agreement, taking into account States' concerns, in particular. See 'Proposal to Arrange the Provisions on Self-Determination, Including Autonomy or Self-Government, Participation, etc, Presented by Norway (16.09.02)' reproduced in Working Document, Summary of Intercessional [sic.] Consultations, Geneva, 16–19 September 2002, UN Doc E/CN.4/2002/WG.15/WP.4 (2002) Annex 2; and Proposal by Norway: Amendment to the Fifteenth Preambular Paragraph (18.09.02), ibid Annex 3. The Norwegian proposal was the first to combine the unqualified affirmation of the rights to self-determination with the affirmation of the principle of territorial integrity (initially as a preambular paragraph) in terms similar to the final Declaration as adopted by the General Assembly.

[84] The Norwegian proposal was the basis for a subsequent proposal jointly tabled by the governments of Nordic countries (the 'Nordic proposal') prior to the Working Group's Ninth Session in 2003. See Working Document, Proposals Submitted by the Nordic Countries (Denmark, Finland, Iceland, Norway and Sweden), UN Doc E/CN.4/2003/WG.15/WP.2 (2003). In order to force the public positioning of a number of dubitative States, Norway called for a vote on the proposal (Åhrén (n 75) 92–93). See Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 on Its Ninth Session, UN Doc E/CN4/2004/81 (2004) paras 18–19. In turn, the Norwegian and Nordic proposals evolved into a third proposal, which, for the first time, sought to rewrite completely the text of the Declaration.

[85] Åhrén (n 75) 93; Henriksen (n 71) 83. Reportedly following Norway's suggestion, the Chairperson appointed Mexico and Guatemala, which until that moment had aligned with the Indigenous movement's 'no-change position', as facilitators of the informal consultations that took place during the Working Group's Tenth Session in 2004. Their role ended up being crucial in crystallizing a unified position within the Group of Latin American and Carribean Countries (GRULAC). See Åhrén (n 75) 97.

[86] The session was divided into meetings (September and November 2004). The session evolved around informal consultations on a whole new text (known as 'CRP1', after the document's UN symbol) which, for the first time, departed completely from the Sub-Commission's text. See Information provided by States: Draft Declaration on the Rights of Indigenous Peoples, Amended Text (Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland), UN Doc E/CN.4/2004/WG.15/CRP.1 (2004). New Zealand later retired its support to the text, alleging difficulties with the land and resource provisions (Åhrén (n 75) 97). CRP1, which incorporated the changes proposed by the Norwegian and Nordic proposals (n 85), served as the basis

In March 2005, the Commission on Human Rights authorized yet another session of the Working Group, as it had already met its initial deadline—the end of the International Decade on the World's Indigenous Peoples.[87] In September that year, the Mexican government gathered together in Pátzcuaro (Michoacán) more than ninety Indigenous and government representatives, along with international experts, aiming at overcoming the 'perceived atmosphere of lethargy and blockage'.[88] The Pátzcuaro meeting possibly constituted the single most influential breakthrough in the Declaration's drafting process. It concluded with the expression of the commitment to accommodate 'both the concerns of States and indigenous peoples without holding back the development of international law'.[89]

This pledge for accommodation materialized in the Working Group's Eleventh (and last) Session, held between December 2005 and January 2006. Building on the existing consensus regarding the unqualified affirmation of Indigenous peoples' right to self-determination, and with only a few outstanding issues, the session concluded with an unprecedented level of consensus, and the Working Group was able to preliminarily adopt twenty-five preambular paragraphs and thirty-five Articles of the Declaration.[90]

The Working Group's chairperson, Peruvian ambassador Luis Enrique Chávez, subsequently recaptured these agreements in a new draft to be presented to the Commission on Human Rights 'with the hope that it would be considered as a final compromise text'.[91] The final text, which incorporated the basic provisional agreements reached during the second phase of the negotiations, departed from the original Sub-Commission's text in 'more than the details'.[92] The text affirmed Indigenous self-determination, made no reference to the principle of territorial integrity, and, in spite of some governments' concerns, managed to preserve strong provisions regarding Indigenous land and resource rights. It also excluded an earlier provision concerning Indigenous peoples' self-identification, thus leaving the text with no criteria for the definition of its personal scope of application.[93]

for the Working Group's negotiation. See Report of the Working Group established in Accordance with Commission on Human Rights Resolution 1995/32 on Its Ninth Session, UN Doc E/CN.4/2005/89 (2005) para 17. At the end of the session, 'substantive progress had been achieved' (ibid para 59). By the end of the session, Norway had identified fourteen preambular paragraphs and fourteen Articles ready for adoption, which represented approximately half of the Declaration's text (Åhrén (n 75) 96).

[87] Commission on Human Rights Res 2005-50 (20 April 2005). The renewal of the Working Group's mandate brought about yet another schism within the Indigenous movement, with a small number of inidgenous organizations calling to bring the process to a halt (Åhrén (n 75) 99–100). In reaction, the world's Indigenous organizations strongly advocated support for the Working Group. See 'Statement Submitted by the Undersigned Indigenous Peoples' Organizations and Support Organizations to the Sixty-First Session of the Commission on Human Rights for the Extension of the CHRWG to Elaborate on a Declaration on the Rights of Indigenous Peoples' (8 April 2005), <http://www.unpo.org/article/2295> accessed 10 October 2017.

[88] Statement of Xóchitl Gálvez Ruiz, Director General of the National Commission for Indigenous Peoples Development, Reproduced in Information Provided by the Government of Mexico, International Workshop on the Draft United Nations Declaration on the Rights of Indigenous Peoples (Patzcuaro, Michoacán, Mexico, 26–30 September 2005), UN Doc E/CN.4/2005/WG.15/CRP.1 (2005) 13.

[89] ibid 11.

[90] LA de Alba, 'The Human Rights Council's Adoption of the United Nations Declaration on the Rights of Indigenous Peoples' in Charters and Stavenhagen (n 58) 108–37, 113.

[91] Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 on Its Eleventh Session, UN Doc E/CN.4/2006/79 (2006) para 30. See 'Revised Chairman's Summary and Proposal, Draft Declaration on the Rights of Indigenous Peoples', reproduced in ibid Annex I.

[92] Åhrén (n 75) 105. [93] ibid 105–06.

4. The UN Declaration: Final Adoption

4.1 Adoption by the Human Rights Council

Notwithstanding the important and rapid progress made in the last few years of the negotiation process, the history of the Declaration was decisively influenced by the reform of the UN human rights structure, which transcended the limits of the Indigenous rights agenda. In April 2006, building on a number of long-standing proposals for reform, the General Assembly formally decided to terminate the Commission on Human Rights, substituting it by a new-fangled Human Rights Council.[94] A process of 'institution-building' ensued, which reviewed the former Commission's structure and standard-setting processes.[95]

The transformation of the UN human rights system subjected the future of the Declaration to a high level of uncertainty. The Sixty-Second (and last) Session of the Commission on Human Rights, which was supposed to consider the proposed draft Declaration elaborated by the chair of the Working Group on the Draft Declaration, was initiated in March 2006 without a clear sense of purpose, and subject to ongoing negotiations concerning the new UN human rights machinery.[96] The Commission's last session ended up being a modest and symbolic session which lasted less than three hours and bore no substantive output.[97] The dismantling of the Commission on Human Rights involved the formal ending of the Working Group on the Draft Declaration. The old Working Group on Indigenous Populations was also called to an end, holding its Twenty-Fourth (and last) Session in May 2006.[98] It was eventually substituted by a new Expert Mechanism on the Rights of Indigenous Peoples, whose mandate was severely curtailed in relation to that of the Working Group.[99]

The transition from the Commission to the Council proved to be beneficial for advancing towards the adoption of the Declaration, which became intertwined with wider political negotiations concerning the Council's future structure and methods of work. Mexico, joined by the GRULAC (the UN Latin American and Caribbean regional group) and the Nordic States, led the support for the Declaration, on the basis of the Working Group Chairperson's proposal, thus preventing any further consideration of the text.[100] Mexico was successful in connecting the future of the Draft Declaration with that of the draft UN Convention on Enforced Disappearances, gaining the European Union's support in exchange.[101] The appointment of the skillful Mexican ambassador, Luis Alfonso de Alba, as the first president of the Human Rights Council was surely a key factor in this regard.

[94] UNGA Res 60/251 (3 April 2001).

[95] ibid para 6. See also 'United Nations Human Rights Council: Institution-Building', Human Rights Council Res 5/1, of 18 June 2006 UN Doc A/HRC/Res/5/1 Annex.

[96] De Alba (n 90) 118.

[97] See Commission on Human Rights Res 2006/1 (27 March 2006) (referring all pending reports to the Human Rights Council for further consideration and formally concluding its work).

[98] See Report of the Working Group on Indigenous Populations on Its Twenty-Fourth Session (Geneva, 31 July–4 August 2006), UN Doc A/HRC/Sub.1/58/22 (2006). The Working Group's last session took place after the adoption of the text of the Declaration by the Human Rights Council in 2006, its historical achievement.

[99] See Human Rights Council Res 6/365 of 14 December 2006 UN Doc A/HRC/6/362 (14 December 2006). The Expert Mechanism mandate was couched in terms of 'thematic expertise', and circumscribed mainly to 'studies and reach-based advice' (ibid para 1(a)).

[100] De Alba (n 90) 120–21. [101] ibid.

In preparation for the First Session of the Human Rights Council in June 2006, Peru—as chair of the late Working Group—submitted a Draft Resolution for approval of the Working Group's text and organized informal consultation in the search for co-sponsors.[102] The opposition towards the adoption of the Declaration was led by Australia, New Zeland, and the United States, joined at the last minute by Canada.[103] The vote of the Peruvian proposal eventually took place on 28 June 2006, and the text of the Declaration was adopted by a large majority of the members of the Human Rights Council (only two States, Canada and Russia, voted against), being referred to the General Assembly for its final adoption.[104]

The text of the Working Group's Chairperson did not surely convince all States, and even some of those that voted in favour of its final adoption had remaining concerns about the wording of some of its provisions. The text did not have unanimous support from the international Indigenous movement either: content-wise, the Working Group's text—circulated only a few months after its final adoption—never actually went through a thorough editing by the UN Secretariat, and was plagued with many inconsistencies and duplications, many of which are still discernable in the final text.

4.2 The Impasse at the General Assembly

Concealed under the climate of general exaltation after the adoption of the text of the Declaration by the Council, there were, from the onset, glooming signs that the States opposing the text would try to exert all their influence to block its passage at the General Assembly. Despite diplomatic efforts to prevent it, these signs proved to be right.

In November 2006, the Draft Declaration, along with the rest of the Resolutions adopted by the Human Rights Council, was to be considered by the General Assembly's Third Committee (Social, Humanitarian, and Cultural Affairs) prior to the plenary. A few days before the scheduled date for the discussions, Namibia, on behalf of the African Group, addressed the President of the General Assembly showing concern on a number of key provisions of the Declaration and requesting the deferral of its consideration in order to allow for negotiations 'in greater depth'.[105] Botswana followed suit, and circulated an aide memoire which elaborated in detail the concerns of the African Group.[106] Despite the fact that the African Group had not objected to the adoption of the Declaration at the Human Rights Council,[107] and that some African States still expressed their support for it,[108] the African Group formalized its position at the Third Committee, succeeding to defer the consideration of the Declaration to the next session of the General

[102] Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human Rights Council', UN Doc A/HRC/1/L.3 (23 June 2006).

[103] De Alba (n 90) 121.

[104] HRC Res 2/1 (29 June 2006). The casted vote was: 30 votes in favour, 12 abstentions, 2 against. Report of the Human Rights Council, First Session (19–30 June 2006), 61 UN GAOR Supp (No 53) 19, UN Doc 61/53 (2006).

[105] Quoted in De Alba (n 90) 126.

[106] African Group, Aide Memoire: 'United Nations Declaration on the Rights of Indigenous Peoples' (New York, 9 November 2006).

[107] No African State voted against the Declaration. Cameroon and Mauritius voted in favour, while Algeria, Morocco, Nigeria, and Senegal abstained. See Report of the HRC (n 104) 19.

[108] De Alba (n 90) 127 (citing Benin, Cameroon, Congo, and South Africa). According to De Alba, South Africa abandoned its initial support for the Declaration, despite the contrary positions 'in Geneva and in Pretoria' (ibid).

Assembly.[109] The general sentiment was that the motion of deferral effectively put the future of the Declaration at risk.

The reasons behind the last-minute African opposition to the Declaration are manifold. Some participants in the process pointed at the direct influence of some of the main countries opposing the Declaration (particularly Australia, Canada, New Zealand, and the United States).[110] Moreover, the debate on the adoption of the Declaration continued to fluctuate in the uncertainties of the makeover of the UN human rights machinery, where the relation between the Human Rights Council and the Third Committee was still under dispute.[111] Beyond these circumstantial factors, the late reaction by the African Group contrasted with the lack of meaningful involvement of African countries in the previous debates on Indigenous issues—and specifically in the negotiation at the Working Group on the Draft Declaration—and of the ambiguities surrounding the notion of Indigeneity in the African context.[112]

The referral in the consideration of the Declaration confirmed the anxiety by the majority of the African Group regarding key provisions of the draft instrument. In January 2007, the Assembly of the African Union adopted an atypical Resolution against the Declaration, citing in particular concerns regarding 'national and territorial integrity'.[113] Despite the eleventh-hour mobilization of the African Commission on Human and Peoples' Rights (ACommHPR, or the African Commission) and other actors in favour of the Declaration,[114] the African Group clearly favoured a reopening of the text for

[109] UNGA Third Committee Resolution 61/57, UN Doc A/C.3/61/L.57/Rev.1 (2007).

[110] These countries started to be ironically known as the CANZUS Group, to underline their coherent position against the Declaration. See 'UN Adopts the Declaration on the Rights of Indigenous Peoples' (2007) 31(3) *Cultural Survival Quarterly Magazine*, <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/none/un-adopts-declaration-rights-indigenous-peoples> accessed 10 October 2017.

[111] De Alba (n 90) 128.

[112] For analysis on the problematic insertion of the concept of 'Indigenous peoples' in the African context, see DL Hodgson, 'Becoming Indigenous in Africa' (2009) 52(3) Afr Stud Rev 1; W van Genugten, 'The Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104(1) AJIL 29.

[113] Decision on the United Nations Declaration on the Rights of Indigenous Peoples, AU Doc Assembly/AU/9 (VIII) Add.6 (2007) para 6.

[114] In response to the African Union's decision, the African Commission produced a detailed advisory opinion which responded, *seriatim*, to the concerns expressed by African States in the 2006 aide memoire (n 107). See United Nations Declaration on the Rights of Indigenous Peoples, ACHPR 42nd Sess (May 2007). The advisory opinion recalled the commission's position that the protection of Indigenous rights should take into account a 'strict respect for the inviolability of borders and the obligation to protect the territorial integrity of State Parties' (ibid para 6). It further called upon to promote an 'African common position' with a view to ensure the 'speedy adoption of the Declaration' (ibid paras 44–45).

With the financial and technical support of the Copenhagen-based NGO International Work Group for Indigenous Affairs (IWGIA), the African Commission had embarked on the promotion of Indigenous peoples' rights in the continent since the early 2000s. In 2000, the African Commission established, as part of its special mechanisms, the Working Group on Indigenous Populations/Communities in Africa (ACommHPR Res 51(XVIII)00 on the Rights of Indigenous Peoples' Communities in Africa (2000)). In 2006, the working group published a comprehensive report on the rights of Indigenous peoples within the African human rights system. See 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities. Submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa", Adopted by the African Commission on Human and Peoples' Rights at Its 28th Ordinary Session' (IWGIA 2005). For a first-hand narrative of the role of the African Commission in relation to the Declaration, see A Barume, 'Responding to the Concerns of the African States' in Charters and Stavenhagen (n 58) 170–82. Albert Barume was the head of a self-fashioned African Group of Experts that liaised with African diplomatic representations missions in New York to address their concerns regarding the Declaration. See African Group of Experts, 'Response Note to the Draft Aide Memoire of the African Group on the UN Declaration on the Rights of Indigenous Peoples' (21 March 2007).

complete renegotiation. Up to thirty-seven amendments were finally proposed by this group.[115]

4.3 Final Negotiations and Adoption by the General Assembly

During the last year of negotiations before its final adoption by the General Assembly, the group of States friends of the Declaration, with the support of the international Indigenous caucus, deployed additional efforts to have the text of the Declaration passed as adopted by the Human Rights Council, in an effort to prevent the opening of new negotiations.[116]

In June 2007, the President of the General Assembly appointed the Permanent Representative of the Philippines, Ambassador Hilario Davide, as facilitator, in order to broker informal consultations on the Declaration.[117] A month later, Davide presented a number of proposals which anticipated different scenarios for breaking the impasse, all of which envisaged the at least limited reopening of key provisions to further negotiation.[118] A number of States continued to oppose all proposed solutions.[119]

After last-minute negotiations, an agreement was directly reached between the African Group and the friends of the Declaration in August 2007, only a few weeks before the General Assembly's vote.[120] This final agreement incorporated the most important set of amendments to the Draft Declaration since its adoption by the WGIP in 1994. This included, inter alia, the affirmation, as a qualifier of Indigenous self-determination, of the

[115] De Alba (n 90) 129.

[116] The main co-sponsors of the Declaration were then Fiji, Germany (holding the EU presidency), Mexico, Norway, and Peru. See De Alba (n 90) 129. For perspectives from Indigenous representatives, see 'Our Land, Our Identity, Our Freedom: A Roundtable Discussion', *Cultural Survival Quarterly* (2007), <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/our-land-our-identity-our-freedom-roundtable-discussion> accessed 5 December 2017 (an interview with Les Malezer, President of the self-fashioned Indigenous Global Caucus, and other international Indigenous leaders).

[117] Letter from the President of the General Assembly, HE Haya Rashed al Khalifa, to All Permanent Missions and Observers (New York, 6 June 2007).

[118] The facilitator tabled three possible 'middle-ground' options. Option A envisaged the addition of a chapeau or foremost preambular paragraph. Option B called for amending Art 46 and addressing the States' concerns in the accompanying Resolution. Option C, on its part, suggested more in depth-amendments. See Report to the President of the General Assembly on the Consultations on the Draft Declaration on the Rights of Indigenous Peoples (New York, 13 July 2007) Annex II.

[119] In a supplement to his report, the facilitator recounted the pending concerns expressed by a group of States (Australia, Canada, Colombia, Guyana, New Zealand, Russian Federation, and Suriname) and their rejection of the facilitator's proposals. See 'Non-Paper: United Nations Declaration on the Rights of Indigenous Peoples. Summary of Key Areas of Concern' (undated), reproduced in Supplement to the Report to the President of the General Assembly on the consultations on the Draft Declaration on the Rights of Indigenous Peoples (New York, 20 July 2007) Annex II. See also 'Non-Paper: United Nations Draft Declaration on the Rights of Indigenous Peoples, Negotiation Framework to Achieve an Irreducible Number of Amendments' (28 June 2007) (ibid Annex III). These documents expressed particular concern regarding six areas, which would involve changes to at least sixteen Articles of the Draft Declaration: self-determination, self-government, and Indigenous institutions (Arts 3–5, 33); lands, territories, and resources (Arts 26, 29); redress and restitution (Arts 11, 27–28); free, prior, and informed consent (Arts 19, 32(2)); lack of clarity concerning the definition of 'Indigenous' military defence (Arts 10, 30); rights of third parties (Art 46); intellectual property rights (Arts 11, 31); and education (Art 14). See Letter to Hilario G Davide, Permanent Representative of the Republic of the Philippines to the United Nations (18 July 2007), reproduced in ibid Annex III. These concerns were expressed in two documents that were widely circulated among States. Colombia's last-minute change of position was seen as a 'desertion' of the GRULAC ranks. See De Alba (n 90) 129. Colombia eventually abstained in the General Assembly's vote on the Declaration.

[120] De Alba (n 90) 132.

principles of territorial integrity and political unity of independent States.[121] Moreover, the final agreement incorporated, in response to the African States' concerns, specific wording acknowledging regional and country specificities.[122]

On the basis of this agreement, Peru formally submitted a Draft Resolution to the General Assembly's plenary. The Declaration was formally adopted by the General Assembly on 13 September 2007, with the positive votes of an overwhelming majority of UN Member States, 143, with only 4 against and 11 abstaining. While the explanatory statements of the four States that voted against adoption of the Declaration (Australia, Canada, New Zealand, and the United States of America) showed disagreement with the wording of specific Articles or concerns with the process of adoption, they also expressed a general acceptance of the core principles and values advanced by the Declaration. And, eventually, each of these States reversed their position and formally endorsed the Declaration.[123]

5. Conclusion: The Declaration as Part of Modern International Human Rights Law

The UN Declaration on the Rights of Indigenous Peoples stands today as a major landmark in the development of international human rights law. In its content, the Declaration is at the forefront of some of the most significant transformations in the modern human rights regime, with its move beyond the classic individualist paradigm and its embrace of collective human rights, and the vision it projects of restorative justice that canalizes social change away from the legacies of historical patterns of oppression.

During the last three decades, the demands for recognition of Indigenous peoples across the world have led to the gradual emergence of a common body of opinion regarding the content of the rights of these peoples on the basis of long-standing principles of international human rights law and policy. This common normative understanding has been advanced by multiple developments that have extended into the practice of international human rights bodies. The Declaration on the Rights of Indigenous Peoples is the most important of these developments globally, encapsulating as it does the widely shared understanding about the rights of Indigenous peoples that has been building over decades on a foundation of previously existing sources of international human rights law.

[121] UN Declaration (n 1) Art 46(1) ('Nothing in this Declaration may be ... 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').

[122] ibid preambular para 24 (recognizing that 'the situation of indigenous peoples varies from region to region and from country to country', as well as 'national and regional particularities and various historical and cultural backgrounds').

[123] For Australia, see J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (3 April 2009). For Canada, see Ministry of Aboriginal Affairs and Northern Development, 'Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples' (12 November 2010). For New Zealand, see P Sharples, Minister of Māori Affairs, 'Opening Statement', UN Permanent Forum on Indigenous Issues, Ninth Session (19 April 2010); 'Ministerial Statements—UN Declaration on the Rights of Indigenous Peoples—Government Support' (20 April 2010) 662 NZPD 10229. For the United States, see State Department, 'Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples Initiatives to Promote the Government-to-Government Relationship and Improve the Lives of Indigenous Peoples' (9 December 2010). See also United Nations, 'UN Expert Welcomes United States' Endorsement of the Declaration on the Rights of Indigenous Peoples', press release (17 December 2010).

The Declaration affirms in its Article 3 the right of Indigenous peoples to self-determination, in terms that restate the widely ratified, common provisions of Article 1 of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. On this grounding, the Declaration provides a detailed list of rights that constitute 'the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world' (Article 43). The Declaration reaffirms basic individual rights to equality and non-discrimination, life and personal integrity and freedom, and nationality and access to justice; and it calls for special attention to specific rights and needs of Indigenous elders, women, youth, children, and persons with disabilities. At the same time, the Declaration affirms rights of a collective character in relation to self-government and autonomous political, legal, social, and cultural institutions; cultural integrity, including cultural and spiritual objects, languages, and other cultural expressions; lands, territories, and natural resources; social services and development; treaties, agreements, and other constructive arrangements; and cross-border cooperation.

Together with affirming the aspects of self-determination related to maintaining spheres of autonomy, the Declaration also reflects the common understanding that Indigenous peoples' self-determination at the same time involves a participatory engagement and interaction with the larger societal structures in the countries in which they live. In this connection, the Declaration affirms Indigenous peoples' right 'to participate fully, if they so choose, in the political, economic, social and cultural life of the State,'[124] and to be consulted in relation to decisions affecting them, with the objective of obtaining their prior, free, and informed consent.[125]

The basic normative justification of the Declaration is stated in the sixth paragraph of the Preamble, which acknowledges that 'indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests'. The Declaration's Preamble thus stresses the essentially remedial purpose of the instrument. It aims at repairing the ongoing consequences of the historical denial of the right to self-determination and other basic human rights affirmed in international instruments of general applicability.

With its essentially remedial character, the Declaration does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights within a new generation of thinking about the specific cultural, historical, social, and economic circumstances of Indigenous peoples. Basic norms of equality and non-discrimination, as well as other generally applicable human rights in areas such as culture, health, or property, which are recognized in other international instruments and are universally applicable, ground the contemporary Indigenous rights regime that is represented by the Declaration.

[124] UN Declaration (n 1) Art 5. See also ibid Art 18 (affirming the right to participate in 'the decision-making in matters which would affect their rights').

[125] ibid Art 19 ('States shall consult and cooperate in good faith with the indigenous peoples concerned ... in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'). For an analysis of the principle of free, prior, and informed consent under the Declaration, see in particular Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples, UN Doc A/HRC/24/41 (1 July 2013) paras 26–36.

Given its character and background, the Declaration has significant normative weight. Albeit clearly not binding in the same way that a treaty is, the Declaration relates to already existing human rights obligations of States, as demonstrated by the work of UN Treaty Bodies and other human rights mechanisms, and hence can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and State practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law.[126] Furthermore, as a Resolution adopted by the General Assembly with the approval of an overwhelming majority of Member States, the Declaration represents a commitment on the part of the United Nations and Member States to its provisions, within the framework of the obligations established by the UN Charter, to promote and protect human rights on a non-discriminatory basis.

Whatever its precise legal significance, the Declaration is a monument to the survival and struggles of Indigenous peoples, an understanding they share with the broader global community about a dignified future for them, and a beacon of hope for realization of that future beyond the daunting challenges that persist.

[126] See International Law Association (ILA), 75th Conf, Res No 5/2102, para 2 (Sofia, 5 August 2012); ILA, Committee on the Rights of Indigenous Peoples, Final Report (2012) (finding that several core provisions of the Declaration constitute, or are becoming, part of customary international law or are general principles of international law); SJ Anaya and S Wiessner, 'OP-ED: The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment', *Jurist* (3 October 2007).

Chapter 3. Relationship to Human Rights, and Related International Instruments

Martin Scheinin and Mattias Åhrén

1. Introduction

This chapter seeks to assess how the UN Declaration on the Rights of Indigenous Peoples[1] (UNDRIP) fits within the international legal system in general. Such an exercise will necessarily also have to include an assessment of the legal status of the Declaration. In doing so, the analysis will place particular focus on the boundaries and relationships between the international legal system and human rights in general, on the one hand, and human rights of Indigenous peoples, communities, and individuals, as recognized in the UNDRIP, on the other. The need for such an assessment springs in large part from the UNDRIP's strong focus on Indigenous *peoples'* rights as 'peoples'.[2] That peoples are no longer exclusively understood as aggregate populations of States or territories, but can in addition be defined in terms of common ethnicity and culture, is at least arguably a new feature in international law. We certainly applaud this recent progression. At the same time, we think that this development has occurred without sufficient attention being paid to how these 'new' peoples' rights relate to the rights of (i) States and (ii) individual members of the people.

In many respects, the general approach taken by the UNDRIP towards Indigenous rights is natural. The Declaration's strong emphasis on collective and in particular peoples' rights is reflective of what has been a key feature of the Indigenous rights regime essentially since its inception. Largely from the very day Indigenous peoples' representatives started to address the United Nations in order to claim recognition of and respect for their rights, the focus of such claims has been on allowing Indigenous peoples the possibility to preserve, maintain, and develop their own distinct societies, existing side by side with the majority society.[3] In other words, political rights—or sovereign rights if one wants—have always been at the forefront of the Indigenous rights regime. In that way, Indigenous peoples' rights distinguish themselves from those that apply to minority groups that are primarily individual rights, ie they are, at least formally, rights of individual members of such groups.[4]

[1] UNGA Res 61/295.

[2] Reference is made to the conceptual discussion in Chapter 1 of this volume, by Joshua Castellino and Cathal Doyle. See also M Scheinin, 'What Are Indigenous Peoples?' in N Ghanea and A Xanthaki (eds), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry* (Martinus Nijhoff 2005) 3–13; M Scheinin, 'Minority Rights, Additional Rights or Added Protection?' in M Bergsmø (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Martinus Nijhoff 2003) 487–504.

[3] See UNDRIP, second recital of the Preamble and Art 5.

[4] The importance of the distinction between Indigenous and minority rights is well illustrated by the differences between the UNDRIP and the principal international instrument on minority rights, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The latter instrument, as the title suggests, in contrast to the UNDRIP, focuses on the rights of members of the group, rather than on rights of the group as such. Within treaty regimes, a discussion on individual and collective dimensions of minority rights is well known under Art 27 of the International Covenant on Civil

Thus, when placing emphasis on peoples' rights, the UNDRIP follows in the tradition of the Indigenous rights discourse in general, as reflected first and foremost in Article 3 of the Declaration. This provision, borrowing language from common Article 1 of the 1966 twin Covenants,[5] proclaims that:

> Article 3
>
> 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.

As some have been eager to point out, the UNDRIP, formally speaking, remains a legally non-binding *instrument*. Notwithstanding, several of the Declaration's *provisions and general positions*, including its Article 3 and the acceptance of peoples' rights in general, must be understood to be reflective of customary international law.[6] The UNDRIP thus confirms that Indigenous peoples have emerged as peoples, also for international law purposes.[7] That substantial parts of the UNDRIP are reflective of customary international law is further highlighted by the fact that many of its provisions are based on widely ratified treaty law standards, such as the two Covenants of 1966, including the mentioned Article 1 on peoples' right to self-determination, and the UN Convention on the Elimination of all Forms of Racial Discrimination (ICERD).[8]

The UN General Assembly's (GA) adoption of the UNDRIP under the more demanding category of a Declaration (instead of a simple resolution),[9] with overwhelming support, and coupled with the important subsequent endorsements by the four States that at the time of adoption voted against the Declaration, provides strong support for the contention that many of the substantive provisions of the UNDRIP reflect and express norms of customary international law.[10] For instance, one of the more central provisions in the Declaration, namely Article 26 on Indigenous peoples' (or rather communities') property rights over territories and natural resources traditionally used by them, is surely reflective

and Political Rights (ICCPR), including as reflected in General Comment 23 and case law by the Human Rights Committee.

[5] UNGA Res 2200 A (XXI), 993 UNTS 3 and 999 UNTS 171 (16 December 1966).

[6] M Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) ICLQ 957, 966; J Rehman, 'Between the Devil and the Deep Blue Sea: Indigenous Peoples as the Pawns in the US "War on Terror" and the Jihad of Osama Bin Laden' in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011) 561.

[7] To be clear, UNDRIP Art 3 only addresses the rights of Indigenous peoples. Consequently, the argument presented here does not stretch beyond asserting that *Indigenous* peoples have emerged as international legal subjects with rights as such. Whether other non-State-forming 'peoples' united by a common ethnicity and culture, but which are not Indigenous, are, or perhaps rather should be, recognized as peoples for international legal purposes is thus beyond the scope of this chapter. For an argument that such groups should be acknowledged as qualifying for peoplehood, see W Kymlicka, 'Beyond the Indigenous/Minority Dichotomy' in Allen and Xanthaki (n 6).

[8] UNGA Res 2106 (XX), 660 UNTS 195 (21 December 1965).

[9] The Office of Legal Affairs of the UN Secretariat has underlined that when the GA opts to adopt an instrument in the Declaration format, there is 'a strong expectation that Members of the international community will abide by it'. See UN Doc E/CN.4/L.6101-2 (1962).

[10] CJ Fromherz, 'Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples' (2007–2008) 156 U Pennsylvania L Rev 1341, 1344; C Baldwin and C Morel, 'Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation' in Allen and Xanthaki (n 6) 123–24.

of customary international law, a claim that can increasingly also be made with regard to Article 28 on the right to restitution.

At the same time, it would be erroneous to state that the UNDRIP in its totality adequately represents customary international law, and even more so to say that the instrument as such has become legally binding. What is more—and this is at the core of this Chapter—it is unlikely that such a course of development could materialize in the foreseeable future. As touched upon, this is due to certain inherent tensions between Indigenous peoples' rights and certain key features of the international legal system. These tensions were not resolved, indeed to some extent perhaps not even seriously noted, during the elaborations on the UNDRIP, and were therefore as a result brought into the text of the instrument itself.

As touched upon, and as elaborated on further below, the mentioned inherent tensions between Indigenous peoples' rights and the international legal system in general are chiefly an outcome of the fact that recent developments within international law—as reflected in the UNDRIP—have witnessed Indigenous peoples emerging as self-determining polities. As such, Indigenous peoples have seemingly come to carry certain features normally and traditionally associated only with States. This development has occurred, however, without there having been any real clarification as to how these new 'State-like features' of Indigenous peoples should, and could, be accommodated for within the international legal system at large, including within the human rights framework. To be more precise, in our view, these features/tensions are first and foremost the following four, as reflected in the UNDRIP.

1.1 What Is the Relationship between Indigenous Peoples' Right to Self-Determination and States' Sovereign Rights, Including Their Right to Respect for Their Territorial Integrity?

The above-cited Article 3 of the UNDRIP on Indigenous peoples' right to self-determination appears verbatim in the Declaration as it did in the very first draft of the instrument. That no changes were made to Article 3 during the Declaration process shall in no way, however, be taken as a token of the provision being uncontroversial. On the contrary, what position the UNDRIP should take on the right to self-determination was highly contentious throughout the process, for various reasons.[11] One concern expressed by some States towards the very end of the UNDRIP deliberations was that a right to self-determination of Indigenous peoples as enshrined in Article 3 of the Declaration might be interpreted as authorizing secession by Indigenous peoples from the States within which they reside today, or that the provision might at least inspire such movements. These expressed fears match well the argument that has been made that States' inhospitality towards an expanded understanding of the right to self-determination has been motivated partly by an assumption that the right encompasses a right to statehood, or at least could be understood to do so by the new beneficiaries of the right.[12] To allay these

[11] For a detailed and in-depth outline of deliberations that eventually resulted in the GA's adoption of the UNDRIP, see Chapter 2 by S James Anaya and Luis Rodríguez-Piñero in this volume.

[12] SJ Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004) 7–8; D Raič, *Statehood and the Law of Self-Determination* (Brill 2002) 242–43; H Hannum, *Autonomy, Sovereignty and Self-Determination: Autonomy: The Accommodation of Conflicting Rights* (rev edn, University of Pennsylvania Press 1996) 96, 473.

expressed concerns and break the impasse, language was eventually borrowed from the Friendly Relations Declaration,[13] principle 5, paragraph 7, and inserted as a new Article 46(1) of the UNDRIP. In this manner, the Declaration was furnished with an explicit reference to the principle of respect for the territorial integrity of States. Article 46(1) reads as follows:

> Article 46
>
> 1. 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.

This was probably from a *practical* point of view a sound solution, as it removed one obstacle for having the UNDRIP adopted. There is, however, a *principal* problem with this seemingly convenient political solution, namely that the Friendly Relations Declaration, and the principle of respect for the territorial integrity of States more broadly, address, at least as conventionally understood, relationships between sovereign States, and not between peoples, nor between peoples and States.

The attempt to subject Indigenous peoples to a principle conventionally reserved for State-to-State relations is illustrative of the broader problem alluded to above. As Indigenous peoples have emerged as international polities with rights as such—including self-determining and self-governing rights—States may see a need, or at least harbour an interest, to subject Indigenous peoples to the same obligations that apply to other recognized international polities, ie to States. But this perceived need or interest does not change the fact that subjecting non-State actors to such obligations constitutes a novelty in international law and is arguably controversial, a fact to which the UNDRIP is apparently blind. Section 2 below elaborates on this issue.

1.2 What Is the Relationship between Indigenous Peoples' Right to Self-Determination and the Jurisdiction Exercised Today by States Internally?

As mentioned, Article 3 of the UNDRIP proclaims that Indigenous peoples have the right to self-determination. The immediately following Articles 4 and 5 then proceed to elaborate that this right should first and foremost be exercised through autonomy and self-governing arrangements with Indigenous peoples' own political institutions as principal actors.

The right to self-determination envisioned by the UNDRIP should be contrasted with the right to consultation. The latter right, as enshrined, for example, in ILO Convention 169 Concerning Indigenous and Tribal Peoples[14] Article 6, is a right to process only. True, the right to consultation does place obligations on the consultor to engage in good faith with the consultee with the aim of reaching common ground. Notwithstanding, if, despite serious and honest efforts, no consent can be found, decision-making power ultimately

[13] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625, UN General Assembly Official Records, 25th Sess, Supp 28 (1971), 9 ILM 1292.

[14] Adopted by the ILO General Assembly on 27 June 1989; 72 ILO Official Bull 59.

always vests with the consultor. The scope and content of the right to self-determination, on the other hand, including as enshrined in the UNDRIP, must conceptually go beyond that of the right to consultation.[15] 'Go beyond' in this context would mean that, unlike the right to consultation, the right to self-determination shifts decision-making power in some instances from the State (the former consultor) to the Indigenous people (the former consultee). In other words, the right to self-determination, when applied to Indigenous peoples, requires a transfer of jurisdiction from State political bodies to Indigenous peoples' representative institutions.

The consequences of the understanding of the right to self-determination outlined here is a novelty within international law. Never before has a human right required States to cede jurisdiction normally associated with them to another polity within the State. The UNDRIP does, however, offer little guidance as to how far-reaching this duty (and the corresponding right) actually is.[16] In the absence of clearer instructions, there are fairly few signs of such jurisdiction having been transferred from States to Indigenous peoples during the more than ten years that have passed since the adoption of the UNDRIP. This begs the question: how is a right to self-determination that applies not to the aggregate populations of States, but rather to a sub-segments thereof, to be realized—or is this very right itself too much of a novelty for one to expect it to be properly implemented within a foreseeable future? Section 3 below addresses this issue.

1.3 'Collectivization' of Rights that are Traditionally Understood to Apply to Individuals Only

The two questions above address situations where Indigenous peoples having emerged as international legal subjects, thereby at least arguably coming close to taking on certain roles normally associated with States, create friction between Indigenous peoples' rights and precisely the rights (and interests) of States. This third point, and our final one immediately below, now turn the attention to two situations where Indigenous peoples taking on the described role instead results in tension with the human rights system's conventional focus on the rights of individuals.

As mentioned, the UNDRIP's clear focus on collective, rather than individual, rights sits well with the history of the Indigenous rights regime, and certainly responds to the position generally taken by Indigenous peoples' representatives during the elaboration of the Declaration. Still, this aspect of the Declaration also implies that the UNDRIP, at least if judging by its wording, 'collectivizes' a number of human rights conventionally understood to apply to individuals only. This aspect of the Declaration is even present in the context of the right of non-discrimination, a right that is generally considered to be a cornerstone of the human rights system and thus to carry the status of *jus cogens*.[17] Indeed, if the right to self-determination is considered the principal peoples' right, the right to non-discrimination is arguably the chief right of individuals in the UNDRIP.

[15] See Vienna Convention on the Law of Treaties Art 31(1), *mutatis mutandis*; and also M Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford University Press 2016) 74–76, 133–38.

[16] A few notable exceptions include UNDRIP Arts 19 and 32.

[17] A Cassese, *International Law* (2nd edn, Oxford University Press 2005) 65; I Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 489.

The principal non-discrimination provisions in the UNDRIP are Articles 1 and 2,[18] which read as follows:

Article 1

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.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals have the right to be free from any kind of discrimination, in the exercise of these rights, in particular that based on their indigenous origin or identity.

The conventional understanding of the right to non-discrimination as a right that attaches to individuals only is in line with the liberal political philosophy theory that underpinned the classical international legal system.[19] Article 2 of the UNDRIP follows in this liberal tradition when proclaiming that Indigenous individuals are equal to all other individuals and shall be free from discrimination. But it equally clearly breaks with the same tradition when suggesting that the entitlement to equality goes beyond individuals and applies to Indigenous peoples also. The same could be said of Article 1 which, although not explicitly referring to 'equality' or 'discrimination', still clearly has a non-discrimination connotation when proclaiming that Indigenous peoples are entitled to the full enjoyment of all human rights and freedoms.[20]

The UNDRIP thus not only confirms that Indigenous peoples are international legal polities, with rights that normally attach to such polities, such as those of self-determination and development, it also suggests that Indigenous peoples are beneficiaries of collectivized versions of the right to non-discrimination and other rights normally understood to attach to individuals only.[21] The UNDRIP does so without offering much explanation as to how this new approach is supposed to fit within the human rights system in general. Maintaining that the right to non-discrimination applies to peoples is clearly at odds with the traditional individual nature of the human rights system and also, it has been argued, contradicts the notion of the universality of human rights, as also reflected in interpretative statements delivered in connection with the adoption of the UNDRIP.[22]

Section 4, below, returns to the potential unresolved tension between the conventional individual nature of human rights and the UNDRIP's 'collectivization' of the right

[18] In the context of the UNDRIP's take on the right to non-discrimination, reference could also be made to Preambular Para 22 of the Declaration. This provision is not, however, further dealt with in this chapter. See also Art 21, which proclaims that Indigenous peoples have a right to non-discrimination when it comes to economic and social conditions.

[19] See, generally, Chapter 7 in this publication by Kirsty Gover.

[20] Here, we leave aside the somewhat awkward and potentially confusing drafting of both provisions, eg, the interchangeable references to rights of individuals and peoples where it is not entirely clear what legal subject is entitled to what rights.

[21] Other UNDRIP provisions that attach rights normally associated with individuals to Indigenous peoples include the right to practise spiritual and religious traditions and ceremonies (Art 12), the right to use, revitalize, and transmit their languages (Art 13), labour rights (Art 17), and the right to determine one's identity (Art 33).

[22] See Chapter 7 in this volume, by Kirsty Gover.

to non-discrimination (and other human rights conventionally understood to attach to individuals only).

1.4 Absence of a General Human Rights 'Safeguard Clause' in the UNDRIP

That the recognition of human rights of Indigenous peoples as such potentially creates friction with the conventional human rights system might to some come across as a legal–technical issue. However, in our view, that is not necessarily the case. Rather, it attains apparent practical relevance when one considers the relationship between Indigenous peoples' collective human rights, and in particular the right to self-determination, on the one hand, and the human rights of individual members of the group, on the other.

State sovereignty has the capacity to limit its own applicability. States have voluntarily limited what actions they can take with reference to their sovereignty, through the creation of international law. This feature of State sovereignty is not least relevant within the sphere of the human rights, which, as mentioned, conventionally meant human rights of the individual.[23] In this way, the human rights system has come to place checks and balances on States' exercise of their jurisdiction in order to ensure for individuals (and groups) certain minimum standards and rights.

As discussed in brief above and as elaborated below, the UNDRIP, in particular through underscoring that Indigenous peoples are beneficiaries of the right to self-determination, seemingly confirms that under international law parts of the jurisdiction normally associated with States shall be transferred to Indigenous peoples. Moreover, as touched upon above and as further shown below, the Declaration also proclaims that Indigenous peoples are holders of other human rights that have conventionally been associated with individuals only. The UNDRIP provides Indigenous peoples with these 'sovereign' and other peoples' *rights* without, or at least without explicitly, placing the corresponding *obligations* upon Indigenous peoples that would attach to States when they are exercising their sovereignty, that is, the obligation to respect and ensure the human rights of their citizens, which in an Indigenous context translates to the individual members of the group. In fact, Article 35 of the UNDRIP contains a provision that could be understood as having the almost opposite intent. Article 35 reads:

> Indigenous peoples have the right to determine the responsibilities of individuals to their communities.[24]

[23] Cassese (n 17) 98, 123; Brownlie (n 17) 291–3; F Mégret, 'International Law as Law' in J Crawford and M Koskenniemi (eds), *International Law* (Cambridge University Press 2012) 67, 83; Raič (n 12) 25–6; F Hinsley, *Sovereignty* (Basic Books 1966) 219; J Castellino, 'The Protection of Minorities and Indigenous Peoples in International Law' (2010) 17(3) Int'l J Minority & Group Rights 393, 409; SJ Anaya, 'The Capacity of International Law' in W Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press 1995) 326–27.

[24] In this context, it is worth noting UNDRIP Art 45, which provides that '[n]othing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future'. In conformity with the other provisions of the UNDRIP, this clause was written as a savings clause in respect of *the collective rights of indigenous peoples* and thus not as a clause aimed at protecting the human rights of *individual members of indigenous peoples* in respect of the exercise of power or authority in relation to the members of the group. Hence, Art 45 does not amount to a 'safeguard clause' in the meaning discussed here. When relating the UNDRIP to international human rights law and general international law, it will therefore be necessary to read into its text an implied clause on the duty of Indigenous peoples to respect the human rights of their members, as elaborated below.

The UNDRIP's recognition of Indigenous peoples' rights, and in particular sovereign/self-determining rights, without explanation as to how such rights relate to the rights of the individual members of the group, possibly caters for a friction between the two sets of rights. Section 5, below, elaborates on the risk for such tensions and how, if appearing, these can be eased.

1.5 Tentative Conclusion

It is our belief that should all of the rights enshrined in the UNDRIP be effectively implemented, and the Indigenous rights regime fit more smoothly into the international legal system in general, the issues outlined above need to be addressed and hopefully resolved. There is a need for a coherent and authoritative institutionalized practice of interpretation that can at least partly remedy some contradictions in the text of the UNDRIP and hence evolve the current practice beyond mere textual interpretation of the Declaration. Moreover, such an authoritative institutionalized practice would need to be backed up by explicit or tacit approval by States. Without such a development, we find it hard to see how the UNDRIP itself could become an international instrument with independent legally binding force, rather than an aggregate of a number of separate norms that each on their own need justification in order to be defended as legally binding.[25] The below analysis constitutes a first attempt to ignite such a discussion.

2. On the Relationship between Indigenous Peoples' Right to Self-Determination and States' Sovereign Rights, Including Their Right to Territorial Integrity

It was highlighted above that Article 46(1) of the UNDRIP provides that nothing in the Declaration may be construed as authorizing or encouraging any action by any State, *people, group, or person* which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. As further mentioned, Article 46(1) borrows this language from Principle 5, paragraph 7, of the GA Friendly Relations Declaration, but in doing so tweaks it in one significant respect. Principle 5, paragraph 7, as that Declaration in general, only obliges *States* to respect the territorial integrity of other States. According to the Friendly Relations Declaration, peoples are bestowed with rights,[26] but not with obligations. In stark contrast, Article 46(1), through the addition of the reference to *peoples, groups, and persons* (which thus does not appear in Principle 5, paragraph 7), appears to oblige also such subjects to respect the territorial integrity of States.

The Friendly Relations Declaration elaborates on the UN Charter, including on its Article 1(2), which identifies as the second of the World Organization's three objectives the development of friendly relations among *nations* based on respect for equal *rights* and self-determination of peoples. The use in Article 1(2) of the term 'nations' is as a reference to States. That said, the Charter did not preclude, and subsequent developments have indeed confirmed, that there may be situations where there are more than one 'people'

[25] We reiterate that several UNDRIP provisions already today reflect binding international customary law. The case here is that for this to be said of the Declaration in its entirety as a comprehensive and coherent instrument outlining what rights Indigenous peoples (as well as Indigenous communities and individuals) possess under international law, some further work is needed.

[26] See in particular Principle 5 on equal rights and self-determination of peoples.

within the territory of a State, and that a people's territory can also stretch across State borders. The use of the word 'peoples' as the rights-holder in Article 1(2) entails that the right of self-determination is not a right of States (or their rulers), but of the people or peoples within a State.

Several UN Charter provisions spell out in more detail *Member States'* obligations towards the territorial integrity of other States. One may in particular in this context make reference to Article 2(4), pursuant to which *all members* shall refrain *in their international relations* from the threat or use of force against the territorial integrity or political independence of any State, and also refrain from acting in any other manner inconsistent with the purposes of the United Nations. This provision clearly addresses States in their international relations when proclaiming their duty to refrain from the use of force against the territorial integrity of another State. Equally clearly, Article 4(2) has no application, however, in respect of the relationship between a State and its own people, or its own peoples when there are more than one people within the State.

In summary, the UN Charter undoubtedly provides that: (i) the principle of territorial integrity of States only applies to State-to-State relationships; and (ii) the principle of self-determination attaches to peoples and not to States. Both these positions have been confirmed by subsequent sources. With regard to the fact that the obligation to respect a State's right to territorial integrity applies only to other States, reference can, in addition to the Friendly Relations Declaration, for example, be made to the International Court of Justice (ICJ) Advisory Opinion on the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* of 22 July 2010, as well as to the Canadian Supreme Court's Ruling in the so-called *Quebec Secession Case*.[27] As to peoples being the only beneficiaries of the right to self-determination (as opposed to States), confirmation is provided by, in addition to the mentioned Article 3 of the UNDRIP and common Article 1 of the 1966 Covenants, extensive case law of the Committee on Economic, Social and Cultural Rights and, in particular, of the Human Rights Committee.

Against the backdrop of the above, one can label Article 46(1) of the UNDRIP as nonsensical. In rendering Indigenous peoples (and groups and individuals) subject to the principle of territorial integrity of States, the provision is certainly an odd creature which completely breaks with a well-established and cardinal principle within the international legal framework.

The outlined position that the UN Charter and other legal sources take on the principle that only States have the duty to respect the territorial integrity of other States and that the right to self-determination attaches to peoples and not States has the implication that international law does not prohibit a quest by a people or other groups for autonomy and self-determination, including through secession. Although international law does not give a right to a people or a group to secede, save, it has at least been argued, in extreme circumstances, international law does not prohibit secession either and definitely does not prohibit a quest for secession.[28] This is naturally true for Indigenous peoples as

[27] International Court of Justice, Reports of Judgments, Advisory Opinions, and Orders 2010, 403; *Reference re Secession of Quebec* [1998] 2 SCR 217. See also M Åhrén, M Scheinin, and JB Henriksen, 'The Nordic Sami Convention: International Human Rights, Self-Determination and Other Central Provisions' (2007) 3 Gáldu Čála: J Indigenous Peoples Rights 1.

[28] J Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 383–418; A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 167, 283, 334, 349; A Buchanan, 'The Morality of Secession' in Kymlicka (n 23) 352; C Tomuschat, 'Secession and

well. An aspiration by an Indigenous people for secession is perfectly compatible with international law and so is a quest for the establishment of an autonomous region, with far-reaching powers which correspondingly reduce the powers of the central government. That is the case irrespective of the fact that an internal quest for secession, by its very nature, puts in question the existing State borders. From a *factual* perspective, the described aspirations can clearly be viewed as threats to the 'territorial integrity' or 'political unity' of a 'sovereign and independent State'. But they nonetheless do not amount to such threats *as a matter of international law* when expressed and campaigned for through means that on their own do not violate international law—as, for instance, acts of terrorism undoubtedly would—and by individuals and groups *within* the State in question, including by any Indigenous people or population of the country concerned.

Some might argue that the practical relevance of the inclusion of Article 46(1) is limited, since secession is not a feasible option for most Indigenous peoples and few of them harbour such ambitions. Still, although this assumption may be correct, in our opinion, the wording of the provision may nonetheless be viewed as problematic, for both principled and practical reasons.

From a principled perspective, Article 46(1) suggests that Indigenous peoples, populations, and groups carry obligations under international law that do not attach to non-Indigenous analogous collectives. The provision in other words takes a discriminatory approach towards Indigenous peoples and other Indigenous groups, something that seemingly is hard to justify. Why should Indigenous peoples, populations, and groups not be entitled to pursue a quest for secession or far-reaching autonomy within the State when this avenue is open to other peoples, communities, and groups?

From a practical point of view, although the number of Indigenous peoples with secessionist aspirations may be limited, should there be such peoples that nonetheless are considering this alternative, it might be of great importance that this road remains open. Indeed, if the situation in the State within which they find themselves residing is grave enough, secession might be the only meaningful way for them to exercise their right to self-determination. That in such situations, Indigenous peoples, unlike non-Indigenous collectives, should be prevented from attempting this path, potentially with the support of the international community, appears to make little sense, and could potentially be seriously harmful to an Indigenous people in such a situation.

Article 46(1) becomes particularly troublesome against the backdrop that Indigenous peoples are beneficiaries of the right to self-determination. As seen, in connection with calling on States to respect the principle of territorial integrity of States, both the UN Charter and the Friendly Relations Declaration highlight the importance of the self-determination of peoples. Both instruments are further clear that the former principle which obliges *States* to respect the territorial integrity of other States must not be understood to impede *peoples* in their exercise of the (principle and) right to self-determination. That being the case, in our view one cannot reasonably argue, as the wording of Article 46(1) of the UNDRIP suggests, that Indigenous peoples in exercising their right to self-determination are prevented from taking actions open to other collectives.

Self-Determination' in MG Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2006) 35–36, 84–86; A Tancredi, 'A Normative "Due Process" in the Creation of States through Secession' in Kohen (ibid) 175–84; P Thornberry, 'Self-Determination and Indigenous Peoples: Objections and Responses' in P Aikio and M Scheinin (eds), *Operationalizing Self-Determination* (Institute for Human Rights, Åbo Akademi University 2002) 53.

Based on the above, we draw the conclusion that the reference to 'territorial integrity', etc. in Article 46(1) only makes sense when its addressee is understood to be another State, a group of States, and possibly individuals and groups of individuals siding with such aspirations by other States. Despite the wording of this provision, one cannot conclude that international law provides that Indigenous peoples, populations, and groups, unlike non-Indigenous such collectives, themselves are prevented from seeking to secede, nor from aspiring to have far-reaching autonomy arrangements within the State established. As mentioned, not all UNDRIP provisions are reflective of international customary law. In our view, Article 46(1), if understood literally, is clearly an example of when such is not the case, given its discriminatory nature and given that it contradicts, rather than conforms with, well-established international law. As further stated above, we accept that Indigenous peoples having emerged as international legal subjects will require creative solutions as to how such peoples and their rights relate to States and their rights and interests. But the sweeping and discriminatory approach taken by Article 46(1) is not such a creative solution and should not be accepted as law if it were relied upon to impose obligations upon Indigenous peoples in respect of the State in which they live.

3. On the Relationship between Indigenous Peoples' Right to Self-Determination and the Jurisdiction Today Exercised by States Internally

As the introductory section touches upon, when the right to self-determination emerged in the international legal system, it was perceived to attach to peoples only in the meaning of aggregate populations of States or territories. That said, as discussed in Section 2, immediately above, it was a conscious choice to render peoples, rather than States, the formal subjects of the right.[29] And importantly for the present purposes, that the right to self-determination was geared towards peoples rather than States spurred a debate on peoples' rights, including on who constitute peoples for international legal purposes.[30] Thus, already at the time when the international normative order embraced a right to self-determination of peoples, it was foreseen that the understanding of what groups qualify as 'peoples' need not be static, but rather has the capacity to evolve and encompass subjects other than the aggregate populations of States or territories.

As the above has further alluded to, probably nowhere has the debate on 'peoples' and 'peoples' rights' been more intense than within the Indigenous rights regime. Here a key question early on became whether Indigenous peoples are peoples also for international legal purposes, with rights as such, including the right to self-determination. As also concluded above, this question has recently been answered in the affirmative, as confirmed by Article 3 of the UNDRIP. Thus, the prediction made when the right to self-determination was deliberately geared towards peoples and not States, ie that the legal understanding of the former concept has the capacity to evolve and embrace also

[29] Crawford (n 28) 125–6; Cassese (n 28) 143–44, 242, 285; I Brownlie, 'The Rights of Peoples in Modern International Law' in J Crawford (ed), *The Rights of Peoples* (Clarendon Press 1988) 3–5.

[30] For instance, Antonio Cassese has observed that the acceptance of a right to self-determination of peoples in international law 'set in motion a restructuring and redefinition of the world community's basic "rules of the game" ': see Cassese (n 28) 1; and also P Alston, *Peoples' Rights* (Oxford University Press 2005) 1.

peoples other than populations that have formed States, has been confirmed, at least as far as Indigenous peoples are concerned.

It is thus clear that Indigenous peoples have become beneficiaries of the right to self-determination. Less obvious is what is embedded in the internal aspect of that right when applied not to the aggregate population of a State, but to a segment of that population, ie to an Indigenous people. When exercised by peoples in the meaning of aggregate populations of States, the internal aspect of the right to self-determination largely means a right of all citizens of the State to participate in the political life of the State, on an equal basis. As we conclude in Section 1, that cannot, however, be the content and scope of the same right when applied to Indigenous peoples that are in a minority situation as compared to the dominant population of a State. Such an understanding would render the right largely meaningless to them. Rather, when applied to Indigenous peoples, the internal aspect of the right to self-determination is a right first and foremost to be exercised through self-governance and autonomy arrangements, as reflected in Article 4 of the UNDRIP.[31] Up and until this point, international legal sources offer sufficient guidance. These sources are, however, essentially silent as to what is the more precise scope and content of Indigenous peoples' self-governance and autonomy rights. Neither have there, to our knowledge, been many attempts by States to advance the understanding of the right to self-determination when applied to Indigenous peoples during the decade since the UNDRIP was adopted. Rather, the right to self-determination is often confused with that of consultation.

In our view, this is an untenable situation. We do understand that it is a complex and challenging journey for States to work with Indigenous peoples in chiselling out how the right to self-determination can be effectively implemented at the domestic level. But that is no justification for back-tracking on the right. As mentioned, the right to self-determination was one of the most hard fought in the UNDRIP process, and it can be said to underpin the entire instrument. It undermines much of what was sought with the Declaration that States after almost a quarter of a century of negotiations with Indigenous peoples are currently doing next to nothing to realize one of the greatest promises of the Declaration. Due to the lack of advancements on the domestic level, there is a need for international institutions to step up. We can identify at least two ways in which this can be done.

As one of the outcomes of the 2014 high-level plenary meeting of the GA, also known as the World Conference on Indigenous Peoples, the Assembly invited the Human Rights Council to review the mandate of among other existing mechanisms the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), with a view to modifying and improving the EMRIP so that it can more effectively promote the implementation of the UNDRIP.[32] This recommendation was largely motivated by a frustration among Indigenous peoples that little, or nothing, is being done to implement the right

[31] For concurring opinions see, among others, Anaya (n 12) 140–1; S Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 Vanderbilt J Transn'l L 1141, 1156–57; J Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 Int'l J Minority & Group Rights 207; M Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20(1) EJIL 111; A Xanthaki, 'The Right to Self-Determination: Meaning and Scope' in Ghanea and Xanthaki (n 2) 22–23.

[32] Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, UN Doc A/RES/69/2, para 28.

to self-determination agreed to by States in the UNDRIP process, and which was the most important part of the 'bargain' to Indigenous peoples. We think that it would be highly relevant for the EMRIP to be transformed into a body that could monitor States' implementation of the UNDRIP. In doing so, it would be natural that EMRIP particularly focused on Articles 3 to 5 on Indigenous peoples' right to self-determination, self-governance, and autonomy. In that way, there would be an international oversight mechanism that contributes to shaping the contours of the right to self-determination, when applied to Indigenous peoples. As mentioned, such a body is clearly needed should advancements be made in implementing Indigenous peoples' right to self-determination on the domestic level.

However, another road may be less bumpy. The Human Rights Committee under the ICCPR (the Committee) has on numerous occasions been requested to handle complaints by Indigenous individuals or groups that the right to self-determination has been violated. Responding to these complaints, the Committee had, on a couple of occasions by 1990, taken the position to hold inadmissible such individual complaints that allege a violation of Article 1 of the ICCPR on the right to self-determination. The Committee's rationale for taking this position is that the right to self-determination is a peoples' right, wherefore individuals cannot—by definition—be victims of violations of that right.[33] Notably, however, the Committee has more recently, rather than holding such complaints manifestly ill-founded, opted for translating them into complaints of a violation of the formally individual right to culture under Article 27 of the ICCPR.[34] The position the Committee has taken not to allow individuals in general to make complaints that the right to self-determination has been violated makes sense as this is a peoples' right, and since, at the time of the first inadmissibility decisions, it had not yet been established that Indigenous peoples are beneficiaries of that right. At the same time, it is notable that the Committee has been unwilling to simply throw out Indigenous complaints that the right to self-determination has been violated, but has rather demonstrated its willingness to consider such concerns in conjunction with the right to culture under Article 27.

The Committee has not (despite opportunities) ruled out that the Optional Protocol to the ICCPR allows the Committee to consider complaints of violations of the right to self-determination. The Committee has also allowed self-determination arguments to influence its position on whether the right to culture pursuant to Article 27, or the right to political participation under Article 25,[35] has been violated. This interpretive approach emerged at a time when it was still unclear whether Indigenous peoples are beneficiaries of the right to self-determination. As it has since been confirmed that Indigenous peoples are indeed holders of this right, in our view, it makes sense that the Human Rights Committee accepts complaints submitted by Indigenous leaders who are documented and uncontested representatives of their people that the right to self-determination of the people has been violated. That would allow the Committee to enhance its contribution to the effective implementation of the right to self-determination when applied to

[33] The Committee first took this position in *Kitok v Sweden*, Comm No 197/1985, para 6.3, and has since repeated it on a few occasions. See, eg, *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Comm No 167/1984, para 13.3.

[34] See the same cases (n 33), and also *Apirana Mahuika and Others v New Zealand*, Comm No 547/1993, para 2.

[35] *Marie-Hélène Gillot and Others v France*, Comm No 932/2000, paras 13, 16.

Indigenous peoples, arguably the most important right in the Covenant over which the Human Rights Committee has been established to watch.[36]

4. On the 'Collectivization' of the Right to Non-Discrimination and Other Human Rights Conventionally Understood to Apply to Individuals Only

The wording of the UNDRIP, and in particular Articles 1 and 2, suggests that the Declaration—in our view in stark contrast to hitherto established human rights law[37]—takes the position that the right to non-discrimination applies not only to individuals, including to individual members of Indigenous peoples, but also to Indigenous peoples as such.[38]

In its General Recommendation 32, the Committee on the Elimination of all Forms of Racial Discrimination (CERD) presents its principal position on how the right to non-discrimination relates to groups and their other human rights. In doing so, the CERD 'observe[s] that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration'. Some might want to interpret this statement as the CERD acknowledging a right to equality that not only indirectly, but also formally, extends protection to minority groups as such. This is, however, in our opinion, probably to stretch the position taken by the CERD on the applicability of the right to non-discrimination a little too far.

First, the CERD does not talk about a right of minority groups to equality. It 'merely' underlines that States shall take the characteristics of such groups into account in an equality context. In addition, the Committee does so through referring to the 'principle', rather than to the 'right', of non-discrimination. Presumably, this is a conscious choice of wording. Thus, there seems to be insufficient evidence to support a conclusion that the CERD has gone as far as suggesting that the Convention enshrines a formal collective right to equality. That is particularly so since, as argued above, to interpret General Recommendation 32 as acknowledging a collective right to equality of minority groups would deviate from the conventional understanding of the right in a rather dramatic manner. That the CERD should reach such a conclusion without clearly and substantially justifying its position therefore appears far-fetched.

In its General Recommendation 23, the CERD specifically targets the right to equality in an Indigenous peoples' context. Here, the CERD employs language that clearly suggests that the right to equality enshrined in the ICERD can apply, not only

[36] Compared with the Human Rights Committee, the Committee on Economic, Social and Cultural Rights (CESCR) has less experience addressing the right to self-determination of Indigenous peoples, partly due to the fact that individual complaints to the latter body have only recently been allowed. However, as such complaints are now permissible, it is possible that the CESCR could in the future take on a similar role to that we here propose the Human Rights Committee takes on.

[37] For a possibly different opinion, see, however, Chapter 7 by Kirsty Gover in this volume.

[38] This section focuses on the right to non-discrimination, as one of the principal individual human rights. The analysis and arguments presented in this section can, however, be expected to apply, *mutatis mutandis*, also to other human rights contained in the UNDRIP that are conventionally understood to attach to individuals only, but that the Declaration seemingly seeks to 'collectivize'.

indirectly, but also formally, to collectives, and more specifically to Indigenous peoples. The opening paragraph of General Recommendation 23 proclaims that 'discrimination against Indigenous *peoples* falls under the scope of the Convention'.[39] Thus understood, the right to equality is not only a right of Indigenous individuals to have all human rights applied to them on an equal basis with other individuals; it is also a right of Indigenous peoples to enjoy peoples' rights on an equal basis with other peoples.[40]

However, parts of the above-mentioned—and subsequently adopted—General Recommendation 32 also explicitly address the situation of Indigenous peoples. In doing so, as discussed above, General Recommendation 32 notably refrains from echoing the earlier General Recommendation 23 proclamation that the right to equality applies not only indirectly, but also formally, to Indigenous peoples.[41] Rather, the CERD explicitly distinguishes between collective human rights, on the one hand, and the right to equality, on the other. Albeit affirming that in an Indigenous (and minority) context, the latter right can only be effectively implemented if the characteristics of the group are taken into account, the Committee stops short of repeating the suggestion in General Recommendation 23 that Indigenous peoples have a formal right to equality. Neither do other international legal sources suggest that this right formally applies to Indigenous peoples (or other collectives).

One must thus conclude that a collective right to equality, including of Indigenous peoples, was unknown to international law at the time of the adoption of the UNDRIP. Yet, as mentioned, Articles 1 and 2 do proclaim that Indigenous peoples as such are beneficiaries of a formal right to equality. In our view, this leads to uncertainties. Is the intention to suggest a rather substantial drift towards recognition of collective rights in international law, or should, rather, the provisions, despite their wordings, be understood to entail something more modest? And if the latter, what? Certainly, the intention must be—in line with the UNDRIP's general approach and the Indigenous rights regime as a whole—to render the right to equality more relevant to Indigenous peoples as collectives. But to what extent and in what manner?

In our view, the outlined lingering lack of clarity is not conducive to an effective realization of the rights contained in the UNDRIP. As indicated, the right to equality underpins many of the other rights enshrined in the Declaration. Therefore, it is useful to establish how this right should be understood in a Declaration context, in order to promote a concerted, systematic, and effective implementation of the rights set forth by the UNDRIP.

Doing so, we suggest that, in line with the above considerations, it is difficult to argue that the right to equality has yet evolved to take on an understanding that implies that the right applies *formally* to Indigenous peoples. Without further support in other international legal sources, one can hardly draw the conclusion that such a customary

[39] Emphasis added.

[40] cf K Tomasevski, 'Indicators' in A Eide, C Krause, and A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Martinus Nijhoff, 2001) 533; A Eide, 'The Use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights' in ibid 549.

[41] cf T Makkonen, 'Equal in Law, Unequal in Fact: Racial and Ethnic Discrimination and the Legal Response thereto in Europe' (Doctoral Dissertation presented at the Faculty of Law at the University of Helsinki, 5 March 2010) 95.

international norm has crystallized solely based on Articles 1 and 2 of the UNDRIP. The legal doctrine seems largely to concur with this assessment.[42]

As a consequence, despite their wording, Articles 1 and 2 of the UNDRIP should be understood more as proclaiming a general and principal affirmation of Indigenous peoples' status as 'peoples' for international legal purposes than as containing explicit references to the right to equality as presently understood in international law. True, having emerged as 'peoples' for international legal purposes, it is only natural that Indigenous peoples are treated equally with other peoples. But that is not the same thing as to say that the right to equality as articulated, for example, in the ICERD formally applies to them. Importantly, however, that the right to non-discrimination does not formally apply to Indigenous peoples is not to say that such peoples are treated less favourably compared with other peoples, from an international legal perspective. As the right to equality does not apply to collectives in general, it does not attach to peoples in the meaning of aggregate populations of States either. Another matter is that both Indigenous and State-forming peoples have legitimate expectations to be treated on a par with other peoples. In other words, even if the right to non-discrimination does not formally apply to them, both Indigenous and State-forming peoples have good grounds to assume that they will be treated equally with other peoples.

Having accepted that the right to equality is yet to formally attach to Indigenous (and other) peoples, the next step is to recognize that this 'shortcoming' might be of less practical relevance. The right to non-discrimination (as applied to individuals) has more recently evolved to take on a second facet that has resulted in the *direct* protection extended by the right to individual members of a group also providing an indirect *protection* of the Indigenous people as such. Today, the right to equality requires not only analogous treatment of analogous situations, but also differential treatment of those who are culturally different compared with the majority population.[43] This second facet of the right to non-discrimination entails that, for all practical purposes, the right protects groups as such, albeit indirectly. On the collective level, the formal right to differential treatment on the individual level corresponds to an informal right of the group to receive protection for its cultural characteristics. If members of an Indigenous people receive education, health care, social services, etc. that are respectful of and promote their cultural identities, then this will also further and protect the cultural identity of the group as such. Thus understood, the right to equality protects the cultural identity of Indigenous peoples as such, and it becomes a less relevant question whether or not the right applies formally to such peoples.[44]

The articulated conclusion finds broad support in the legal doctrine.[45] It is also in line with Diminitrina Petrova's and Bhiku Parekh's observations, independent of one another,

[42] For instance, Timo Makkonen concludes that the right to equality, irrespective of recent developments, formally remains individual in nature. See Makkonen (n 41) 178–79.

[43] See, eg, the European Court on Human Rights ruling in *Nachova and Others v Bulgaria* [GC] (2005) 42 EHRR 933; and, in particular, in *Thlimmenos v Greece* (2001) 31 EHRR 411, 44. See also Makkonen (n 41) 127–28.

[44] For a more expansive outline of the contemporary understanding of the right to equality of individuals and the relationship between this right and indirect protection of the cultural identity of Indigenous peoples as such, see Åhrén (n 15), Sections 7.4–7.6.

[45] See P Thornberry, 'Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD Practice' in Allen and Xanthaki (n 6) 64; C McCrudden, 'The New Concept of Equality' (2003 ERA Forum, vol 4, No 3) 22–23; S Wheatley, *Democracy, Minorities and International Law* (Cambridge University Press 2005) 22; D Lea, *Property Rights, Indigenous People and the Developing World: Issues from Aboriginal Entitlement*

that racial discrimination—by definition—presupposes the existence of ethnic and/or racial groups in society. Even if an individual might be the victim of racial discrimination, he or she is not so because of his or her own characteristics, but because of association with a particular group. Consequently, racial discrimination cannot be disassociated from the group as such. It simply cannot be discussed in individual terms.[46]

In our view, the outlined understanding of the right to equality, as enshrined in the UNDRIP, simultaneously serves the purposes of ensuring that the right (i) fits within the human rights system in general and (ii) promotes and protects the collective cultural identity of Indigenous peoples as such (albeit indirectly, and in addition to protecting individual members of the group). However, whether accepting this interpretation or not, it is important that common ground is found on how the 'collectivized' human rights in the UNDRIP square with the larger human rights system. If not, tensions between collective and individual human rights will continue to hamper the effective, coherent, and systematic realization of the rights contained in the Declaration.

5. Absence of a General Human Rights 'Safeguard Clause'

We are certainly not the first to point out that the recognition of collective (or group) rights can create tensions with the individual human rights of some members of the group. Indeed, concerns as to the impact of collective rights on the well-being of individual members of the group is one of the most often raised arguments against recognizing collective rights altogether,[47] something that is not at all the assertion here.[48]

But even if recognizing and supporting the UNDRIP's strong focus on Indigenous peoples' collective rights—in line with the Indigenous rights regime in general—it may be troubling that the Declaration does not contain an explicit general human rights safeguard clause that ensures that such collective rights are exercised with respect for the human rights of the members of the group. Article 1, discussed above, promises that 'Indigenous peoples' have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms. Yet, this clause is deficient in identifying its addressee(s). Clearly, States would by default be the duty-bearers, but can Indigenous

to Intellectual Ownership Rights (Martinus Nijhoff 2008) 20; J Castellino, 'Conceptual Difficulties and the Right to Indigenous Self-Determination' in Ghanea and Xanthaki (n 2) 61; M Hartney, 'Some Confusion Concerning Collective Rights' in Kymlicka (n 23) 220; R Stavenhagen, 'Cultural Rights: A Social Science Perspective' in Eide et al (n 40) 98; Anaya (n 12) 139; Makkonen (n 41) 180–81.

[46] See D Petrova, 'Racial Discrimination and the Rights of Minority Cultures' in S Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press 2001) 67; B Parekh, 'Redistribution or Recognition? A Misguided Debate' in S May, T Modood, and J Squires (eds), *Ethnicity, Nationalism and Minority Rights* (Cambridge University Press 2004) 210. cf also Chapter 7 in this volume, by Kirsty Gover.

[47] For discussions on potential negative impacts of collective rights on individual members of the group, see, eg, DM Weinstock, 'Liberalism, Multiculturalism, and the Problem of Internal Minorities' in S Laden and D Owen (eds), *Multiculturalism and Political Theory* (Cambridge University Press 2007) 246–47; A Shachar, 'Feminism and Multiculturalism: Mapping the Terrain' in ibid 115–47; A Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press 2001) 2–3, 19, 28–29; J Spinner-Halev, 'Multiculturalism and Its Critics' in JS Dryzek, B Honig, and A Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press 2006) 549; C Kukathas, 'Are There Any Cultural Rights?' in Kymlicka (n 23) 236; SM Okin, 'Is Multiculturalism Bad for Women?' (1997) 22(5) Boston Rev 25, 26; A Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press 2007) 20–21.

[48] See further below.

peoples be on both sides of the equation, as rights-holders and as duty-bearers? Further, Article 44 assures that all UNDRIP rights and freedoms are equally guaranteed to male and female Indigenous individuals.[49] Again, the provision fails to identify the duty-bearers. In the UNDRIP, there is no clause on the protection of individual human rights in relation to the exercise of powers by the Indigenous people itself, including the powers that stem from the collective rights of the group. This omission of safeguards for individual rights is related to the UNDRIP's emphasis on collective rights, reflected also in its Article 33, which assures to Indigenous peoples the right to determine the responsibilities of individuals in respect of their communities.

We wish to underline that our concern with the presumed absence of a human rights safeguard clause in the UNDRIP is not only with welfare of the members of the people, but also with the rights of Indigenous peoples as such. It is highly unlikely that Indigenous peoples' right to self-determination under Article 3 will be accepted by States and may hence fail unless it is accompanied by a recognition that power comes with responsibilities, that the exercise of the right of self-determination (Article 3), including through arrangements for autonomy or self-government (Article 4), amounts to an exercise of *public authority* in relation to the members of the group. States cannot reasonably be expected fully to respect the self-determination rights of Indigenous peoples unless they feel confident that the latter will respect human rights. States themselves have human rights obligations under international law against which they will be held accountable at the international level and also before their own courts, even if human rights violations are a result of Indigenous peoples within the State exercising their right to self-determination. In short, this attribution of State responsibility may serve as justification for States to assert that Indigenous self-determination must not compromise individual human rights. Otherwise States cannot be expected to accept self-determination rights.

It follows from the above that the UNDRIP should contain a safeguard clause, and in our view one can indeed be read into the Declaration. The UNDRIP contains sufficient elements that allow and perhaps even necessitate an interpretive construction according to which a general human rights safeguard clause is read into its text. Above all, we refer to Article 46(2), which reads:

> In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

True, even this provision is not explicit about the duty-bearers and could be interpreted, as human rights instruments generally are, as addressing the obligations of the State. Nevertheless, as it opens with a reference to the exercise of *rights* enshrined in the UNDRIP, one has to infer that the primary addressee and hence the subject of human rights obligations here is *not* the State, but those who enjoy collective rights under the UNDRIP, namely Indigenous peoples and their decision-making structures. The second and third sentence of the provision are then more ambiguous, or less helpful, in the current context, as they refer to limitations placed on UNDRIP rights, ie primarily upon

[49] See here also Chapter 7 in this volume, by Kirsty Gover.

the collective rights of Indigenous peoples, rather than limitations of 'human rights' or of 'individual human rights', which would have come much closer to what we mean by a human rights safeguard clause.

In the drafting process of the UNDRIP, some proposals were made towards a more explicit or comprehensive human rights safeguard clause. In 1996, the Netherlands government expressed concern about a possible 'imbalance between individual and collective rights' in the Declaration and proposed considering the inclusion of a 'general safeguard clause for individual rights'. Article 8(2) in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities was suggested as a model for such a clause.[50] The idea also had some support from the side of Indigenous peoples, as reflected in a 2004 proposal by the Sami Council and the Sami Parliamentary Council. According to this proposal, the Indigenous rights savings clause of Article 45 of the UNDRIP would have been complemented with a paragraph 2 with a savings clause for individual rights, according to which the exercise of (primarily collective) UNDRIP rights 'shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms'.[51] The inclusion of the word 'persons' in this formulation goes one step further towards explicit recognition of the duty of Indigenous peoples (who will 'exercise' UNDRIP rights) to respect the individual human rights of their members, as compared to the final text of the first sentence of Article 46(2) as quoted above. This drafting history of the last-mentioned provision, however, in our view affirms that the clause can be relied upon in the much-needed interpretive construction of an implied fully-fledged human rights safeguard clause.

Furthermore, as to the 'context' in which Article 46(2) is to be interpreted, the UNDRIP Preamble contains several elements that are relevant for a discussion on the relationship of the instrument as a whole to the broader system of international law and international human rights. The very first preambular paragraph refers to the 'purposes and principles' of the UN Charter. Notably, Preambular Paragraph 16 then explicitly refers to the twin Covenants of 1966 and, as is understandable in a non-treaty instrument, also to the final document of the 1993 Vienna World Conference on Human Rights when addressing the issue of the right of self-determination.[52] Preambular Paragraph 19, in turn, encourages States to comply with and effectively implement all of their obligations as they apply to Indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned. The two following paragraphs (Preambular Paragraphs 20 and 21) address and emphasize the role of the United Nations in promoting and protecting the rights of Indigenous peoples. Without trying to be exhaustive in identifying pertinent elements in the UNDRIP Preamble, reference must also be made to the above-mentioned Preambular Paragraph 22,[53] where it is once more affirmed that Indigenous individuals are entitled without discrimination to all human rights recognized in international law.

[50] See UN Doc E/CN.4/1997/102 (10 December 1996) para 109.

[51] See UN Doc E/CN.4/2004/WG.15/CRP.5 (28 October 2004).

[52] 'Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.'

[53] See n 18 above.

In summary, in our view, the wording of Article 46(2) of the UNDRIP, understood in light of the Preamble and recalling the drafting history of the provision, must be understood as a general human rights safeguard clause that provides that Indigenous peoples' collective rights, including the right to self-determination, must be exercised in a manner that respects the human rights of the individual members of the group. However, this conclusion does not only follow from a textual and contextual interpretation, but, as indicated, also, and perhaps primarily, from necessity.

Indigenous peoples' rights, and in particular the right to self-determination, must be viewed as a form of exercise of public power, as these rights, as seen above,[54] materialize as a result of public power being transferred from States to Indigenous peoples, or such powers being finally acknowledged by States as inherent in the recognition of Indigenous peoples as peoples. As public power when exercised by States is subject to human rights obligations, it would appear fully justified and even necessary that the same applies, at least in principle, when those same or analogous public powers are exercised by Indigenous peoples.[55]

The above leads to the conclusion that when jurisdiction is shifted to them, Indigenous peoples should be obliged to respect the human rights of their individual members, in the same way that States are obligated to respect the human rights of their citizens.[56] Without the acceptance of this principle, Indigenous self-determination is likely to fail, not least because many States may invoke their human rights obligations as justification for not allowing Indigenous peoples to determine their own fate.

Having clarified the fundamental issue, we want to point out that when discussing the human rights obligations of Indigenous peoples and their organs of self-determination, one should note that only the most fundamental human rights are absolute. Most human rights open up for limitations in their applicability, provided that certain conditions are met. In line with the logic above, this aspect of human rights must be present also in the relationship between Indigenous peoples vis-à-vis individual members of the group. When exercising their peoples' rights, Indigenous peoples, similarly to States, must be entitled to limit the individual human rights of their members. Permissible limitations should be seen as governed by the same principles and same criteria that bind States when they limit individual human rights and are to be taken into account in any 'balancing' between rights or between rights and other interests. The requirements for permissible limitations upon human rights are:

(1) proper legal basis—accessible and foreseeable *in abstracto* regulation of an issue, instead of ad hoc arbitrary decisions in individual cases without advance warning;
(2) a legitimate aim being served by the limitation—a further guarantee against arbitrariness or abuse of power in bad faith;
(3) respect for the essence (the inviolable core) of any human right;

[54] See Section 3.

[55] For a more thorough elaboration of this position, see M Scheinin, 'How to Resolve Conflicts between Individual and Collective Rights?' in M Scheinin and R Toivanen (eds), *Rethinking Non-Discrimination and Minority Rights* (Åbo Akademi University Institute for Human Rights and Deutsches Institut für Menschenrechte 2004) 219–38.

[56] In this context, the fact that States have human rights obligations not only towards their own citizens, but also towards other persons within their jurisdiction, lacks relevance.

(4) necessity—a proclaimed legitimate aim is not sufficient, but it must be demonstrated or demonstrable that the envisaged limitation will result in an actual benefit towards meeting that aim;
(5) proportionality—the negative impact on the human right that is subject to a limitation must remain proportionate in comparison to the actual benefit obtained towards serving the identified legitimate aim that is used to justify the limitation.[57]

States must respect all of these cumulative conditions when they restrict the human rights of individuals. When States cede some of their powers to Indigenous peoples, as they should in recognition of Indigenous self-determination, Indigenous peoples must assume the same duty to respect the conditions for permissible limitations, if the powers they seek to exercise over their members should be accepted as lawful and legitimate. In fact, under their international human rights obligations, States would not even be allowed to cede their powers over individuals to Indigenous peoples without exercising due diligence that those powers will be exercised without making the State itself responsible, at the level of international law, for violating human rights through being complicit in internationally wrongful acts perpetrated by an Indigenous group in the exercise of their powers over their individual members. This implies—even if it may come across as a paradox to some—that it is in fact in Indigenous peoples' own interest to assume the same human rights obligations accepted by States in the form of international human rights treaties, as otherwise States would not be in a position to cede jurisdiction to Indigenous peoples.

Importantly, the understanding of the criteria and principles that must be fulfilled in order for an Indigenous people to lawfully limit the human rights of members listed above must take into account the fact that the right is now applied not in a State–individual, but in an Indigenous people–individual context. In particular, the fact that Indigenous peoples, generally speaking, place considerably more importance on the collective, and thus on collective rights, compared with most other cultures should be taken into account, in particular when applying the legitimate aim and proportionality criteria. The weight given to the collective and to collective rights in an Indigenous culture must be allowed to impact the assessment of both whether a legitimate social need is present and whether the negative impact of the individual is proportionate to that aim. We underline that this is nothing new or controversial. The legitimate aim and proportionality test should always take the social context into account.

It is reflective of the history of dispossession and colonization that today the criterion that may appear as the greatest challenge to Indigenous self-determination and its legitimate consequence of justifying some limitations upon individual rights is the very first one, the requirement of a proper legal basis. For instance, before the European Court of Human Rights, States usually find it quite easy to convince the Court that an interference with one of the rights enshrined in the Convention was 'prescribed by law'. The State is the presumed legislator with general jurisdiction in all matters and within its geographical territory, and for this purpose States almost invariably have an elected parliament that exercises legislative powers. By referring to a law passed by parliament as the legal basis for

[57] There are many competing and overlapping doctrinal constructions concerning permissible limitations on human rights. The concise five-element formula presented here is built upon General Comment 27 by the Human Rights Committee, addressing permissible limitations on the freedom of movement (ICCPR Art 12), but at the same time presenting a general framework. See UN HRComm. CCPR General Comment 27: Article 12 (Freedom of Movement) UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999).

a restriction upon a human right, a State usually easily passes the first test that requires a legal basis for a restriction.

When Indigenous peoples exercise self-determination and end up imposing limitations on the human rights of their individual members, the requirement of a proper legal basis must be applied in a flexible manner. Not only written legislation, but also the customary law of the Indigenous people must be accepted as 'law'. Likewise, legislation by the State that recognizes Indigenous self-determination in a matter should be seen as constituting a proper legal basis for decision-making by the group, provided that the other requirements listed above are met.

The right of an Indigenous people to determine its own borders, ie its membership criteria, is an important test case for the position developed here. Article 9 of the UNDRIP protects the right of Indigenous individuals to belong to an Indigenous community or nation, 'in accordance with the traditions and customs of the community or nation concerned', without discrimination of any kind. Clearly, the primary addressee of this provision as the corresponding duty-bearer is the Indigenous people itself and its decision-making organs. Articles 3, 4, 5, and 33(1) of the UNDRIP strongly support the right of the group to decide about its membership, while Article 9 together with a general human rights safeguard clause inferred from Article 46(2) would protect the individual when those powers are exercised by the group. We find it the most compelling reading of all these provisions taken together that the decision-making organs of an Indigenous people should have the authority to determine who is a member of the group, subject to an obligation to avoid discrimination or arbitrariness. The political, or even judicial, organs of the State should exercise deference and resist the temptation to adjudicate any emerging disputes concerning individual membership. Rather, they should encourage and facilitate efforts to take eventual disputes to the international level for discussion and resolution.

Above, it was proposed that the first sentence of Article 46(2) of the UNDRIP constitutes the strongest textual basis for reading a general human rights safeguard clause into the Declaration through interpretation. It is also important to recall Article 43, according to which 'the rights recognized herein' constitute the 'minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world', as well as Article 44, which makes it clear that all UNDRIP rights are equally guaranteed to male and female Indigenous individuals.[58] In a systematic reading of the UNDRIP, these provisions, taken together, support the view that a general human rights safeguard clause is to be implied, even if not written into the text.

6. Conclusion

This chapter has addressed the relationship between the UNDRIP and the general framework of international human rights law through four issues. Doing so, we have discussed primarily Articles 3 and 46 of the UNDRIP, read together with the UNDRIP as a whole and in particular Articles 1, 2, 44, and 45. The four themes were first presented in introductory Section 1 of this chapter, whereafter we devoted Sections 2 to 5 separately on each one of them.

[58] For the role of equality and non-discrimination in the UNDRIP, see Chapter 7 in this volume, by Kirsty Gover.

Section 2 addressed the relationship between Indigenous peoples' right to self-determination as peoples, and States' sovereign rights, including their right to respect for their territorial integrity. Article 3 of the UNDRIP, proclaiming that Indigenous peoples have the right to self-determination, was subject to the biggest controversies in the drafting of the Declaration, the resolution of which was a *sine qua non* for reaching agreement. While the inclusion of the right of self-determination was a historical breakthrough for the Indigenous peoples of the whole world, it is burdened by compromises and uncertainties that will affect its impact and implementation. Article 3 was 'softened' by including in immediately following Article 4 phrases about 'autonomy' and 'self-government' and in Article 46(1) a strongly worded provision that appears to prioritize the sovereignty and territorial integrity of States. As explained in our chapter, however, this latter provision may not have the effect sought by some States through its inclusion, as the notion of territorial integrity in international law applies to relationships between States and to the prohibition against the use of armed force in them. Its inclusion in the UNDRIP is hence more symbolic than of real consequence. We have above proposed the conclusion that the reference to 'territorial integrity', etc. in Article 46(1) of the UNDRIP only makes sense when its addressee is understood to be another State, a group of States, and possibly individuals and groups of individuals siding with such aspirations by other States. The provision does not negate Article 3 of the UNDRIP, a cornerstone of the Declaration, and does not preclude an Indigenous people from pursuing the option of secession as one of the possible modalities of their self-determination, through means that are compatible with international law. The drafters created ambiguity and internal tension through the seeming disharmony between the two Articles. A proper understanding of the principle of territorial integrity in international law will nevertheless help in settling the seeming incoherence.

Also, Section 3 discussed the right of self-determination by asking: what is the relationship between Indigenous peoples' right to self-determination and the jurisdiction exercised today by States internally? We defend the view that self-determination rights by Indigenous peoples must go beyond a mere right of consultation, as enshrined, for instance, in ILO Convention 169, and it needs to be understood that nation-States will either transfer some of their powers to Indigenous peoples or alternatively acknowledge that Indigenous peoples' self-determining powers and jurisdiction are inherent in the status of Indigenous peoples as subjects of peoples' rights. While the conceptual issue now appears clear, we see a need for effective monitoring mechanisms for the right of self-determination, in order to explore and settle its proper contours in relation to powers traditionally exercised by States. The UN-level EMRIP may evolve in that direction, but we also flag that the Human Rights Committee has a mandate to interpret the right of self-determination under Article 1 of the ICCPR, including through complaints submitted by Indigenous peoples and despite the challenge of on occasion needing to adjudicate on a collective right through a procedure that was created for individual complaints of human rights violations. A similar role may emerge also for the Committee on Economic, Social and Cultural Rights under Article 1 of the International Covenant on Economic, Social and Cultural Rights, which is now entrusted with a complaints procedure.

The third issue discussed in this chapter is related to the move from individual to collective rights when the UNDRIP is assessed as a human rights instrument. In Section 4, we asked whether the UNDRIP not only entails the introduction of collective rights, but also the 'collectivization' of those rights that are traditionally understood to apply to

individuals only. Dealing with the right of non-discrimination as a case study, we engaged in a discussion about the ICERD and in particular General Recommendation 32 by the CERD. Our position is that it would be premature to read the UNDRIP as affirming that the right to equality has evolved to such an extent as to apply also formally to Indigenous peoples as collective beneficiaries of the right of non-discrimination. We further concluded, however, that when formally applied to individual members of Indigenous peoples, the right to equality already protects the cultural identity of Indigenous peoples as such, albeit indirectly, wherefore it becomes a less relevant question whether the right of non-discrimination applies also formally to such peoples, as a collective legal right.

Finally, Section 5 addressed the seeming absence of a general human rights 'safeguard clause' in the Declaration. In spite of some proposals to that effect, Article 45 of the UNDRIP did not come to include an explicit clause on the duty of Indigenous peoples, as beneficiaries of collective rights, to respect individual human rights. While we acknowledge that the drafting could have been clearer, we elaborate the position that Article 46(2) of the UNDRIP should be interpreted as including such a safeguard clause, read in the light of the Preamble and other provisions of the Declaration and its drafting history. In our view a clear acknowledgement, by States and Indigenous peoples, of the need to read a guarantee for individual human rights into the text of the UNDRIP will be essential for the success of the Declaration as a whole: as States have international human rights obligations and will be held internationally accountable for them, Indigenous peoples can expect States to accept their self-determination rights, and the ensuing reduction of their own powers in matters governed by Indigenous self-determination, only if Indigenous peoples and their decision-making structures have a commitment to respect and ensure individual human rights.

Chapter 4. The UNDRIP and Interactions with International Investment Law

*Christina Binder**

1. Introduction

Interactions between international investment law and Indigenous rights are becoming more frequent. On the one hand, there is a quantitative increase in foreign investments. These investments are protected by an ever-denser net of bilateral investment treaties (BITs)—close to 3,000 by the end of 2015.[1] On the other hand, Indigenous peoples' territories are often resource-rich areas with significant attraction for foreign investors. This entails a considerable risk that investment projects on Indigenous territories—for example, concessions for resource exploitation—encroach upon Indigenous rights. Negative consequences include detrimental impacts on Indigenous peoples' relationship to their lands, environmental degradation, and pollution. These risks are even more acute given the importance of lands for Indigenous culture. Indigenous rights thus increasingly conflict with the rights of foreign investors and show an evident need for coordination between both systems—Indigenous peoples' rights and international investment law.[2]

Against that background, it seems of particular interest whether the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[3] adds new perspectives to interactions and conflicts between investment law and Indigenous rights. What is the UNDRIP's legal impact in the field? What contribution has it made to the state of law? And, are there still aspirations *de lege ferenda*? Since, so far, Indigenous rights have been very rarely raised

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[1] UNCTAD, 'World Investment Report 2016—Investor Nationality: Policy Challenges' (2016), <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf> accessed 11 October 2017.

[2] On the investment and human rights debate, see generally U Kriebaum, 'Human Rights of the Population of the Host State in International Investment Arbitration' (2009) 10 JWIT 653; B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder, U Kriebaum, A Reinisch, and S Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press 2009) 678; U Kriebaum, 'Foreign Investments and Human Rights: The Actors and Their Different Roles' in NJ Calamita, D Earnest, and M Burgstaller (eds), *Current Issues in Investment Treaty Law*, vol IV: *The Future of ICSID and the Place of Investment Treaties in International Law* (BIICL 2013) 45; P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in P-M Dupuy, F Francioni, and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 45; U Kriebaum, 'Privatizing Human Rights: The Interface between Investment Protection and Human Rights' in A Reinisch and U Kriebaum (eds), *The Law of International Relations: Liber Amicorum Hanspeter Neuhold* (Eleven International 2007) 165; E de Brabandere, 'Human Rights Considerations in International Investment Arbitration' in M Fitzmaurice and P Merkouris (eds), *The Interpretation and Application of the European Convention on Human Rights* (Martinus Nijhoff 2013) 183.

[3] UN Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) (UNDRIP).

in investment proceedings with even less reference made to the UNDRIP,[4] the issues will be discussed mainly from a theoretical viewpoint.

At the outset, this contribution examines the UNDRIP's legal impact concerning those Indigenous rights which are of relevance in the context of investment law (Section 2). Then, interactions and conflicts between Indigenous peoples' and foreign investors' rights are outlined on the basis of relevant human rights (Section 3) and investment law jurisprudence (Section 4) taking into account the UNDRIP's role. In the following, existing techniques to improve interactions between Indigenous rights and investment law before international investment tribunals will be addressed with special focus on the UNDRIP's contribution thereto (Section 5). Finally, improved solutions to further interactions between investment law and Indigenous rights are explored and assessed against the UNDRIP's aspirations *de lege ferenda* (Section 6). Section 7 concludes.

2. The UNDRIP and Indigenous Rights of Relevance for International Investment Law

The UNDRIP contains numerous provisions which are possibly at stake when activities of foreign investors impact on Indigenous territories.[5] First, the Declaration recognizes the distinct cultural identity of Indigenous peoples (eg in Articles 5, 8, 9, 11, 12), including a right to maintain, control, protect, and develop their cultural heritage (Article 31(1)). Likewise, Indigenous land rights are recognized to a far-reaching extent. More particularly, the UNDRIP acknowledges Indigenous peoples' specific relationship with their territories (Article 25) and their right to lands, territories, and resources which Indigenous peoples have traditionally owned, occupied, or otherwise used (Article 26).[6] Accordingly, Indigenous land rights must be secured to the extent that is necessary to preserve the spiritual relationship of the people (or community) concerned with its ancestral lands.[7] What is more, the UNDRIP also obliges States to cooperate and consult with Indigenous peoples in good faith in order to obtain their free, prior, and informed consent before adopting or implementing measures that may affect them (Article 19), especially as regards projects affecting their lands (Article 32). While the UNDRIP is not explicit whether this implies a general right to veto projects[8] which affect Indigenous

[4] See Section 4 for details.

[5] See the different contributions in this Commentary for further reference on the relevant provisions.

[6] See, for further reference, International Law Association (ILA), Committee on the Rights of Indigenous Peoples, 'The Hague Conference: Interim Report' (2010) 22–23, <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> accessed 18 November 2016. When lands were alienated from Indigenous peoples without their consent, Indigenous peoples' right to redress can include restitution, or, when this is not possible, just and fair and equitable compensation (UNDRIP Art 28).

[7] ILA, Committee on the Rights of Indigenous Peoples, 'The Sofia Conference: Final Report' (2012) 30, para 8, <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> accessed 18 November 2016.

[8] Note that the Colombian Constitutional Court, for instance, has elaborated on the question of whether the requirement of free and informed consent amounted to a veto power of Indigenous communities against investment projects. Without clarifying whether or not there is a right to veto, the Court pointed out 'that the whole discussion is not raised in terms of who vetoes whom but it is about having room for discourse among equals in the midst of differences, opportunity for state agencies and concessionaires to explain concretely and transparently what purposes their projects have while the community itself sets out its needs and points of views' (unofficial translation); see Constitutional Court of Colombia, Sentencia T-129/11 (2011) 74.

lands.[9] Still, even further going rights, including a right to veto, refer to the relocation of Indigenous peoples[10] and the storage or disposal of hazardous materials in the lands or territories of Indigenous peoples.[11] The right to self-determination of Indigenous peoples is recognized in Article 3 of the UNDRIP.[12]

The UNDRIP therewith contributes to a further strengthening of Indigenous rights. True, as a General Assembly Resolution, the UNDRIP is not legally binding. Still, key provisions in the Declaration, including its land rights provisions and the necessary participation of Indigenous peoples in decisions which affect them, are generally considered as a codification of customary international law.[13] Therewith, the UNDRIP contributes to substantive law by codifying significant parts of Indigenous rights.[14] Moreover, even those rights in the UNDRIP which are not yet reflective of customary international law present parameters of reference for any recognition of Indigenous rights.[15]

From the investment law perspective, the UNDRIP contains key provisions of relevance for interactions between Indigenous peoples' rights and investment law. It strengthens Indigenous rights. In so doing, the UNDRIP increases the potential for conflicts with the rights of foreign investors.[16] Of particular relevance are the codification of Indigenous land rights and the necessary involvement of Indigenous peoples in decisions which affect them. This is also reflected in the case law of international human rights monitoring institutions.

[9] See wording of UNDRIP Arts 19, 32(2). See in this sense also Sofia Conference (n 7) 4.

[10] UNDRIP Art 10: 'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned ...'.

[11] UNDRIP Art 29(2): 'States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.'

[12] See also Sofia Conference (n 7) 30, para 5: 'States must comply with the obligation—consistent with customary and, where applicable, conventional international law—to recognize, respect, protect, fulfil and promote the right of indigenous peoples to self-determination ...'.

[13] See in this sense (including supporting references), Sofia Conference (n 7) 23ff, 30, para 6. See particularly ibid 30, para 8: 'States must comply—pursuant to customary and, where applicable, conventional international law—with the obligation to recognize, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources, which include the right to restitution of the ancestral lands, territories and resources of which they have been deprived in the past. Indigenous peoples' land rights must be secured to the extent that is necessary to preserve the spiritual relationship of the community concerned with its ancestral lands, which is an essential prerequisite to allow such a community to retain its cultural identity, practices, customs and institutions.' See Hague Conference (n 6) 22–3. See generally, Sofia Conference (n 7) 29: 'The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a whole cannot yet be considered as a statement of existing customary international law. It, however, includes key provisions which correspond to existing State obligations under customary international law'; see also *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment, IACtHR Series C No 79 (31 August 2001) para 140(d).

[14] See the different contributions in this Commentary for further reference.

[15] See in this sense Sofia Conference (n 7) 29 (footnotes omitted): 'The provisions included in the UNDRIP which do not yet correspond to customary international law nevertheless express the aspirations of the world's indigenous peoples as well as of States in their move to improve existing standards for the safeguarding of indigenous peoples' human rights. Their recognition by States in a Declaration subsumed "within the framework of the obligations established by the Charter of the United Nations to promote and protect human rights on a nondiscriminatory basis" and passed with overwhelming support by the UN General Assembly leads to an expectation of maximum compliance by States and the other relevant actors ...'.

[16] What is more, as will be shown in Section 5.3, the UNDRIP's recognition of Indigenous peoples' right to self-determination—and related rights, including their right to participate in decisions which affect them—may be taken as an argument to enhance Indigenous peoples' procedural rights in investment proceedings.

3. The UNDRIP, Indigenous Rights, and Foreign Investments in the Jurisprudence of Human Rights Monitoring Institutions

3.1 Overview

The UNDRIP confirms the ongoing evolution of Indigenous rights. The development of relevant standards is also evident in the jurisprudence of human rights monitoring institutions. Due to the increasing rights of Indigenous peoples, conflicts between them and investors become increasingly likely. This is evidenced in the case law of the respective institutions. Human rights monitoring institutions increasingly find violations of Indigenous rights which are caused by activities of foreign investors. Also, the jurisprudence of the Inter-American Court of Human Rights is especially far-reaching. The Inter-American Court increasingly draws on the UNDRIP. That is why the following discussion is largely based on the jurisprudence of the Inter-American Court of Human Rights.[17]

3.2 Indigenous Rights, the UNDRIP, and Foreign Investments in Human Rights Jurisprudence

In particular, recent judgments of the Inter-American Court of Human Rights have found violations of Indigenous rights in case of investment projects having an effect on Indigenous lands. Already in its 2001 landmark decision *Awas Tingni v Nicaragua* (2001), the Inter-American Court found Nicaragua in violation of the Indigenous Awas Tingni community's right to property (Article 21 of the American Convention on Human Rights (ACHR)) for having consented to timber-logging activities by a South Korean corporation on lands traditionally occupied by the Awas Tingni community.[18] This jurisprudence was confirmed in subsequent cases. In *Yakye Axa v Paraguay* (2005) and *Sawhoyamaxa Indigenous Community v Paraguay* (2006), the Inter-American Court of Human Rights ordered Paraguay to restore ancestral land which was in the hands of private investors to Indigenous groups.[19] In *Saramaka People v Suriname* (2007), the Inter-American Court found that Suriname breached Article 21 of the ACHR for issuing mining concessions to foreign companies on territories traditionally occupied by the Saramaka people without the establishment of adequate safeguards to ensure that the concessions would not cause harm to the people and its territories.[20] In *Kichwa Indigenous People of Sarayaku v Ecuador* (2012), the Inter-American Court held that Ecuador violated the land rights as well as the right to cultural identity of the Sarayaku Indigenous people, who had not been consulted before resource exploitation projects by foreign investors were carried out in its traditional lands.[21]

[17] For the jurisprudence of the European Court of Human Rights and the European Commission on Human Rights, see T Koivurova, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects' in Fitzmaurice and Merkouris (n 2) 217.

[18] *Awas Tingni* (n 13).

[19] *Indigenous Community Yakye Axa v Paraguay*, Judgment, IACtHR Series C No 125 (17 June 2005) paras 148, 217–18; *Sawhoyamaxa Indigenous Community v Paraguay*, Judgment, IACtHR Series C No 146 (29 March 2006) paras 135–41, 210–14.

[20] *Saramaka People v Suriname*, Judgment, IACtHR Series C No 172 (28 November 2007) paras 174–75, 214.

[21] See esp *Kichwa Indigenous People of Sarayaku v Ecuador*, Judgment, IACtHR Series C No 245 (27 June 2012) paras 177, 220. The case concerns a dispute which was also dealt with by an investment tribunal: *Burlington v Ecuador*; see *Burlington Resources Inc v Ecuador*, Decision on Jurisdiction, ICSID Case No ARB/08/5 (2 June 2010); and *Burlington Resources Inc v Ecuador*, ICSID Case No ARB/08/5, Decision on Liability (14 December 2012); see Section 4 for details.

Likewise, the Inter-American Commission on Human Rights issued relevant decisions. For example, in *Mary and Carrie Dann v United States*, the Commission found that the United States had not acted in conformity with their obligations under the 1948 American Declaration of the Rights and Duties of Man when granting gold-mining prospecting within the traditional lands of the Western Shoshone's Indigenous people which affected the Dann's use of the lands and polluted the water.[22] The potential for conflicting State obligations is also evidenced in Africa in the jurisprudence of regional human rights monitoring institutions. For instance, the African Commission on Human and Peoples' Rights found Nigeria in violation of numerous provisions of the African Charter on Human and Peoples' Rights in relation to a project on oil production on the lands of the Indigenous Ogoni community, which had resulted in environmental degradation and health problems for members of the Ogoni.[23]

References to the UNDRIP play an increasing role especially in the jurisprudence of the Inter-American Court of Human Rights. In both cases handed down after the Declaration's adoption—*Saramaka People v Suriname* and *Sarayaku v Ecuador*—the Inter-American Court relied on the UNDRIP in its discussion of Indigenous peoples' rights.[24] In *Saramaka People v Suriname*, the Inter-American Court drew on Article 32 of the UNDRIP when discussing 'safeguards against restrictions on the right to property that deny the survival of the Saramaka people' to support its arguments[25]—the latter with an explicit (footnote) reference to Suriname's statement in the process of adoption of the Declaration.[26] The Court held:

> ... the restrictions in question pertain to the issuance of logging and mining concessions for the exploration and extraction of certain natural resources found within Saramaka territory. Thus, in accordance with Article 1(1) of the Convention, in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan ... within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the

[22] *Mary and Carrie Dann v United States*, Inter-American Commission on Human Rights, Case 11.140, Report No 75/02 (27 December 2002) para 172.

[23] See *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights, Comm No 155/96 (2001) esp paras 55ff, <http://www1.umn.edu/humanrts/africa/comcases/155-96.html> accessed 11 October 2017; F Lenzerini, 'Foreign Investment in the Energy Sector and Indigenous Peoples' Rights' in E de Brabandere and T Gazzini (eds), *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (Martinus Nijhoff 2014) 192, 212.

[24] See, eg, *Saramaka People* (n 20) para 131; *Sarayaku* (n 21) paras 160, 167, 215.

[25] *Saramaka People* (n 20) para 131.

[26] The Inter-American Court of Human Rights stated: 'The Court observes that, in explaining the position of the State in favor of this text, the representative of Suriname is reported to have specifically alluded to the aforementioned text of Article 32 of such instrument. The UN Press Release states the following: "[The representative of Suriname] said his Government accepted the fact that the States should seek prior consultation to prevent a disregard for human rights. The level of such consultations depended on the specific circumstances. Consultation should not be viewed as an end in itself, but should serve the purpose of respecting the interest of those who used the land", ...' (ibid para 131 fn 131).

Saramaka community have with their territory, which in turn ensures their survival as a tribal people ...

... Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples, which was recently approved by the UN General Assembly with the support of the State of Suriname, states the following:

...[27]

Even more extensive references to the UNDRIP were made in the *Sarayaku v Ecuador* case.[28] The Inter-American Court drew on the UNDRIP to support its reading of various Indigenous rights. First, the Court interpreted the necessary consultation of Indigenous peoples when measures affect their lands with according (footnote) references to the UNDRIP:

It is for all the aforementioned reasons that one of the fundamental guarantees for ensuring the participation of indigenous peoples and communities in decisions regarding measures that affect their rights and, in particular, their right to communal property, is precisely the recognition of their right to consultation, which is recognized in ILO Convention No. 169, among other complementary international instruments.[29]

Likewise, in relation to the right to cultural identity of Indigenous peoples, the Inter-American Court of Human Rights referred to the UNDRIP and stated:

Two international instruments are particularly relevant to the recognition of the right to cultural identity of indigenous peoples: the ILO Convention No. 169 on indigenous and tribal rights and the United Nations Declaration on the Rights of Indigenous Peoples.[30]

Finally, the Inter-American Court also relied on Article 1 of the UNDRIP when recognizing '[Indigenous peoples'] rights as collective subjects of international law and

[27] ibid paras 129, 131. Footnotes omitted. See also the recent *Case of the Kaliña and Lokono Peoples v Suriname*, Judgment, IACtHR Series C No 309 (25 November 2015) para 201 fn 238, where the Inter-American Court cited *Saramaka People* (n 20) para 129 in its elaboration on Suriname's alleged failed compliance with the 'three guarantees'.

[28] *Sarayaku* (n 21).

[29] ibid para 160. Footnote references inter alia to UNDRIP Arts 19, 30(2), 32(2), 38 (ibid fn 178). See furthermore *Sarayaku* (n 21) para 167: 'Given that the State must guarantee the rights to consultation and participation in all phases of planning and implementation of a project that may affect the territory on which an indigenous or tribal community is settled, or other rights essential to their survival, these processes of dialogue and consensus-building should take place from the first stages of planning or preparation of the proposed measures, so that the indigenous peoples can truly participate in and influence the decision-making process, in accordance with the relevant international standards. To that effect, the State must ensure that the rights of indigenous peoples are not disregarded in any other activity or agreement reached with private or third parties, or in the context of public sector decisions that would affect their rights and interests. Therefore, where applicable, the State must also carry out the tasks of inspection and supervision of their application and, when appropriate, deploy effective means to safeguard those rights through the corresponding judicial organs' (ibid para 167; footnote references, inter alia, to UNDRIP Arts 15(2), 17(2), 19, 30(2), 32(2), 36(2) (ibid fn 218)). See also ibid para 185 fn 242. See also *Kaliña and Lokono Peoples* (n 27) paras 205–07. Para 206: 'In this regard, the Court has already established that the State must ensure the effective participation "with regard to any development, investment, exploration or extraction plan." In particular, the Court referred to development and investment plans as "any activity that may affect the integrity of the lands and natural resources ... in particular, any proposal related to logging or mining concessions."' Footnotes omitted.

[30] *Sarayaku* (n 21) para 215. Footnote references, inter alia, to UNDRIP Arts 8 and 13 (ibid fn 283).

not only as individuals'.[31] The UNDRIP's legal impact thus is most obvious in the case law of the Inter-American Court of Human Rights.

3.3 Appreciation

It is especially the jurisprudence of the Inter-American Court of Human Rights that illustrates the UNDRIP's contribution to the state of law in disputes concerning investment projects on Indigenous territories. The Court established violations of Indigenous rights in case of resource exploitation activities by foreign investors with explicit reference to the UNDRIP. Its approach exemplifies the Declaration's contribution to the state of law. At the same time, this strengthening of Indigenous rights increases the potential for conflicts between Indigenous rights and those of foreign investors.

The constellations governing such conflicts are usually quite similar und involve a triangular relationship between States, Indigenous peoples, and foreign investors. Generally, the controversy's origin is a State's granting of an extractive activity or resource-exploitation project in contradiction to pre-existing rights of Indigenous peoples.[32] When the State subsequently wants to correct such a situation by imposing specific regulations to safeguard Indigenous (land) rights without compensating the investor, an investment dispute scenario can arise and the foreign investor may resort to investment arbitration in view of the host State's interference with their investment. Possible investment claims at stake are unlawful expropriation—when governmental measures to protect Indigenous lands reduce the economic value of an investment project to an extent that this amounts to expropriation—as well as breaches of the fair and equitable treatment (FET) standard, of non-discrimination, or of full protection and security clauses.[33]

Importantly, this is less an issue of incompatible obligations than one of monetary compensation of foreign investors.[34] The expropriation of foreign investors to give effect to competing territorial claims of Indigenous peoples is not as such illegal. Rather, compensation has to be paid. Still, the usually high amounts of compensation may pose a problem to host States. A related question as regards interactions/conflicts between investment law and Indigenous rights is, consequently, to what extent States can rely on Indigenous rights—and especially on the UNDRIP—as a 'shield' against claims brought by foreign investors.

Against that background, it seems of particular interest which cases have effectively been brought before investment tribunals and whether references to the UNDRIP have been made, ie whether the UNDRIP has played a role in the jurisprudence of investment tribunals.

[31] ibid para 231.

[32] See generally Kriebaum, 'Human Rights of the Population of the Host State' (n 2) 657. The risk of conflicts is acute, since Indigenous territories are partly still undefined for lack of demarcation of Indigenous ancestral lands.

[33] See Section 4 for the respective investment cases.

[34] As was rightly pointed out by Kriebaum, 'Human Rights of the Population of the Host State' (n 2) 656: 'The obligations incumbent upon the State under human rights treaties will not normally lead to a conflict in a strict sense with investment protection standards. Human rights treaties do not impose a duty on States to expropriate without compensation or to treat investors in an unfair or inequitable or discriminatory manner …'.

4. The UNDRIP and Indigenous Rights in the Jurisprudence of Investment Tribunals

4.1 Overview

So far, Indigenous issues have been at stake only in very few investment cases.[35] Merely a handful of controversies arising from investment projects on Indigenous lands have reached the adjudication phase before international investment tribunals and even fewer have been declared admissible. This may be explained by the fact that some disputes are settled at the national level and others are resolved through 'extra-judiciary settlements'. In still other cases, no dispute is brought before investment tribunals since domestic authorities are complicit in the violations of Indigenous land rights and abstain from interfering with the rights of foreign investors. In any case, the investment tribunals' jurisprudence—as discussed below—illustrates the UNDRIP's possible contribution to the state of law as regards Indigenous rights at least in the abstract. One of the cases—*Grand River Enterprises v United States*—makes explicit reference to the UNDRIP.

4.2 Indigenous Rights and the UNDRIP in Investment Jurisprudence

The investment cases which reached the adjudication phase dealt with issues of considerable importance for Indigenous peoples. Still, Indigenous rights generally played a very limited role in the tribunals' reasoning. The first and perhaps best known is *Glamis Gold v United States* (2009).[36] *Glamis Gold* concerned US federal and Californian measures in relation to open-pit mining operations which impacted on Indigenous (the Quechan Indian Nation's) cultural sites. The measures—including regulations requiring the backfilling of mines—inter alia aimed at the protection of these cultural sites. Glamis submitted a claim under the North American Free Trade Agreement (NAFTA) in 2003, arguing that the destruction of the economic value of its investment amounted to expropriation, that the FET standard was violated, and that it was discriminated against since its project was subject to more onerous regulations than those of other operators. The US government relied on federal and State laws which accorded protection to tribal sacred sites and other tribal resources. The Indigenous Quechan tribe participated as *amicus curiae*.[37] In the award, the *Glamis Gold* tribunal did not find the United States in breach of their obligations. The required backfilling measures were not of sufficient economic impact on the investment to amount to expropriation.[38] Likewise, the FET standard was not breached since the measures were of general application.[39] The award is thus, in result, favourable to the Quechan Indian Nation's rights since the US measures which accorded protection to their sacred sites were accepted. However, the Indigenous concerns played, at best, a minor role in the tribunal's reasoning.

[35] See generally Lenzerini (n 23) 199ff. See also Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, 'Impacts of International Investment Agreements on the Rights of Indigenous Peoples', UN Doc A/HRC/33/42 (11 August 2016) paras 26–69 for further details.

[36] *Glamis Gold Ltd v United States of America*, UNCITRAL, Award (8 June 2009).

[37] *Glamis*, Non-Party Supplemental Submission by the Quechan Indian Nation; see Section 5.4 for details.

[38] *Glamis* (n 36) para 536.

[39] ibid paras 598–830. This, as held by Kriebaum and Schreuer, in application of a particularly high threshold for the standard; see C Schreuer and U Kriebaum, 'From Individual to Community Interest in International Investment Law' in U Fastenrath, R Geiger, D-E Khan, and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 1079, 1086.

In *Chevron Corporation and Texaco Petroleum Company v Ecuador*,[40] Chevron resorted to investment arbitration before the Permanent Court of Arbitration against the judgment of an Ecuadorian court, ordering that it had to pay US$18.6 billion to Indigenous communities as damages for dumping toxic waste in the Amazon.[41] Chevron argued, inter alia, a breach of Ecuador's obligations under the US–Ecuador BIT, including a violation of the FET standard, of full protection and security, as well as of non-arbitrary and non-discriminatory treatment.[42] Chevron asked the tribunal to declare that any (domestic) judgment on the issue was not final and enforceable.[43] While the tribunal had issued several interim awards ordering Ecuador to stop enforcing the judgment,[44] the dispute is still pending at the time of writing.

In *Burlington v Ecuador*,[45] the claimant, a US oil and gas company which had obtained a hydrocarbon concession in the Amazon rainforest, argued that Ecuador was responsible for not providing full protection and security to its investment against attacks from local Indigenous communities opposing the project. The ICSID tribunal, however, dismissed the claim on procedural grounds.[46] It thus did not deal with this issue on the merits.

Gallo v Canada[47] related to an investment in open-pit mining and the adjacent construction of a rubbish dump site in the Canadian state of Ontario. The Ontario government had enacted legislation which prevented the investor from acquiring the lands next to its project for the construction of the rubbish dump site.[48] On this basis, the investor (Gallo) brought a claim under NAFTA for unlawful expropriation and also claimed a violation of the FET standard. In defence, Canada relied, inter alia, on the rights of local aboriginal peoples, especially land rights, which would have been violated had the purchase of the land by the investor been permitted.[49] The NAFTA tribunal dismissed the investor's claim for lack of jurisdiction and consequently did not discuss the merits of the case.[50]

[40] *Chevron Corp and Texaco Petroleum Corp v Ecuador*, PCA Case No 2009-23, pending, <http://www.pcacases.com/web/view/49> accessed 11 October 2017.

[41] *Maria Aguinda and Others v Chevron Texaco Corp*, Proceeding No 002-2003, Supreme Court of Justice, Nueva Loja, Ecuador. The dispute was called 'Lago Agrio Litigation' because the Ecuadorian court was situated in the town of Lago Agrio. In January 2012, the judgment was upheld by the Ecuadorian Court of Appeals; see CNN Wire Staff, 'Ecuador Court Upholds US$8.6 Billion Ruling against Chevron', *CNN* (4 January 2012), <http://edition.cnn.com/2012/01/04/world/americas/ecuador-chevron-lawsuit/index.html> accessed 11 October 2017, with according efforts to enforce the judgment in Argentina, Brazil, Canada, and the United States; see B Reddall, 'Tribunal Presses Ecuador to Halt Chevron Case Enforcement', *Reuters* (8 February 2013), <http://www.reuters.com/article/2013/02/09/chevron-ecuador-idUSL1N0B8FBB20130209> accessed 11 October 2016; see Lenzerini (n 23) 208 for details.

[42] *Chevron and Texaco Petroleum v Ecuador* (n 40) paras 456ff. [43] ibid para 547.

[44] See, eg, *Chevron and Texaco Petroleum v Ecuador*, Fourth Interim Award on Interim Measures (7 February 2013) operative paras 2ff.

[45] *Burlington* (Decision on Jurisdiction) (n 21) para 342.

[46] ibid para 315. Note, however, that the tribunal decided on the merits of Burlington's expropriation claim and found Ecuador in breach of its obligations: see *Burlington* (Decision on Liability) (n 21) para 546. This, nonetheless, without touching upon Indigenous rights.

[47] *Vito G Gallo v Government of Canada*, UNCITRAL, PCA Case No 55798, Award (15 September 2011).

[48] See ibid, Investor's Memorial (1 March 2010) para 8, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gallo.aspx?lang=eng> accessed 12 October 2017.

[49] See ibid, Government of Canada Counter-Memorial (29 June 2010) para 137, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gallo.aspx?lang=eng> accessed 12 October 2017.

[50] *Gallo* (n 47) para 341.

In *Pac Rim v El Salvador*, decided in October 2016, the subject of dispute was a mining concession (El Dorado Project) which was not granted to the claimant by El Salvador after local and national protests had taken place in the host State.[51] Although the ICSID tribunal held that the claimant had indeed no legal right to the concession under Salvadoran Mining Law, it failed to address the submission put forward by the *amicus curiae* advancing that El Salvador's international human rights obligations supported El Salvador's measures.[52]

Also, there were—as of November 2016—two pending cases which could bring new findings to light as regards the importance attributed to the UNDRIP. The first is the *South American Silver Mining (SAS) v Bolivia* arbitration before the Permanent Court of Arbitration. In *SAS*, the claimant sought compensation for the alleged expropriation of investments (the nationalization of mining concessions) and violation of the FET standard.[53] Both Bolivia and SAS dealt in the counter-memorial and the reply to the counter-memorial with the UNDRIP and its legal nature and implications.[54]

In the second case, *Bear Creek Mining Corporation v Peru*, the company claimed direct expropriation under the Peru–Canada Free Trade Agreement (FTA) after the respondent had withdrawn the company's concession to operate the Santa Ana silver-mining site[55] following the protest of the Aymara Indigenous people.[56] While the parties' memorials did not refer to the UNDRIP,[57] one of the *amicus curiae* submissions relied on the UNDRIP (Articles 12, 26).[58]

[51] *Pac Rim Cayman LLC (OceanaGold) v El Salvador*, ICSID Case No ARB/09/12, Award (14 October 2016) paras 6.1ff; see also J Hofbauer, 'Foreign Investments Meet Free, Prior and Informed Consent (FPIC): Whose Sovereignty?'(2013) 18 Austrian Rev Int'l & European L 1, 25–26 for further details.

[52] Such a human rights obligation is, for instance, the right to property or land. See *Pac Rim* (n 51) paras 3.28–3.30, 10.4–10.6. See also ibid, Center for International Environmental Law (CIEL), Submission of *Amicus Curiae* Brief on the Merits of the Dispute (25 July 2014) 12.

[53] *South American Silver Ltd v Bolivia*, UNCITRAL, PCA Case No 2013-15, pending, <https://www.pcacases.com/web/view/54> accessed 12 October 2017; Report of the Special Rapporteur (n 35) para 46.

[54] Bolivia argued that the company's project violated several UNDRIP provisions. Report of the Special Rapporteur (n 35) para 47; *South American Silver*, Respondent Counter-Memorial, 31 March 2015, paras 302–26. See especially the reference which was made to the Hague Conference (n 6) 43 in para 302 fn 436: 'After a careful study on international law, the International Law Association recognized that respect for certain indigenous peoples' fundamental rights is a part of customary international law, ie "self-determination, autonomy or self-government, cultural rights and identity, land rights as well as reparation, redress and remedies [which] are all strictly interrelated with each other as building blocks of the unique Circle of Life representing the heart of Indigenous peoples' identity, to the extent that 'the change of one of its elements affects the whole'" …'. The claimant (SAS) conversely considered that the UNDRIP was neither binding nor customary in nature. Report of the Special Rapporteur (n 35) paras 48–49; *South American Silver*, Claimant's Reply to Respondent's Counter-Memorial on the Merits and Response to Respondent's Objections to Jurisdiction and Admissibility (30 November 2015) paras 247ff.

[55] *Bear Creek Mining Corp v Peru*, ICSID Case No ARB/14/2, pending, <https://www.italaw.com/cases/2848> accessed 27 November 2016; for further details see 'Bear Creek Announces Its Intent to Commence an Arbitration Against Peru—Santa Ana Dispute' (12 August 2014), <https://www.italaw.com/cases/2848> accessed 27 November 2016; and UNCTAD Investment Policy Hub, 'Bear Creek Mining v. Peru', <http://investmentpolicyhub.unctad.org/ISDS/Details/589> accessed 12 October 2017.

[56] Report of the Special Rapporteur (n 35) para 50; see also *Bear Creek*, Non-disputing party written submission of DHUMA and Dr Carlos López (9 May 2016) 8f: 'The protest movement started at the beginning of March. The Aymara population demanded the repeal of Supreme Decree 083-2007 which had approved the Santa Ana mining project, the application and respect for the right of prior consultation, the suspension of all mining concessions in the southern area of Puno and especially of those that directly affected Apu Khapia …'.

[57] Note, however, that although Peru did not elaborate on the UNDRIP, it referred to ILO Convention 169 in its counter-memorial to argue the international obligation to obtain prior consent. See *Bear Creek*, Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction (6 October 2015) para 62.

[58] The non-disputing parties argued that the claimant had failed to respect the Indigenous rights recognized in the UNDRIP and, more specifically, that they had not obtained prior consent: see *Bear Creek* (Submission of

In the above cases, the activities of foreign investors interfered or had the potential to interfere with the rights of Indigenous peoples.[59] Investors were thus potential perpetrators of human/Indigenous rights violations. Investments and economic activities conflicted with the non-economic, cultural rights of Indigenous peoples, as prominently enshrined in the UNDRIP. The rights most at stake were Indigenous peoples' rights to cultural identity, land rights, and participation in decisions which affect them.[60]

In *Grand River Enterprises Six Nations, Ltd v United States*, conversely, the foreign investors themselves were Indigenous and relied on their First Nation status to argue preferential treatment in a NAFTA arbitration.[61] Put differently, they claimed special economic privileges in reliance on their Indigeneity. *Grand River* is thus one of the exceptional cases where investors have referred to their status as Indigenous peoples to support their claims.[62] The *Grand River* case is even more outstanding for the investment tribunal's extensive reference to the UNDRIP to delineate the scope of investors' rights.

The claimants controlled a Canadian company which was engaged in the tobacco-exporting business to the United States. They maintained that their investment had been harmed by a US regulation which required contributions of tobacco companies to health expenses for tobacco patients. Their arguments, inter alia, referred to the issue that the measures amounted to expropriation and breached also the customary international law minimum FET standard. They stated that the US measures were inconsistent with their 'legitimate expectation ... not to be subject to regulatory action'[63] because of their status as one of the First Nations in North America. In doing so, the claimants extensively relied on the UNDRIP in support of their arguments.[64] The tribunal did not decide on the claim for immunity from State regulation, but rather held that there could not be a reasonable expectation not to be subject to State regulation when engaging in large-scale tobacco distribution business.[65] It also found that the measure did not amount to expropriation since the claimants' business remained profitable.[66] In the end, the *Grand River* tribunal dismissed the claim. Still, the award remains interesting for its far-reaching reference to Indigenous rights. Most importantly, the *Grand River* tribunal affirmed a right to consultation of Indigenous peoples with explicit reference to Article 19 of the UNDRIP:

DHUMA and Dr Carlos López) (n 56) 15, 17. Canada's *amicus curiae* submission does not refer to the UNDRIP, conversely. *Bear Creek*, Non-disputing State Party submission of the Government of Canada (9 June 2016).

[59] See also the procedural order in the Joint ICSID Cases, *Bernhard von Pezold and Others v Zimbabwe*, ICSID Case No ARB/10/15, Award (28 July 2015); *Border Timbers Ltd, Border Timbers International (Private) Ltd and Hangani Development Co (Private) Ltd v Zimbabwe*, ICSID Case No ARB/10/25, Procedural Order No 2 (26 June 2012), where the arbitral tribunal denied an *amicus* petition submitted jointly by four Indigenous communities from Zimbabwe and a European NGO. The Indigenous *amicus* petitioners had argued that land at stake in the investment dispute was part of their ancestral territory and that they thus had a significant interest in the outcome of the investment proceedings. For further reference and a critical view on the investment tribunal's denial to admit the *amicus* petition, see C Schliemann, 'Requirements for Amicus Curiae Participation in International Investment Arbitration: A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15' (2013) 12 Law & Practice Int'l Courts & Tribunals 365.

[60] See, eg, UNDRIP Arts 5, 8, 9, 11, 12, 19, 25, 26, 31, 32.

[61] *Grand River Enterprises Six Nations Ltd and Others v United States*, UNCITRAL, Award (12 January 2011); see for details C Binder, 'Investment Law and Indigenous Peoples: The Grand River Case' (2013) 2 Rivista dell'Arbitrato 487.

[62] Also more generally, investors rarely argue a violation of their human rights as investors; see Schreuer and Kriebaum (n 39) 1089 for further reference.

[63] *Grand River* (n 61) para 128.

[64] See *Grand River*, Claimant's Memorial (10 July 2008) paras 150–51, 158 fns 198, 171, 174, 189.

[65] *Grand River* (n 61) paras 141ff. [66] ibid paras 152–53.

It may well be … that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them. One member of the Tribunal has written that there is such a customary rule. Moreover, a recent study by a committee of several international law experts assembled under the auspices of the International Law Association, after an exhaustive survey of relevant state and international practice, found a wide range of customary international law norms concerning indigenous peoples, including 'the right to be consulted with respect to any project that may affect them'. As pointed out by the Claimants, the duty of states to consult with indigenous peoples is featured in the UN Declaration on the Rights of Indigenous Peoples, particularly in its Article 19 as well as in several other articles. In its Counter-Memorial the Respondent maintained in sweeping terms that the Declaration does not represent customary international law, as did Canada in its non-disputing party submission. However, when questioned by the Tribunal on this point at the hearing, the Respondents' counsel stated that some parts of the Declaration could reflect fundamental human rights principles and emerging customary law.[67]

The *Grand River* case thus especially illustrates the UNDRIP's contribution to the state of law and its potential legal relevance for investment cases.

4.3 Appreciation

The investment cases discussed above deal with matters of immense relevance for Indigenous peoples. Although reliance on Indigenous rights—and more particularly on the UNDRIP—did not play an important role for their outcome, the cases highlight the need to deal with Indigenous concerns in investment proceedings. The UNDRIP's ample codification of Indigenous rights thus increases the potential for interactions and conflicts between Indigenous peoples' rights and investment law. A development which is likely to continue with the always stronger recognition of Indigenous rights.

Grosso modo, two types of situations may be distinguished: reliance on Indigenous peoples' rights as a 'shield' (see, eg, *Glamis Gold*, *Burlington*, *Chevron*, *South American Silver*) and as a 'sword' (*Grand River*). As regards the former, host States, when taking action to protect Indigenous peoples which interferes with investors' rights, are in principle able to use Indigenous rights as a 'shield'. Reliance on Indigenous rights (as contained in the UNDRIP) may thus serve as a defence against alleged breaches of investment agreements.[68] The UNDRIP's (potential) contribution to the state of law in these constellations is that it should strengthen a host State's position when relying on Indigenous rights in defence against claims brought by foreign investors. Still, almost no reference seems to have been made to the UNDRIP in the respondent States' memorials[69]

[67] ibid para 210. What is more, the *Grand River* tribunal criticized, inter alia, the lacking involvement of First Nations and tribal governments in the development of the proposed amendments to the Master Settlement Agreement (MSA) (para 185), as well as the missing sensitivity of the US States vis-à-vis the Claimants'/the Indigenous nations' interests (para 186). The tribunal also more generally referred to the growing protection of Indigenous rights (para 186). While the tribunal maintained that such obligation to consult with Indigenous peoples was not to be equalled with an obligation to consult with individual investors (para 211), it held that consultations should have occurred with the First Nations whose members could and were being affected by the MSA and related measures (para 212). Put differently, the tribunal 'operationalized' the obligation to consult with Indigenous peoples by applying it to the case before it.

[68] See in this sense also Section 3 for the jurisprudence of human rights monitoring institutions. Having been found in violation of their rights under international human rights instruments, States may be induced to 'correct' situations by interfering with the rights of foreign investors as protected under investment agreements.

[69] Bolivia seems to be the only respondent State in an investment proceeding which referred to the UNDRIP in its counter-memorial: see *South American Silver* (Respondent Counter-Memorial) (n 54). Note also, however, that Ecuador's counter-memorials in *Burlington* (n 21) and *Chevron* (n 41) are not publicly available; and

or in the reasoning of the investment tribunals so far.[70] Reliance on Indigenous rights as a 'sword', conversely, relates to claims of preferential treatment by investors. Indigenous investors then claim economic privileges for being Indigenous. As elaborated above, in the *Grand River* case, claimants extensively relied on the UNDRIP, and also the tribunal made according references to the Declaration.

Accordingly, in both instances—reliance on Indigenous rights as a 'shield' and as a 'sword'—the UNDRIP's contribution to the state of law has the potential to shape interactions between Indigenous and investors' rights. It seems thus of particular interest to examine means to coordinate between the systems. How should interactions between both—Indigenous rights and investment law—be dealt with? What are the techniques of coordination? And what are the possible contributions of the UNDRIP in the field?

5. The UNDRIP's Contribution to Existing Means to Deal with Indigenous Rights in Investment Contexts

The growing recognition of Indigenous rights—most prominently through the UNDRIP—increases the need to coordinate between investment law and Indigenous rights when they interact or conflict with each other. As will be shown, there are several possibilities to take Indigenous rights into account in investment disputes. These include jurisdiction and applicable law, treaty interpretation, and the *amicus curiae* participation of Indigenous peoples in investment proceedings. Also, enhanced transparency requirements in investment proceedings and the human/Indigenous rights education of arbitrators may further the Indigenous cause.

The UNDRIP contributes at various levels to these techniques, shapes them, and changes approaches thereto. As regards jurisdiction and applicable law as well as treaty interpretation, the recognition of Indigenous rights in the UNDRIP—especially insofar as they codify customary international law—may be of relevance for substantive standards. Also procedurally, the UNDRIP calls for a maximum respect for Indigenous rights.[71] Concretely, it does so by emphasizing the right to be heard of Indigenous peoples in investment proceedings (eg as *amicus curiae*), and, more in the abstract, by pushing for increased transparency requirements.

Still, notwithstanding the range of possibilities to address interactions between Indigenous rights and investment law at the disposal of investment tribunals, the tribunals so far do not seem to have made use of them: not in relation to Indigenous rights, and only to a very limited extent in the broader investment law and human rights debate.[72] One major reason for this lack of judicial treatment certainly lies in the fact that the parties rarely put forward Indigenous or human rights arguments in investment

that the United States' counter-memorial and the United States' Rejoinder in *Glamis* were submitted before the UNDRIP's adoption (*Glamis*, Counter-Memorial of Respondent United States of America (19 September 2006), <http://www.state.gov/s/l/c10986.htm> accessed 12 October 2017; *Glamis*, Rejoinder of Respondent United States of America (15 March 2007), <http://www.state.gov/s/l/c10986.htm> accessed 12 October 2017). Canada did not refer to the UNDRIP in its Counter-Memorial (n 49) in *Gallo*.

[70] Note, however, that *amicus curiae* submissions referred to the UNDRIP; for details, see Section 5.3.

[71] See, eg, UNDRIP Arts 3, 19, 32.

[72] For general references on the investment law and human rights debate, see n 2.

proceedings.[73] For this reason, the different techniques and the UNDRIP's possible contribution will have to be discussed mostly in the abstract.

5.1 Jurisdiction and Applicable Law

By strengthening the relevant standards with regard to Indigenous rights, the UNDRIP contributes in terms of applicable law.[74] More particularly, the UNDRIP increases investment tribunals' possibilities to refer to Indigenous rights—as 'norms, applicable between the parties' concerning those provisions which constitute a codification of customary international law. This is, however, under an important caveat. The extent to which an investment tribunal will be able to rely on the rights of Indigenous peoples depends to a large extent on the jurisdictional clause in the investment treaty. A tribunal's jurisdiction is limited to what the parties have consented to. Thus, the broader a jurisdictional clause is framed, the more room is—in principle—left to a tribunal for the possible consideration of alleged violations of Indigenous rights, if and to the extent that they affect the investment.[75] Article IX of the Norway–Lithuania BIT is an example of a broad jurisdictional clause. It covers 'any dispute which may arise between an Investor of one Contracting Party and the other Contracting Party in connection with an investment'.[76] In case of such broad jurisdictional clauses it would be—at least in principle—within the scope of jurisdiction of the investment tribunal to examine violations of Indigenous peoples' rights should they arise 'in connection with an investment'.[77] The UNDRIP's contribution to further incorporate Indigenous rights into investment proceedings thus has the most potential with regard to such broad jurisdictional clauses.[78]

With the above considerations in mind, the UNDRIP's possible contribution in terms of applicable law is as follows. The applicable law generally opens some room for an investment tribunal to look into alleged violations of Indigenous peoples' rights which relate to the investment dispute. Typical choice-of-law clauses in investment treaties refer to the law of the host country and such rules of international law as are applicable.[79] Tribunals could thus—provided that the jurisdictional clause is broad enough—draw upon relevant instruments for the protection of Indigenous rights as part of the applicable international law of treaties (see, eg, ILO Convention 169) or as applicable customary international law. Especially for the latter, the UNDRIP's codification of relevant rights

[73] See Schreuer and Kriebaum (n 39) 1096: '... arbitrators are prone to reacting to the parties' submissions who will invoke community interests [including human rights] only when it serves their particular interests. It would be untypical for a tribunal to investigate and promote community interests on its own initiative.' See also Section 4.3.

[74] See Section 2. [75] Kriebaum, 'Human Rights of the Population of the Host State' (n 2) 661.

[76] Norway–Lithuania BIT Art IX.

[77] Conversely, narrow jurisdictional clauses—restricting jurisdiction on violations of the investment treaty—will thus leave very little room to refer to Indigenous rights; see, eg, Art 9 of the Netherlands–El Salvador BIT as an example of a narrow jurisdictional clause: '... disputes which arise within the scope of this agreement between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the other Contracting Party ...'.

[78] See for a general discussion on jurisdiction and applicable law, Kriebaum, 'Human Rights of the Population of the Host State' (n 2) 660ff.

[79] See, eg, Netherlands–Argentina BIT Art 10(7); see also ICSID Convention Art 42(1), which states that if there is no agreed choice of law, 'the Tribunal shall apply the law of the Contracting State Party to the dispute and such rules of international law as may be applicable'; see Kriebaum, 'Human Rights of the Population of the Host State' (n 2) 661 for further references.

seems important. In a similar vein, tribunals could also apply Indigenous rights as part of the law of the host State.[80]

In case of conflicting obligations, for example, when Indigenous land rights conflict with competing claims of foreign investors, tribunals could draw on relevant techniques for the resolution of norm conflicts (especially the *lex posterior* and *lex specialis* principles).[81] A tribunal might even consider a hierarchy of norms in case of *jus cogens* obligations. Indigenous rights which would trump competing investor claims for being classified as *jus cogens* might include the right to self-determination of Indigenous peoples or their right not to be subject to cultural genocide in case of consistent violations of their territories and cultural heritage.[82] In this context, the UNDRIP's codification of the right to self-determination of Indigenous peoples and their right not to be subjected to forced assimilation or destruction of their culture in Articles 3 and 8 of the UNDRIP seems of particular relevance. So far, however, these techniques do not appear to have ever been applied by investment tribunals.

Also, 'in accordance with host State law-clauses' can be a means to give effect to Indigenous rights, to the extent that these rights are part of the law of the host State. They are of particular importance in case of open constitutional provisions with general references to, eg, 'international human rights law' and thus also to the UNDRIP insofar as it codifies customary international law.[83] Several investment treaties include 'in accordance with host State law-clauses' in the definition of the investment.[84] Investments which are made in violation of host State laws do not enjoy protection under the respective BIT. Investors can thus lose their protection in cases of serious violations of Indigenous rights which are at the same time a breach of the domestic law of the host State. What is more, even without 'in accordance with host State law-clauses', tribunals have examined whether investments were made in accordance with the law of the host State before granting protection.[85] The requirement that investments must not to be made in violation of the domestic law of the host State can thus be a means to protect Indigenous rights.

The issue becomes more problematic where a State wants to subsequently—after an investment was made—amend its laws to give effect to Indigenous rights. 'In accordance

[80] This seems especially important given the growing domestic recognition of Indigenous rights especially in Latin American countries. See, eg, the constitutions of Brazil, Bolivia, Colombia, Ecuador, Nicaragua, Paraguay, and Venezuela. For further reference, see Hague Conference (n 6) 23.

[81] See T Gazzini and Y Radi, 'Foreign Investment with a Human Face—with Special Reference to Rights of Indigenous Peoples' in R Hofmann and CJ Tams (eds), *International Investment Law and Its Others* (Nomos 2012) 87, 95.

[82] See V Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law' (2011) 42 Columbia Human Rights L Rev 797, 857ff.

[83] See, eg, 2008 Constitution of Ecuador Arts 57ff.

[84] See, eg, Germany–Philippines BIT Art 1(1); Spain–Mexico BIT Art 1(4); see Kriebaum, 'Human Rights of the Population of the Host State' (n 2) 664 for further reference.

[85] The ICSID tribunal in *Plama Consortium Ltd v Bulgaria* observed that: 'Unlike a number of Bilateral Investment Treaties, the ECT [Energy Charter Treaty] does not contain a provision requiring the conformity of the Investment with the particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law' (*Plama Consortium Ltd v Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) para 138). As was generally affirmed by the ICSID tribunal in *Phoenix Action v Czech Republic* in an *obiter dictum*: 'To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments in pursuance of torture or genocide or in support of slavery or trafficking of human organs' (*Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 78). See generally Kriebaum, 'Human Rights of the Population of the Host State' (n 2) 665.

with host State law-clauses' usually refer to the time the investment is made.[86] They will thus not cover subsequent legislative changes enacted by a State—for instance, to bring its laws into line with relevant standards on Indigenous rights.[87] Such subsequent legislative changes may accordingly conflict with foreign investors' rights.

Overall, the UNDRIP—by codifying customary international law and detailing and affirming relevant norms—should, in principle, increase an investment tribunal's means to refer to Indigenous rights. This with the caveat that the possible reference to Indigenous rights depends largely on the wording/provisions of the respective investment treaty as well as, obviously, on the arguments put forward by the parties.

5.2 Treaty Interpretation

Also for treaty interpretation, a further 'technique' for investment tribunals to refer to Indigenous rights in investment proceedings, the UNDRIP's codification of certain Indigenous rights is of relevance. Especially the so-called 'principle of systemic integration' of Article 31(3)(c) of the Vienna Convention on the Law of Treaties[88] (VCLT) is important.[89] It provides that in the interpretation of a treaty 'there shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the parties'. Article 31(3)(c) of the VCLT may thus, in principle, be an important tool to interpret an investment treaty in accordance with relevant Indigenous—or human—rights.

Insofar as relevant standards on Indigenous rights are binding on the parties, an investment tribunal could refer to Indigenous rights in reliance on Article 31(3)(c). In an ideal world, the UNDRIP's far-reaching recognition of Indigenous rights could thus contribute to increased references to Indigenous rights by investment tribunals insofar as it codifies customary international law. This is, on the one hand, when Indigenous investors claim preferential treatment for being Indigenous. A tribunal could thus interpret the relevant investment treaty provisions in a way which is favourable to the claims of the Indigenous investors. In fact, the *Grand River* tribunal referred very broadly to

[86] An exception to the contrary is the China–Malta BIT, which requires investments to be continuously in accordance with host State law. Article 2(2) of the China–Malta BIT (2009) states: 'Investments of either contracting Party shall be made, and shall, for their whole duration, continuously be in line with the respective domestic laws.' Such wording would thus allow for an even broader consideration of Indigenous rights, thus encompassing even subsequent legal changes; see generally U Kriebaum, 'The State's Duty to Protect Human Rights: Investment and Human Rights', 8, <http://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Kriebaum/Publikationen/states_duty_protect_human_rights.pdf> accessed 2 February 2018.

[87] When contracts between investor and host State include stabilization clauses, such subsequent legislative changes seem even more difficult. On stabilization clauses and human rights, see A Shemberg, 'Stabilization Clauses and Human Rights: A Research Project Conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights' (27 May 2009), <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES> accessed 2 February 2018.

[88] 1155 UNTS 331 (22 May 1969).

[89] VCLT Art 31(3)(c); as to the relevance of the principle of systemic integration, see, eg, Simma and Kill (n 2); see also the reference to VCLT Art 31(3)(c) in the ILC Fragmentation Report; Study Group of the International Law Commission (Finalized by M. Koskenniemi), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc A/CN.4/L.682 (2006) para 423; R Gardiner, *Treaty Interpretation* (Oxford University Press 2015) 299; C McLachlan, 'The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 280.

Indigenous rights, including to the UNDRIP, in its interpretation of the relevant State obligations arising under the investment treaty.[90] However and deplorably, the tribunal failed to discuss the principle of systemic integration, as outlined in Article 31(3)(c) of the VCLT.

Second, the UNDRIP can promote reference to Indigenous rights when a host State relies on Indigenous rights as a 'shield'. An investment tribunal could thus refer to relevant standards on Indigenous rights—insofar as they are binding between the parties—to adopt an 'Indigenous rights' friendly interpretation of the investment treaty's provisions and take a position which is favourable to the host State's defences. This especially applies in case of broad treaty terms—for instance, when determining the meaning of the FET standard, when interpreting full protection and security clauses, or in relation to direct or indirect expropriation.[91] So far, this does not seem to have occurred.[92]

Also more generally, practice is scarce and there seems to be a certain reluctance of investment tribunals to take external norms—ie relevant human and Indigenous rights—into account. Apart from the *Grand River* case, no reference to Indigenous rights was made by investment tribunals. The reasons for this limited reference are multiple. First, the narrow object and purpose of most BITs—being focused on investment protection—may prevent due reference to relevant human and Indigenous rights through interpretation.[93] Also, the private law background of many investment arbitrators may play a role in the limited reliance on human rights treaties and on instruments enshrining Indigenous rights.[94] Finally, if alleged violations of Indigenous rights are not raised in the submissions of the parties to the dispute, the investment tribunal may not even know about them.[95] Overall, the UNDRIP's possible impact thus seems to be very limited so far. While the UNDRIP, through its codification of relevant norms, in principle facilitates an investment tribunal's task to refer to Indigenous rights in treaty interpretation, in practice, this does not seem to have been the case—yet (?).

[90] See Section 4.

[91] See Kriebaum, 'Human Rights of the Population of the Host State' (n 2) 668 as regards human rights. In fact, the treaty text is the starting and—usually—end point of any interpretation: '*in claris cessat interpretatio*' ('interpretation stops in the face of clarity'). It is the task of an international tribunal to interpret, not to replace a treaty provision. In the words of the arbitral tribunal in the *Laguna del Desierto* case, interpretation is 'a judicial function, whose purpose is to determine the precise meaning of a provision, but which cannot change it'. *Dispute concerning the Course of the Frontier between BP 62 and Mount Fitzroy 'Laguna del Desierto'* (*Argentina v Chile*) (1994) 113 ILR 1, 45, para 75.

[92] Note, however, that in the *South American Silver* case, the respondent State Bolivia argued in its counter-memorial for a systematic interpretation of the UK–Bolivia BIT; see *South American Silver* (Respondent Counter-Memorial) (n 54) paras 193ff. See esp para 199: 'Under a systemic interpretation of international law, the Arbitral Tribunal shall resort to the sources of law which protect the rights of the Indigenous Communities when ginving [sic] content to certain concepts that are constantly evolving such as fair and equitable treatment, full protection and security, arbitrariness and the legality or illegality of an expropriation' (footnotes omitted). Again, it remains to be seen how the tribunal will deal with the respondent's submission.

[93] See VCLT Art 31(1)'s reference to the object and purpose of a treaty for treaty interpretation; see also Section 6.2.

[94] See Section 5.5 for details.

[95] See, however, *South American Silver* (Respondent Counter-Memorial) (n 54). Note respectively that also proportionality reasoning may be used as a conflict-solving technique and cross-regime harmonization between investment law and Indigenous rights. See, eg, SW Schill, 'Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights' (2012) 27 ICSID Rev 87, for further reference.

5.3 *Amicus Curiae* Participation of Indigenous Peoples in Investment Proceedings

The—so far—limited reference to Indigenous rights in investment proceedings raises questions of how best to inform an investment tribunal about the Indigenous concerns at stake. The participation of Indigenous peoples through *amicus curiae*/non-disputing party submissions thus seems most important. Since Indigenous peoples typically are not parties to the proceedings, but 'merely' affected by investment activities, *amicus curiae* submissions are an important procedural means to voice their concerns. Such increased participation of Indigenous peoples in investment proceedings[96] acknowledges the UNDRIP's recognition of Indigenous peoples as distinct peoples (see, eg, Article 3) and their right to determine strategies for the development or use of their lands, territories, and resources (Article 32(1)).

Amicus curiae submissions should support the tribunal in achieving a more complete vision of the factual and legal background of a case.[97] They are sometimes explicitly dealt with in investment treaties. Certain BITs refer to the possibility to submit *amicus curiae* and generally leave it to the discretion of the arbitral tribunal to accept such submissions.[98] Also, if nothing is explicitly mentioned in an investment treaty, it wil be within the discretion of ICSID tribunals whether to allow *amicus curiae* briefs.[99] Respectively, the values expressed in the UNDRIP, including the recognition of Indigenous peoples as distinct peoples, should generally push an investment tribunal to accept *amicus curiae* submissions by Indigenous peoples when their interests are at stake.

The investment cases which have touched upon Indigenous issues so far have shown a certain practical relevance of *amicus curiae* submissions.[100] These submissions generally relied on the UNDRIP to sustain their arguments. In *Glamis Gold*, the Quechan Indian Nation submitted an *amicus curiae* brief which supported the US government's position

[96] As to an increased reference to Indigenous rights, inter alia through a right to intervention, see Section 6.3.

[97] See Kriebaum, 'Human Rights of the Population of the Host State' (n 2) 658 fn 21 for relevant case law on *amicus curiae* petitions by civil rights groups and human rights NGOs.

[98] See Australia–Chile FTA Art 10(20) (Conduct of Arbitration): '... 2. The tribunal shall have the authority to accept and consider *amicus curiae* written submissions that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party ...'.

[99] See Rule 37 of the ICSID Rules as amended 2006. While the ICSID tribunal in *Pac Rim* admitted the *amicus curiae* submission by the CIEL under ICSID Arbitration Rule 37(2), it refused to deal with its arguments in the award; see *Pac Rim* (n 51) paras 3.28–3.30.

[100] See, however, the arbitral tribunal's denial to admit the *amicus curiae* petition in *von Pezold* and *Border Timbers* (n 59). See n 59 for further reference. Recently, also the *amicus curiae* brief submitted by the Columbia Centre on Sustainable Investment (CCSI) in the pending *Bear Creek* arbitration (n 56) was denied. See, however, n 58 on the admitted *amici curiae* briefs. Among other things, CCSI drew on UNDRIP Arts 19 and 32(2) to argue that Peru was bound by the international human rights law obligation 'to respect and protect the rights of indigenous peoples to prior consultation and to give or withhold their free, prior and informed consent (FPIC)'; see *Bear Creek*, Submission as an 'other person' pursuant to Art 836 and Annex 836(1) of the Peru–Canada FTA, 9 June 2016, 2–3 and fn 7. In its Procedural Order No 6, the tribunal rejected CCSI's *amicus curiae* submission by merely stating that the brief would not contribute to the legal issue and the tribunal's fact-finding. However, it did not deal with Bear Creek's argument that the brief should be denied on the ground that the tribunal lacked jurisdiction to deal with human rights issues; see *Bear Creek*, Procedural Order No 6 (21 July 2016) paras 22, 38–29. Para 22: '... the CCSI Submission addresses matters that are beyond the scope of the arbitration. This case does not relate to the rights of the Aymara communities. Neither side has put at issue the rights of the Aymara communities and neither side has disputed the existence of or alleged the violation of international human rights law. Rather, this dispute concerns the enactment of Supreme Decree 032. This arbitration is an inappropriate forum for the interpretation and application of international human rights treaties, which is beyond the Tribunal's jurisdiction.'

as regards the necessary preservation and protection of Indigenous rights in ancestral lands.[101] An *amicus curiae* brief was likewise filed in *Chevron v Ecuador*, maintaining that the dispute was both outside the jurisdiction of an investor-State tribunal and non-justiciable.[102] Also in the *Grand River* case, the Office of the National Chief of the Assembly of Canadian First Nations supported the Indigenous investors through an *amicus curiae* brief.[103] In these cases, *amicus curiae* submissions were thus a means to convey Indigenous concerns, even though they do not seem to have influenced the outcome of the cases.[104]

5.4 Transparency of Investment Proceedings

Enhanced requirements of transparency may also be important to further the respect for Indigenous rights,[105] as codified, inter alia, in the UNDRIP. Transparency requirements subject investment proceedings to public scrutiny by civil society, media, and NGOs. They thus counter the often-criticized secrecy of investment proceedings. True, far-reaching transparency requirements in investment treaties remain rare.[106] Still, there is a general

[101] See, eg, *Glamis* (Submission by the Quechan Indian Nation) (n 37) 1, which maintained: '... the preservation and protection of indigenous rights in ancestral land is an obligation of customary international law which must be observed, by both the NAFTA Parties and any treaty interpreter, in accordance with the principle of good faith; and that an investor seeking compensation for an alleged taking of property cannot rely upon a claim to acquired rights in which no legitimate expectation to enjoy such rights existed.' The submission referred to UNDRIP Arts 11, 12, 25, 26 (ibid 2, 4, 6).

[102] IISD, 'Amicus Curiae Fundación Pachamama and the International Institute for Sustainable Development (IISD)—Chevron v. Ecuador' (5 November 2010) para 1.4, <http://www.iisd.org/sites/default/files/publications/submission_amici_pachamama_chevron.pdf> accessed 12 October 2017. The *amicus curiae* brief referred to the UNDRIP, eg, in para 4.9.

[103] Office of the National Chief of the Assembly of Canadian First Nations, 'Amicus Curiae Submission' (19 January 2009), <http://www.state.gov/documents/organization/117812.pdf> accessed 12 October 2017. The submission stated, for instance, that '[t]he Assembly of First Nations supports the United Nations Declaration on the Rights of *Indigenous* Peoples and the customary international law principles it reflects' (ibid 2). It concluded by affirming that '[w]hile it is truly unfortunate that neither government [of the United States of America and Canada] has so far indicated a willingness to sign the United Nations Declaration on the Rights of Indigenous Peoples, such intransigence cannot mean that their officials should be free to ignore the basic principles of international law reflected in it' (ibid 4).

[104] The reasons for the limited impact are various. Some cases are declared inadmissible (see *Burlington* (Decision on Jurisdiction) (n 21) and *Gallo* (n 47)). In *Glamis* (n 36), conversely, considerations of Indigenous peoples' rights do not seem to have played any role for the tribunals' deliberations. In *Grand River* (n 61), the *amicus* submission overwhelmingly reiterated and supported the claimants' arguments already put forward in the memorial and was thus of somehow limited relevance; see generally Section 4.

[105] See Vadi (n 82) 878.

[106] 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> accessed 12 October 2017. For a model example as regards transparency, see Australia–Chile FTA Art 10(22) (Transparency of Arbitral Proceedings): '1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, make them available to the public at their cost: a. the notice of intent ... b. the notice of arbitration ... c. pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions ... d. minutes or transcripts of hearings of the tribunal, where available; and e. orders, awards, and decisions of the tribunal. 2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure including closing the hearing for the duration of any discussion of confidential information.' See similar provisions in the 2007 Norwegian Draft Model BIT Art 29, the 2012 US Model BIT Art 29, and the Canadian Model Foreign Investment Protection and Promotion Agreement 2004 Art 38; see generally Kriebaum, 'Human Rights of the Population of the Host State' (n 2) 659.

trend towards more transparency. This can also be evidenced, most importantly, in the recent UNCITRAL Rules on Transparency in Treaty Based Investor-State Arbitration.[107] This may be beneficial to the Indigenous cause because violations of Indigenous peoples' rights are exposed to public scrutiny and pressure. With the increased prominence given to Indigenous rights inter alia by the UNDRIP, transparency requirements will hopefully have even more impact in the future.

5.5 Human/Indigenous Rights Expertise of Arbitrators

Finally, the education and expertise of individual arbitrators is a relevant factor for the promotion of Indigenous rights—including through references to the UNDRIP—in investment proceedings. The private/commercial law bias of investment proceedings has been viewed as a possible impediment to a due appreciation of common concerns, including human rights concerns.[108] A broader public international law expertise might thus induce arbitrators to also consider the relevant public interests—ie human and Indigenous rights considerations—at stake, beyond the resolution of a particular investment dispute. In fact, specific human or Indigenous rights expertise might be particularly beneficial for the arbitrators' comprehension of Indigenous concerns. In *Grand River*, such expertise was ensured by one of the three arbitrators, S James Anaya, the former Special Rapporteur on the Rights of Indigenous Peoples. His expertise becomes apparent between the lines of the award[109] and seems to have positively contributed to a harmonious reading of both systems, Indigenous rights and investment law. In fact, *Grand River* is so far the only investment case with an explicit reference to the UNDRIP in the award.

5.6 Conclusions on the UNDRIP's Contribution to Existing Means

Several possibilities exist to take Indigenous rights into account in investment disputes. They range from a tribunal's jurisdiction and the applicable law to procedural means such as *amicus curiae* submissions by Indigenous peoples and the human/Indigenous rights education of arbitrators. In principle, these techniques apply to both, when Indigenous rights are used as a 'shield', ie as a defence by the host State to escape responsibility in investment disputes, and as a 'sword', when Indigenous investors refer to relevant standards on Indigenous rights to argue preferential treatment. The UNDRIP positively contributes to all; especially through its codification of relevant Indigenous rights and by pushing for an Indigenous participation in investment proceedings, inter alia through *amicus curiae* briefs. Overall, the mentioned techniques should be drawn upon in a comprehensive approach so that they contribute in a mutually complementary way to give maximum respect to Indigenous rights.

[107] In this sense, see Kriebaum, 'Human Rights of the Population of the Host State' (n 2) 659.

[108] See Schreuer and Kriebaum (n 39) 1096: 'A restraining factor in the consideration of community interests is the origin of investment arbitration in commercial arbitration. Not infrequently tribunals are focused on the settlement of the particular dispute without regard of the wider repercussions of their decisions …'.

[109] See, eg, *Grand River* (n 61) para 210: 'It may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them. One member of the Tribunal has written that there is such a customary rule.'

6. The UNDRIP's Aspiration: Improved Solutions to Deal with Investment Law and Indigenous Rights

Most of the above-mentioned solutions can be implemented on the basis of existing law/*de lege lata*. However, they are not necessarily sufficient to deal with the UNDRIP's aspirations concerning Indigenous rights. Further, improved solutions are called for, especially by the Declaration's far-reaching recognition of Indigenous peoples as distinct peoples and by the extensive codification of Indigenous land rights. Accordingly, the UNDRIP calls for *de lege ferenda* means to even further promote Indigenous rights in investment proceedings. These means relate to the relevant substantive law (such as explicit references to human/Indigenous rights in investment treaties or cultural exception clauses). They also include procedural means, such as a right to intervention of Indigenous peoples or mandatory *ex ante* human rights or cultural impact assessments. Still, some of these *de lege ferenda* solutions have to be handled with care. The objectives to best promote Indigenous rights, in line with the UNDRIP's aspirations, have to be balanced against the primary aim of international investment arbitration, namely the timely resolution of investment disputes.

6.1 Reference to Human/Indigenous Rights in Investment Treaties

To incorporate explicit references to human or Indigenous rights in investment treaties are a first possibility for further consideration of Indigenous rights. For example, references to human rights in the preamble of an investment treaty may induce arbitrators to interpret the treaty in accordance with relevant human and Indigenous rights.[110] Countries with significant numbers of Indigenous peoples might consider including explicit references to Indigenous rights, including to the UNDRIP, in the preamble of their BITs. But also more general references to relevant human rights in the preamble of an investment treaty should induce arbitrators to interpret an investment treaty with due account of Indigenous rights (the UNDRIP) when its guarantees interfere with Indigenous rights.

The incorporation of references to human or Indigenous rights is thus a potentially forceful tool. However, an investment treaty with a general reference to human (or even Indigenous) rights is still missing.[111] The seemingly only document with explicit mention of human rights is the Norwegian Draft Model BIT.[112] It has, however, not been adopted.

An even more effective means to further investors' respect for human/Indigenous rights could be strong 'in accordance with host State law-clauses' with explicit reference to human/Indigenous rights, including to the UNDRIP.[113] *A fortiori*, these clauses could require that investments have to be made 'in accordance with host State law' not only at the

[110] See Section 5.2.

[111] Certain BITs refer to labour rights or the protection of health and safety in their preamble; see, eg, the US–Albania BIT, the US–Argentina BIT, the US–Armenia BIT, the US–Azerbaijan BIT, the US–Bolivia BIT, the US–Ecuador BIT, and the US–Estonia BIT; see generally Kriebaum (n 86) 8.

[112] The Norwegian Model BIT contains a commitment to human rights as set out in the UN Charter and the Universal Declaration of Human Rights in its Preamble: 'Reaffirming their commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights …'; see <https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf> accessed 12 October 2017.

[113] See Kriebaum (n 86) 5–8, 21.

time of admission, but during the entire duration of the investment.[114] This would have the advantage that foreign investors, who (seriously) violate human/Indigenous rights throughout the duration of their investment, lose the protection under the investment treaty. At the same time, overly broad 'in accordance with host State law-clauses' pose the risk of abuse by host States. They thus have to be handled with care and, for instance, be restricted to compliance with domestic *human and Indigenous rights* law during the duration of the investment.

6.2 Cultural/Human Rights Exception Clauses in Investment Treaties

Especially the UNDRIP's recognition of Indigenous peoples as culturally distinct peoples (see, eg, Article 3) calls for further-reaching *de lege ferenda* means to strengthen Indigenous rights, such as the incorporation of cultural/human rights exception clauses in investment treaties. Cultural exception clauses in investment treaties may be relied upon by the host State to protect sites of cultural value, including Indigenous cultural heritage.[115] Such exceptions may also relate to affirmative action measures to remedy past injustices. Cultural (or similar) exception clauses in investment treaties enable host States to uphold their police powers to implement social policies—here, to protect Indigenous peoples—which accordingly should not constitute violations of the respective investment treaties. They thus imply, positively, that the host State retains its full regulatory powers for a specific situation and that it can adopt measures, for instance, to uphold Indigenous rights as required by the UNDRIP. At the same time, such carve-outs burden the investor with the economic consequences of the host State's regulatory measures. Consequently, cultural (and similar) exception clauses have to be used with caution and should only be included with clearly defined criteria in investment treaties.

Certain investment treaties already incorporate exceptions of this kind. Malaysia excluded measures designed to promote the economic empowerment of the Bumiputras ethnic group from the scope of its BITs.[116] Certain South African BITs provide for carve-outs for affirmative action programmes to remedy past injustices.[117] A further-reaching—*de lege ferenda*—incorporation of similar clauses also in other investment treaties might, with the above caveat, thus be a means for States to pursue affirmative action programmes in support of Indigenous peoples and their traditional activities without running the danger of being accused of breaching, for example, the investment treaty's national treatment or non-discrimination provisions. Cultural exceptions clauses could thus provide regulatory space for States to realize the UNDRIP's aspirations.

[114] See China–Malta BIT 2009 Art 2(2) (n 86), which, however, does not contain an explicit reference to human rights.

[115] Generally on cultural exceptions, see Vadi (n 82) 868ff.

[116] See H Mann (International Institute for Sustainable Development), 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' (February 2008), <http://www.iisd.org/pdf/2008/iia_business_human_rights.pdf> accessed 12 October 2017.

[117] See, eg, Art 3(4)(c) of the Agreement between the Government of the Republic of Mauritius and the Government of the Republic of South Africa for the Promotion and Reciprocal Protection of Investments (1998), <http://investmentpolicyhub.uncrad.org/Download/TreatyFile/1991> accessed 12 October 2017; Art 3(3)(c) of the Agreement between the Czech Republic and the Republic of South Africa for the Promotion and Reciprocal Protection of Investments (1998, entered into force 17 September 1999), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/982> accessed 27 November 2016; see Schreuer and Kriebaum (n 39) 1093 for further reference.

6.3 A Right to Intervention of Indigenous Peoples?

The UNDRIP's far-reaching recognition of Indigenous peoples as culturally distinct peoples may also require additional procedural rights, such as a right to intervention of Indigenous peoples in investment proceedings. Such additional rights account for the distinct cultural identity of Indigenous peoples whose interests, even if they are affected by the outcome of investment proceedings, are at risk of not being adequately represented by the host State of the investment.[118] They are thus in line with the UNDRIP's aspirations in terms of cultural distinctiveness and Indigenous self-determination.

In fact, some commentators have called for a right to intervention of Indigenous peoples in investment proceedings.[119] Such right to intervention would include Indigenous peoples as parties to the proceedings, allowing them to submit briefs with no page limits, to attend and participate in oral hearings, and access to records.[120] This would go further than *amicus curiae* submissions. Still—and notwithstanding the strong arguments in favour of a right to intervention from the perspective of Indigenous peoples—to incorporate such a far-reaching right to intervention in investment treaties seems undesirable.[121] A right to intervention considerably burdens investment proceedings, including through the necessary identification of the third parties (here: the Indigenous peoples) affected by the outcome, the lengthening of proceedings, and a possible re-politization of the dispute. As convincingly argued by Vadi:

> Admitting third parties, such a[s] indigenous persons, to act as parties in the proceeding would take judicialization too far, and as a matter of procedure, it would be undesirable. When states agree to a BIT, they accept investor-state arbitration as the dispute settlement mechanism to solve investment disputes with foreign nationals, not with other parties with varying interests.[122]

In short, a *de lege ferenda* right to intervention seems too far-reaching from an investment law perspective. Interactions between Indigenous rights and investment law—the UNDRIP's *de lege ferenda* aspirations—should be accounted for differently.

6.4 Mandatory *ex ante* Human Rights/Cultural Impact Assessments?

A further means to live up to the UNDRIP's aspirations are measures taken prior to the admission of an investment. To exemplify, Article 32(2) of the UNDRIP requires the free and informed consent of Indigenous peoples 'prior to the approval of any project affecting their lands or territories and other resources'. This presupposes knowledge of the potential effects of an investment project for Indigenous peoples. A useful means to comply with this requirement and to give room to Indigenous concerns are *ex ante* human rights or cultural impact assessments.[123] Both, human rights and cultural impact

[118] See generally P Wieland, 'Why the *Amicus Curia* Institution Is Ill-Suited to Address Indigenous Peoples' Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention' (2011) 3(2) Trade Law & Development 334.

[119] See ibid 360ff for further reference.

[120] ibid 366. Thus, a right to intervention, in principle, extends Indigenous peoples' procedural rights.

[121] See Vadi (n 82) 886. [122] ibid.

[123] On human rights impact assessments, see, eg, F Baxewanos and W Raza, 'Human Rights Impact Assessments as a New Tool for Development Policy?' (2013) ÖFSE Working Paper 37, <http://www.oefse.at/fileadmin/content/Downloads/Publikationen/Workingpaper/WP37_Human_Rights.pdf> accessed 12 October 2017; J Harrison, 'Measuring Human Rights: Reflections on the Practice of Human Rights Impact Assessment and Lessons for the Future' (2010) Legal Studies Research Paper No 2010-26, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706742#> accessed 12 October 2017; see Vadi (n 82) 797 for further reference on cultural impact assessments.

assessments, follow a similar logic. They are a technical instrument to identify the effects of a proposed activity on human rights (or cultural values). They are also a means to avoid or mitigate these effects. To include mandatory cultural or human rights impact assessments as admission criteria for an investment in investment treaties should thus further the protection of Indigenous rights. So far, investment treaties do not seem to require such impact assessments. Still, some domestic systems provide for them.[124]

De lege ferenda, it could be useful to incorporate mandatory human rights or cultural impact assessments in investment treaties, especially for large-scale investment projects with potentially severe effects for the affected local communities. Impact assessments may be an important *de lege ferenda* tool to avoid or mitigate the possibly negative consequences of an investment project for Indigenous peoples before they occur. They are thus a building block for the UNDRIP's aspirations.

6.5 Conclusions on the UNDRIP's Potential for Improved Solutions

Numerous *de lege ferenda* options exist to improve the incorporation of Indigenous concerns in investment proceedings, in line with the UNDRIP's aspirations. They concern the applicable substantive law—ie the incorporation of references to human/Indigenous rights or cultural exception clauses in investment treaties—as well as procedural means, such as a right to intervention of Indigenous peoples or mandatory *ex ante* human rights or cultural impact assessments. Some of these options, such as references to human and Indigenous rights in investment treaties, appear as reasonable and necessary means to further promote the Indigenous cause, in line with the UNDRIP's aspirations. Others, conversely, such as a right to intervention of Indigenous peoples, go too far and may put at risk the effectiveness of investment dispute settlement. Thus, a careful weighing of arguments in favour and against should precede any incorporation of additional means to enhance the promotion of Indigenous rights in investment proceedings.

7. Conclusion

The UNDRIP's interactions with international investment law raise complex issues. They stem from the particular identity of Indigenous peoples as culturally distinct peoples with a specific attachment to their lands. What is more, Indigenous peoples usually live as minorities in nation-States and are not necessarily represented by the government of that State (ie the host State) in investment proceedings.

The UNDRIP's contribution to the state of law increases the potential for conflicts between Indigenous rights and those of foreign investors. This is reflected in the jurisprudence of human rights monitoring institutions. Especially the far-reaching recognition of Indigenous rights by the Inter-American Court of Human Rights—inter alia with reference to the UNDRIP—illustrates the potential of clashes between Indigenous and foreign investors' rights. It also shows the need to address interactions and conflicts between Indigenous rights and investment law.

So far, Indigenous concerns have found very little reflection in investment proceedings. In merely a handful of cases were Indigenous peoples' rights—and the UNDRIP—referred

[124] For instance, in New Zealand, cultural impact assessments are conducted with regard to activities that may affect Māori cultural values and heritage; see Vadi (n 82) 874.

to in the parties' memorials or in *amicus curiae* submissions. Explicit references of investment tribunals are even rarer. Only the *Grand River* tribunal seems to have pronounced itself more extensively on Indigenous rights, with explicit reference to the UNDRIP. At the same time, the growing likelihood of interactions between Indigenous rights and investment law entails an obvious need for coordination between both systems. Also, the UNDRIP calls for a further-reaching acknowledgement of Indigenous concerns in investment proceedings.

International (investment) law provides for various techniques to deal with Indigenous rights in investment proceedings, to coordinate and address conflicts between the systems. Possibilities comprise a tribunal's jurisdiction and the applicable law, which includes international law in general and, consequently, rules protecting Indigenous peoples, methods of treaty interpretation (Article 31(3)(c) of the VCLT), and procedural means such as *amicus curiae* submissions. Still, arbitrators seem to make surprisingly little use of these techniques. Thus, more is needed *de lege ferenda* to comply with the UNDRIP's aspirations, such as explicit references to human (Indigenous) rights in investment treaties or the incorporation of human rights or cultural exception clauses in these treaties. Overall, as shown in the *Grand River* case, the personal expertise of individual arbitrators is among the most important factors to give due recognition to Indigenous concerns. In the end, to reach a truly holistic approach to the interactions between investment law and the rights of Indigenous peoples in line with the UNDRIP's aspirations, a combination of these tools should increasingly be resorted to.

PART II

GROUP IDENTITY, SELF-DETERMINATION, AND RELATIONS WITH STATES

Chapter 5. Self-Determination of Indigenous Peoples

Articles 3, 4, 5, 18, 23, and 46(1)

Marc Weller[*]

Article 3

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

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.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 46(1)

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.

1. Introduction

Self-determination of peoples is the most controversial and contested term in international law and relations. Is it a right, or is it a principle? If it is a right, who are the 'peoples' it

[*] The research assistance of Ms Claire Simmonds and of Mr Jake Rylatt, and the latter's corrections, additions, and comments, are gratefully acknowledged.

applies to? Does the right operate only in the colonial context, or does it reach beyond it? Does it have external or internal application, or both? If it applies internally, does it provide for democratic rights, for autonomy, or for what? The questions are endless. And sadly, perhaps, while these questions have triggered entire libraries of scholarship and commentary, they are in no way solely academic. Governments and those who consider themselves representatives of Indigenous peoples fight over them in diplomatic fora with just as much vigour as they do in the theatres of war of the many self-determination conflicts around the globe.

It is therefore not surprising that the hearts of those charged in 1982 by the UN Commission of Human Rights with the elaboration of standards on Indigenous rights must have sunk when Indigenous groups demanded somewhat harshly that the right to self-determination would need to be included in any draft instrument that might emerge. If not, they would withdraw participation in the venture and oppose it, however well-intentioned it might have been.

This attitude was swiftly answered by the drafters. As will be shown below, they changed course from their initial temptation to abandon the term and exercise silence on the subject. In consequence, a unique relationship evolved, allowing for unprecedented access of Indigenous representatives—non-State actors who nevertheless enjoyed a hitherto unknown degree of organization, effective coordination, technical legal competence, and support from funders and some friendly governments—to a drafting process of an instrument that would in the end require the positive approbation of governments represented in the UN General Assembly—a body where only governments hold sway.

It is true that insistence on the express inclusion of the right to self-determination resulted in a period of prolonged deadlock. It might be said that the UN Declaration on the Rights of Indigenous Peoples ('UN Declaration') could have been adopted in 1997, rather than 2007, had this issue not arisen and been pressed so hard. To help overcome stalemate on this question, the UN Working Group charged with drafting the text, composed of experts rather than diplomats, was supplemented by an open-ended working process involving governmental representatives along with large numbers of representatives of Indigenous peoples and advocacy organizations. In this way, it was thought to be assured that any text to emerge eventually would attract broad support when it finally came to the vote in the UN General Assembly. But even then, the issue remained difficult. As the draft text, duly approved by the Human Rights Council, saw the brighter lights of the full General Assembly, a revolt was unleashed. Adoption of the text was deferred. An experienced facilitator, the Philippine Permanent Representative to the United Nations, Ambassador Hilario Davide, had to help break deadlock and overcome an attempt to filibuster at the very last moment.

All this renders it fairly astonishing that an instrument containing so much contested content was in the end adopted by the UN General Assembly by 144 votes in favour, only 4 against, and 11 abstentions. This is all the more remarkable as the content of the UN Declaration had remained substantive, rather than denuding it of all meaning in order to obtain a broad, but minimum, consensus.

This section of the Commentary will first set the scene by reviewing briefly the issue of self-determination, as it existed before the adoption of the UN Declaration. It will then turn to some of the more specific issues and challenges created by applying the term 'self-determination of peoples' in this context. The Commentary will then chart the negotiating history of the relevant provisions of the Declaration, before turning to

international practice in this area. A final section will consider the question of autonomy and self-governance that flows from the concept of self-determination. Other, related issues, such as the definition of Indigenous peoples or the question of informed consent, will only be mentioned briefly, as they are covered in other chapters in this volume.[1]

2. Background to the Issue of Self-Determination

Most governments have historically viewed the right to self-determination as highly dangerous. They have tended to see the term as code for a licence to question and challenge their dominance over the State, and even for dissolving it through secession or dissolution.

While it was convenient for all governments to embrace the rhetoric of self-determination, turning the principle into a right only became possible by 1960. By then, most conflicts about decolonization of the preceding decade and a half had been fought and lost by the former colonial powers, most notably the Netherlands and France. Only internationally isolated States, like the dictatorships of Spain and Portugal, clung to their remaining colonial empires. Hence, it became feasible to forge a universal consensus on the legal content of a right to self-determination.

The right was framed in a way that offered very significant entitlements to colonial peoples—entitlements that were designed in a way that they would ultimately win in a contest with the colonial powers. This included the following features:

- colonial peoples already enjoyed separate international legal personality, even while still under the control of a colonial power, and the right to territorial integrity;
- colonial peoples would exercise permanent sovereignty over natural resources which no colonial power would be able to alienate;
- colonial peoples were entitled to administer the act of self-determination, ie a free choice of independence, association, integration, or other options, and of the political, economic, and social system they would adopt;
- no arguments concerning their state of development (classically 'backwardness') could be employed to obstruct the act of self-determination;
- the colonial State was not entitled to repress the move towards the act of self-determination;
- if a colonial State used repressive measures, the self-determination unit was entitled to form National Liberation Movements which could legitimately 'struggle', or even wage an 'armed struggle', against that State; and
- other States could support that struggle, which would be legitimate and thus not constitute an unlawful interference or intervention.

Indeed, the right was not only extremely potent, it was duly consecrated as an international right of the highest order, enjoying the status of an *erga omnes* obligation in the implementation of which all States had a well-founded legal interest, and as a *jus cogens* rule from which no State could deviate.[2]

[1] See especially Chapters 1, 6, 8, 9, and 19.

[2] For ICJ jurisprudence on the issue, see, eg: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16, 31, paras 52f; *East Timor (Portugal v Australia)*, Judgment, [1995] ICJ Rep 90, 102, para 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory

The aggressive nature of this right could be explained by the universal realization that colonialism constituted an evil that needed to be overcome. Exceptionally in international law, the rule would be retroactive, curing a defect that had arisen in the past.

The strength of this provision was balanced by the very restrictive way in which it was to be applied. The right could only develop as it did because it was framed in a way which would not threaten the vast majority of governments, whether they were heading former colonial empires or newly independent ones.

First, the right would only apply to colonial peoples.[3] Technically, these were cases listed as non-self-governing territories at the United Nations. A rule-of-thumb definition would establish them as instances of classical, mainly European colonialism: during the age of imperialism, a Western metropolitan power had forcibly acquired a territory, divided from itself by an ocean and inhabited by a racially distinct population and maintained a state of alien domination for the purposes of economic exploitation. Internal colonialism by racist regimes (formerly South Africa), alien occupation (Palestine), or instances of secondary colonialism (Western Sahara, formerly Eastern Timor) were covered.[4] Other cases for forcible changes of borders among independent States before 1945 were not included, preserving in particular the stability of post-World War II borders in Europe.

Second, although self-determination was phrased as a peoples' right, it would in fact appertain to territories, rather than populations, under the doctrine of *uti possidetis*, which preserves the former colonial boundaries. Hence, the peoples empowered to change their political status by the right would be defined by the territorial boundaries assigned to them by the colonial powers. They might opt for independence, or integration or association with other States.[5] But it was not foreseen that ethnic kingdoms of old, or tribal communities, would be restored once the shadow of colonial division was lifted. As the International Court of Justice (ICJ) put it when confirming the application of *uti possidetis*, which had been pioneered in Latin America, to Africa:[6]

> At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields have inducted African states judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination.

Third, the right would be applied only once, at the point of decolonization. Once decolonization had occurred, the right could not be invoked against any existing State, whatever the views and sentiments of potentially diverse populations within. Instead,

Opinion, [2004] ICJ Rep 136, 171f, para 88; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403, 437.

[3] See the seminal UNGA Res 1514 (XV), A/RES/1514(XV) (14 December 1960), addressing itself to 'Colonial Territories and Peoples'.

[4] On the scope of the right to self-determination, see, eg: R Emerson, 'Self-Determination' (1971) 65 AJIL 459–75; J Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007) ch 14 ('Non-Self-Governing Territories: The Law and Practice of Decolonization'); U Sud, *United Nations and the Non-Self-Governing Territories* (University Publishers 1965).

[5] UNGA Res 1541 (XV), A/RES/1541(XV) (15 December 1960).

[6] *Frontier Dispute (Burkina Faso v Mali)*, [1986] ICJ Rep 564 (22 December 1986) para 25.

they would be trapped by the doctrine of territorial integrity and unity that protected all existing States. This view was expressed in the Friendly Relations Declaration (UNGA Resolution 2625 (XXV)), as follows:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember of impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people without distinction as to race, creed or colour.
>
> Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

At the time, it was broadly assumed to be axiomatic that only colonial or analogous States (South Africa) were not conducting themselves in accordance with the principle of equal rights and self-determination of people, thus not possessing a government representing the whole people without distinction as to race, creed, or colour. Hence, only those cases would be exempt from the exhortation to refrain from disrupting the territorial integrity and political unity of existing States.[7]

In this way, it was believed, the dangerous doctrine of self-determination had been tamed. It would be safely invoked without risking the stability of the international system in which all States shared an interest.

There were, of course, alternative voices. Some argued that it was wrong to restrict the application of self-determination to the colonial context. At least there would be a further, 'internal' dimension to the right, in addition to its 'external' dimension in the sense of secession. After all, the UN Covenants had consecrated self-determination as a human right.[8] This might underpin a right to personal autonomy or democratic participation in the State. However, given the ideological confrontation of the Cold War, this democratic thesis in favour of self-determination as a fountainhead of individual freedoms and of political rights could initially not lay claim to universal support.

3. Issues and Challenges

The proposal to apply the right of peoples to self-determination to Indigenous populations appeared to undo this carefully crafted understanding in a number of ways.

First, it provided a precedent for the argument that the right of self-determination might, after all, apply outside the colonial context. A broader entitlement to secession might emerge. Other populations, for instance minorities, might claim a similar right.[9] Hence, it was not only States with significant Indigenous populations and issues, such as Canada, the United States, Australia, and New Zealand, which regarded this potential development as highly ominous.

[7] This position has changed with the modification of that provision in the somewhat more recent 'Vienna Declaration and Programme of Action', adopted by the World Conference on Human Rights in Vienna on 25 June 1993, A/Conf.157/24.

[8] A Cassese, 'The Self-Determination of Peoples' in L Henkin (ed), *The International Bill of Human Rights* (Columbia University Press 1981) 92, 101ff.

[9] Addressing this argument, see, eg: L Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 Yale J Int'l L 177; P Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 ICLQ 867; MS Carter, 'Ethnic Minority Groups and Self-Determination: The Case of the Basques' (1986) 20 Columbia JL & Social Problems 55.

Some European States were taken aback as well. By the early 1990s, when the Declaration was drafted, they were hesitantly moving towards a recognition of the need to establish minority rights in positive international law in the form of the European Framework Convention on the Protection of National Minorities. Their reluctance had been increased by the very reason which had impelled them, nearly fifty years after the end of World War II, finally to address minority issues through hard law. This reason lay in the violent ethno-political conflicts that erupted in Europe with the end of the Cold War. This had led to the violent dissolution of the former Yugoslavia, followed by NATO's dramatic intervention in Kosovo. Of course, these cataclysmic events had been triggered by demands for secession, seemingly based on a post-colonial understanding of self-determination.[10]

There were other States which also viewed the discussion about Indigenous rights with suspicion. Asian States, including China and India, might have been content to observe the development of standards that would be applied in the Americas and in Australia and New Zealand—provided it was clear that this concept had no application to them.[11]

African States, too, argued initially that this concept was alien to the needs of their continent. They argued that Indigenous peoples were unknown in their regions, where all native populations had been equally the victim of Western colonialism. Now that independence had been achieved, there were no Indigenous issues of international concern left.[12]

However, the right to self-determination of peoples, as it had developed in international customary law, clearly had universal application. Indeed, it had developed mainly in relation to Africa and Asia—the location of the Western colonies—and had then been consecrated as a truly universal, *erga omnes* rule.[13] Using the term of self-determination in the sense of an inherent and universal right would thus undermine the claim of Asian and African States that they were merely bystanders in the development of legal rules on Indigenous peoples elsewhere—rules which they would resist in relation to their own tribal or otherwise non-dominant ethnic populations.

The second issue concerned the concept of 'peoples'. As already noted, self-determination in the colonial context refers to peoples, but is actually applied to colonially defined *territories*. It is a territorially applied right, not one based on ethnic appurtenance or historically established communities tied to certain pieces of land by ancient belief, culture, and practice. The tie to land existed in the case of Indigenous populations, but the land was not rigidly defined and it did not determine the subject of the right. It was clear that the people would 'self-identify', rather than be predetermined by existing territorial definitions.

To apply self-determination to Indigenous peoples would therefore undo the key element that had been used to maintain stability, despite the change in status of the colonial territories in question. Again, this development seemed threatening in itself where

[10] See, eg: H Quane, 'A Right to Self-Determination for the Kosovo Albanians?' (2000) 13 Leiden J Int'l L 219–27; T Jaber, 'A Case for Kosovo? Self-Determination and Secession in the 21st Century' (2011) 15(6) Int'l J Human Rights 926.

[11] See, eg, Castellino and Doyle, Chapter 1, this volume.

[12] See, eg, R Murray, 'The UN Declaration on the Rights of Indigenous Peoples in Africa: The Approach of the Regional Organizations to Indigenous Peoples' in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011) 485.

[13] Above, n 2.

Indigenous peoples were concerned. But this might be the thin edge of the wedge, just waiting to be exploited by other ethnic groups seeking to undo the existing *uti possidetis* boundaries.[14]

Of course, the representatives of many Indigenous groups indicated that they were not in fact seeking secession or to effect territorial change. However, others did not. Moreover, all or most were united in what governments perceived as a strident and inflexible insistence of self-determination in its full sense. Why would they do so, if there were not some further agenda hiding behind the consoling words of reassurance?[15]

Self-determination was also related to the issue of sovereignty. Sovereignty is claimed by the State as a uni-polar right, a right centred on the State alone. As will be noted below, Indigenous peoples, however, claimed that they had enjoyed legal personality before colonization, the doctrine of *terra nullius* in the acquisition of territory having been overcome.[16] They had retained sovereignty and never become validly submerged with the States that purported to have absorbed them. Indeed, a significant range of Indigenous peoples could point to treaties concluded with them during the time of imperialism, apparently recognizing them as sovereign entities.[17] They argued that such treaties would never submerge the underlying right to sovereignty and self-determination, but rather confirm and strengthen it.[18] This, too, posed a fundamental challenge to State authorities.[19]

A further concern related to collective rights. Mainly Western governments had been very reluctant to contemplate even the existence of collective rights as human rights. For instance, the UN Declaration on the Rights of Minorities bears the rather convoluted title of 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Lingusitic Minorities' rather than 'UN Declaration on the Rights of Minorities', emphasizing that no collective rights are being bestowed. The European Framework Convention for the Protection of Minorities, too, conceives of minority rights as rights that are derived from the collective identity of a non-dominant group, but that are exercised as individual rights. Hence, minority rights are considered, in rather an outdated view,[20] as the rights of members of minorities, rather than the rights of the minority.

This cherished doctrine was also under threat by the conception of Indigenous rights as an outgrowth of self-determination. Self-determination is the prototype of a collective right. It is not a right shared by individuals who belong to a common group, and exercised by them individually. It is a right that appertains to the collective entity as such. Several governments initially attempted to hold the line, rejecting both the application of self-determination in the Indigenous context, and resisting the framing of Indigenous rights as collective rights. In the end, they lost on both counts. There is clear reference

[14] B Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' in P Alston (ed), *Peoples' Rights* (Oxford University Press 2001) 67.

[15] Arguing that such fears are obviously groundless, S Sargent and G Melling, 'Indigenous Self-Determination: The Root of State Resistance' (2012) 24 Denning LJ 117.

[16] Discrimination against Indigenous Populations, Report of the Working Group on Indigenous Populations on Its Sixth Session, UN Doc E/CN.4/Sub.2/1988/24 (24 August 1988) para 104, referring to the *Western Sahara Advisory Opinion*.

[17] This led the UN Working Group to commission a major study on the issue of treaties and Indigenous peoples.

[18] Report of the Working Group on Indigenous Populations on Its Sixth Session (n 16) para 101.

[19] S Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 Vanderbilt J Trans'l L 1141.

[20] See below, Section V.

to self-determination of peoples, and the Declaration abounds with confirmations of the collective nature of the rights that are assigned to them in consequence.[21]

In addition, there were issues of substance. Even if self-determination could be somehow restricted in this instance, to exclude the possibility of secession, other painful concessions would be required. Most governments had not been ready to accept, for instance, a legal obligation to bestow autonomy in the sense of permanent and formal, constitutionally entrenched self-governance arrangements, on minorities. Once again, they feared that granting autonomy as a matter of right, rather than as an exceptional solution freely agreed by them, would advance secessionist claims in the long run. In this present context of Indigenous rights, it was taken as read that self-determination would imply an entitlement to very extensive territorial autonomy.

Then, there was the issue of additional, hard rights. Again, it was clear that self-determination in this particular context implied very directly the granting of very strong land rights, both in terms of title to land and of restrictions on land use that might conflict with traditional uses or beliefs of Indigenous peoples.[22] Indeed, land rights had become very closely entwined with the very concept of Indigenous peoples. As the Inter-American Court of Human Rights (IACtHR) had found in the *Awas Tingni Community v Nicaragua* case of 2001:[23]

> The close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

This close relationship and hence tight legal claim relating to land implied very difficult economic decisions, in addition to complex legal problems. Indeed, the invocation of the principle of self-determination might elevate what might appear as civil law claims over land to public international law issues of territory. After all, self-determination does carry with it the doctrine of permanent *sovereignty* over natural resources, a right ascribed to 'peoples and nations'.[24]

Other rights might be very costly to turn into reality, such as funding for educational systems, cultural activities, and the dedicated political system that would need to be developed.

A further concern related to human rights: States are internationally obliged to deliver compliance with human rights instruments—how could they guarantee such compliance

[21] See, eg, K Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) EJIL 141; and multiple chapters in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011), including H Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?' (259–88), J Gibson, 'Community Rights to Culture: The UN Declaration on the Rights of Indigenous Peoples' (433–56), and A Xanthaki, 'The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What's the Future for Indigenous Women?' (413–32).

[22] See, eg, N Schrijver, 'Self-Determination of Peoples and Sovereignty over Natural Wealth and Resources' in OHCHR, *Realizing the Right to Development* (United Nations 2013), <http://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIChapter5.pdf> accessed 12 October 2017.

[23] IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment (31 August 2001), <http://www.oas.org/DIL/XXXV_Course_IACHR_Case_Mayagna_v_Nicaragua_Luis_Toro.pdf> accessed 12 October 2017.

[24] UNGA Res 1803 (XVIII), 'Permanent Sovereignty over Natural Resources' (14 December 1962) para 1.

when their own exercise of jurisdiction was barred by exclusive jurisdiction assigned to Indigenous peoples in relation to 'their' lands and population? Moreover, would other groups not complain of discriminatory treatment if certain benefits would accrue only to Indigenous peoples, but not to other population segments?

These problems were significant, and appeared insurmountable as long as the Indigenous representatives would stick to their insistence on an unqualified right to self-determination of peoples along with a panoply of substantive rights attached.

4. Context: Other Instruments Related to Self-Determination

Self-determination is reflected, of course, in a significant range of international instruments, including the UN Charter, the Friendly Relations Declaration, common Article 1 of the two human rights Covenants, the African Charter on Human and Peoples' Rights, etc.[25] The language in all these instruments tends to be virtually identical, mainly restating the text of the Covenants (ie 'By virtue of that right they shall freely determine their political status and freely pursue their economic, social and cultural development').

The Human Rights Committee has issued a General Comment on Self-Determination which does not, however, add any illumination on the issue of self-determination in relation to Indigenous peoples.[26] The Committee attached to the Convention on the Elimination of Racial Discrimination has adopted General Recommendation XXIII on Indigenous People. However, the recommendation does not mention self-determination and only offers modest suggestions on political participation, leaving out autonomy and self-governance.

ILO Convention 169 on Indigenous and Tribal Peoples, which emerged in parallel with the UN Declaration, does not in itself assign a right to self-determination.[27] However, with added caution, it addressed the meaning that would in general international law attach to the technical use of the word 'peoples' employed in the Convention. It clarifies in Article 1(3) that:

> 3. The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Most recently, the American Declaration on the Rights of Indigenous Peoples has been adopted.[28] The American Declaration mirrors Article 3 of the UN Declaration in its own Article 3, confirming the right to self-determination of Indigenous peoples. Following also the language of Article 1 of both Human Rights Covenants, it notes that by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development. This is then matched, in the Article immediately following, by a replica of Article 46(1) of the UN Declaration, reserving the territorial

[25] For a good general review in relation to Indigenous rights, see B Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002) *passim*.

[26] UN Human Rights Committee, CCPR General Comment 12: Art 1: Right to Self-Determination UN Doc HRI/GEN/1/Rev.6 (13 March 1984).

[27] ILO Convention 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989), <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314> accessed 12 October 2017.

[28] American Declaration on Indigenous Rights, AEA/Ser.P, AG/doc.5537/16 (8 June 2016).

integrity and political unity of the State. A further section addresses autonomy and self-government, again largely consistently with the UN Declaration.[29]

5. Context: Other Rights Related to Self-Determination

Self-determination is a foundational right. Accordingly, it has a bearing on most other rights. Given the broad range of entitlements contained in the UN Declaration, and going beyond the narrow issue of self-determination and secession that will be considered in some detail, it may still be useful to highlight the most prominent points of contact with particular substantive rights.

First, there is the issue of self-determination at a personal or individual level. In a general sense, this is a right to personal autonomy to make major life-choices without State interference. This may include choices relating to family, opinion, sexual orientation, etc. In a more specific sense, self-determination as applied to individuals is taken to include two aspects: the right to participation in democratic decision-making through elections, and the right to stand for elected office.

Where minorities are concerned, there is the additional right to self-identification as a member of a minority. However, this individual power to claim minority membership tends to be opposable to the State. It is less evident that it can be invoked against the minority group itself.

The UN Declaration indicates in Article 9 that Indigenous peoples and individuals have the right to belong to an Indigenous community or nation. However, the right of individual choice seems constrained by the rider in Article 9 of 'in accordance with the traditions and customs of the community or nation concerned'. Membership in relation to an Indigenous peoples is therefore not simply a matter of self-assignation. Instead, the people concerned will exercise a greater degree of determining power.[30] Article 33 of the UN Declaration adds that it is the 'Indigenous peoples' that have the right to determine their own membership in accordance with their customs and traditions, ie the collectivity, rather than the individual concerned.

This issue was addressed by the UN Human Rights Committee in the *Lovelace* case, where self-identification was balanced against the right of an Indigenous community to determine membership.[31] In that instance, it was found that the community could not deny membership to an individual who had been a member by birth, merely on account of her marriage to a non-member. The UN Declaration does not appear to foresee such an exception, while it does confirm that the UN Declaration would not submerge other human rights entitlements that might be affected by it.

The next issue of self-determination arises at a group or community level. Again, it is a matter of self-identification, although this time of the population (or people) itself. The UN Declaration does not offer a definition of Indigenous peoples, although the Preamble refers to the context of historic injustice arising, inter alia, from colonization and dispossession of land and territories and resources, and the resulting deprivation of development in accordance with their needs and interests.

ILO Convention 169, on the other hand, does offer a definition of Indigenous peoples in Article 1(b), namely:

[29] ibid Art 21. [30] See Chapter 8.
[31] *Sandra Lovelace v Canada*, Comm No 24/1977: Canada 30/07/81, UN Doc CCPR/C/13/D/24/1977.

> [P]eoples 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.

While the terms 'who are regarded' might appear to suggest identification of Indigenous peoples from the outside, by others who 'regard' them, as it were, this is not the case. The Article adds that:

> Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

Therefore, one of the threshold questions that plague self-determination discourse (who is the self-determination 'unit', or who are the 'people') does not arise in relation to Indigenous peoples. Of course, it is not every group that can simply self-identify as an Indigenous people (let us say, the Freemasons of America). Rather, there is a two-step test. First, the community in question must fulfil the historical criterion offered in the ILO Convention and at least reflected, although somewhat dimly, in the Preamble of the UN Declaration. Once those criteria are *prima facie* fulfilled, it is up to the community in question to declare itself an Indigenous people.

A range of entitlements, discussed in greater detail in other sections of this book, then apply. It will be sufficient at this point merely to offer some cross-references. The first tranche of rights underpinned by self-determination concerns existence. This includes protection from destruction or genocide, forced displacement, and assimilation.[32] Moreover, there is a protection from discrimination on account of appurtenance to the Indigenous people.[33] The next layer of rights concerns identity and culture, through its expression in daily life, through language use, and through the transmission of Indigenous identity to future generations through education.[34]

Thus far, these entitlements mirror the rights generally ascribed to minorities. However, in relation to Indigenous people, it is accepted that self-determination also underpins special rights reflecting the close identification of the people with the land it traditionally inhabits. Land rights, control over economic resources associated with the land and its natural heritage, obligations to preserve the ecology and traditional land uses, etc. all flow from this relationship.[35] And, as noted above, the rights to autonomy, self-government, and political participation are particularly pronounced.

6. Negotiating Self-Determination of Indigenous Peoples

The UN system had been engaged with the issue of Indigenous people since 1949, when the General Assembly initiated a study by the Sub-Commission of the Commission on Human Rights on the advancement of Indigenous Americans.[36] This venture was resisted by the United States, leading at one point to the suspension of the Sub-Commission.[37]

[32] UN Declaration on the Rights of Indigenous Peoples (13 September 2007) Arts 7, 8, 10.
[33] ibid Art 9. [34] ibid Arts 11–16, 25, 31. [35] ibid Arts 31–33.
[36] UNGA Res 275 (III), A/RES/275 (III) (11 May 1949).
[37] RL Barsh, 'Indigenous Peoples: An Emerging Object of International Law' (1986) 80 AJIL 370.

In the meantime, the ILO generated Convention 107 of 1957, addressing Indigenous and tribal 'populations'.[38] The Convention was a child of its time, seeking to ensure that Indigenous peoples could share more fully in the rights and developments of the State in which they live, but also addressing how they could be progressively integrated. This approach was subsequently criticized as being assimilationist, and work commenced in 1985 with a view to generating a more up-to-date instrument, which was to become ILO Convention 169 (considered below).

Meanwhile, the UN Sub-Commission gained courage and returned to the issue in 1971, commissioning Mexican Ambassador José R. Martínez Cobo to conduct a study in this area. In view of the notional, formal mandate of the Sub-Commission (prevention of discrimination) and the emphasis on the struggle for equal rights in most UN human rights bodies (apartheid), it was prudent to adopt the lens of discrimination against Indigenous populations in this instance.

Due to issues of health and other delays, a final report became available only in 1983. However, the report was highly influential. It squarely placed the issue of Indigenous people in the context of self-determination, noting that it would be the 'basic precondition for the enjoyment by Indigenous peoples of their fundamental rights and the determination of their own future'.[39] The report asserted that self-determination:[40]

> [c]onstitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific contents of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they may live and to set themselves up as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State.

In essence, this report set the stage for the key developments that were to follow. It referred to Indigenous 'peoples' rather than populations. It recognized the application of the right to self-determination to them as a foundational issue. While not excluding the possibility of secession outright, it suggested that there might be a variant of self-determination that would not offer such a prospect by right. Instead, it emphasized the issue of autonomy, ie self-government within the existing State.

In 1981, the World Council of Indigenous Peoples approved a draft International Covenant on the Rights of Indigenous Peoples at its General Assembly in Australia. The draft claimed the right to self-determination for Indigenous peoples and asserted:[41]

> One manner in which the right of self-determination can be realized is by the free determination of an indigenous people to associate their territory and institutions with one or more states in a matter involving free association, regional autonomy, home rule or associate statehood as self-governing units. Indigenous people may freely determine to enter into such relationships and to alter those relationships after they have been established.

[38] ILO Convention 107, 'Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries' (26 June 1957), <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312252:NO> accessed 12 October 2017.

[39] Study of the Problem of Discrimination against Indigenous Populations, Final Report of Special Rapporteur JR Martínez Cobo, UN Doc E/CN.4/Sub.2/1983/21/Add.8 (30 September 1983) para 580, cited from Barsh (n 37).

[40] ibid para 581.

[41] Quoted from D Sanders, 'The Re-emergence of Indigenous Questions in International Law' (1983) Canadian Human Rights Yb 29.

These means of realizing the right to self-determination are, of course, the very modalities for implementing the right in relation to colonial peoples according to General Assembly Resolution 1541. This includes virtual independence by way of associated statehood, although there is no reference to outright independence in the draft.

The next year, a UN Working Group on Indigenous Populations was established at the initiative of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights. The Economic and Social Council mandated the Working Group in its Resolution 1982/34 of 7 May 1982 to consider, inter alia, the evolution of standards concerning the rights of Indigenous peoples around the world.

Initially, the Working Group focused on assembling statistical data. However, there was more appetite for a drafting effort than may have been assumed. By 1985, the Sub-Commission, in Resolution 1985/22, requested that the preparation of standards should be advanced over the session of that year.[42]

Around that time, two major conferences of Indigenous peoples adopted their own Draft Declarations that were submitted to the Working Group. The first, adopted by the World Council of Indigenous Peoples held in Panama the previous year, proclaimed as its first principle that all Indigenous peoples have the right to self-determination. By virtue of this right, they may freely determine their political status and freely pursue their economic, social, religious, and cultural development.[43] This provision reflected the definition of self-determination in common Article 1 of the two Covenants on Human Rights, with the addition of the word 'religious'.

The second Declaration adopted by the Indian Law Resource Council, Four Direction Council, and others, contained a somewhat different provision:[44]

> 2. All Indigenous Nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they chose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership/citizenship, without external interference.
>
> 3. No state shall assert any jurisdiction over an indigenous people or its territory, except in accordance with the freely expressed wishes of the nation or people concerned ...
>
> 6. Discovery, conquest, settlement on a theory of terra nullius and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples ...
>
> 15. Indigenous nations and peoples are subjects of international law.
>
> 16. Treaties and other agreements freely made with indigenous nations or peoples shall be recognized and applied in the same manner and according to the same international laws and principles as treaties and agreements entered into with other States.

[42] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1985/22 (29 August 1985). This was later followed by decisions of the Commission on Human Rights in Resolutions 1986/27 and 1987/34. See also E-I Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011) 11, 24.

[43] Discrimination against Indigenous Populations, Report of the Working Group on Indigenous Populations on Its Fourth Session, UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985) Annex III.

[44] Discrimination against Indigenous Populations, Report of the Working Group on Indigenous Populations on Its Fourth Session, UN Doc E/CN.2/Sub.2/1985/22 (27 August 1985) Annex IV, quoted in W Churchill, 'A Travesty of a Mockery of a Sham: Colonialism as "Self-Determination" in the UN Declaration on the Rights of Indigenous Peoples' (2011) 20 Griffith L Rev 526, 539.

17. Disputes regarding the jurisdiction, territories and institutions of an indigenous nation or people are a proper concern of international law, and must be resolved by mutual agreement or valid treaty.

18. Indigenous nations and peoples may engage in self-defence against State actions in conflict with their right to self-determination.

This rendering requires a slightly more careful reading in its individual elements, as it evidences the way in which self-determination was conceived.

In asserting that discovery, conquest, settlement on a theory of *terra nullius*, and unilateral legislation are never legitimate bases for States to claim or retain the territories of Indigenous nations or peoples, it aimed to undo any legal basis for the inclusion of Indigenous peoples within existing States in the first place.[45] The relationship between the State and Indigenous peoples within it was as yet legally unresolved.

Second, it was claimed that this vacuum could only be filled through an act of will on the part of the Indigenous peoples. This flowed from the claim that no State shall assert any jurisdiction over an Indigenous nation, or people, or its territory, except in accordance with the freely expressed wishes of the nation or people concerned. Instead, all Indigenous nations and peoples would still have the right to self-determination. It would be up to them to choose whatever degree of autonomy or self-government they would require.

As Indigenous peoples were, *prima facie*, a subject of international law, much like colonial peoples engaged in a struggle for self-determination, the issue of the extent of State jurisdiction that might apply to them would not be settled according to the internal, constitutional law of the State concerned. Rather, it was a matter of international law.

Finally, there was a right to self-defence, somewhat akin to the concept of national liberation struggles as it, again, applies to colonial peoples. This right is triggered by a refusal to implement self-determination and associated repression. This, of course, is a very aggressive rendering of Indigenous self-determination, directly threatening to governments. This is somewhat balanced by apparent focus of the right as framed in the draft on internal accommodation of Indigenous peoples.

The Working Group started the actual drafting effort in 1985, initially putting forward seven principles addressing substantive rights, including existence, non-discrimination, education, cultural identity, and communication.[46] In view of strong pressure from Indigenous groups,[47] it also issued a work plan for the next session which included an item on 'autonomy, self-government and self-determination', including political representation and institutions.[48] However, by 1987, the argument about the possible inclusion of a reference to self-determination remained most lively. Some Indigenous groups demanded such a right, also encompassing secession. Others focused on autonomy, self-governance, and full participation in the State.[49] A preparatory meeting for the Working

[45] See the positions of the International Indian Treaty Council in Discrimination against Indigenous Populations, Information Received from Non-Governmental and Indigenous Organizations on Consideration of a Draft 'United Nations Declaration on the Rights of Indigenous Peoples', UN Doc E/CN.4/1995/WG.15/4 (10 October 1995) paras 11–25.

[46] Report of the Working Group on Indigenous Populations on Its Fourth Session (n 43) Annex II.

[47] ibid para 79. [48] ibid Annex I.

[49] Discrimination against Indigenous Populations, Report of the Working Group on Indigenous Populations on Its Fifth Session, UN Doc E/CN.4/Sub.2/1987/22 (24 August 1987) para 52.

Group Session held in Geneva in 1987 attended by Indigenous peoples representatives combined the vision of the two earlier Declarations as follows:

> All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy of self-government they chose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference.

The free choice of political status claimed in line with the right to self-determination of peoples in general international law was balanced by the focus of the right on autonomy and self-government. Several governments, on the other hand, insisted again that self-determination applies only in the colonial context.[50]

The Working Group responded by issuing fourteen draft principles, none of which referred to self-determination, and by inviting the Chairperson Rapporteur to develop these into a draft instrument.[51] The following year, Daes offered a first full preliminary draft for consideration. She noted that a crucial issue was the use of the term 'Indigenous peoples' rather than 'populations' in combination with the acceptance of certain collective rights.[52] This starting point significantly advanced the position of campaigners for the cause of Indigenous peoples.

There was also reference in the Working Group to the principle of self-determination. In the view of one member, this principle underlay the entire discussion and should be demystified since it did not mean, in this case, statehood or independence or any sort of secession.[53] Representatives of Indigenous groups added that self-determination was among the most fundamental issues.[54]

Still, the Draft Universal Declaration on Indigenous Rights, as it was then entitled, did not contain any reference to self-determination.[55] However, as Daes had suggested, it used the term 'Indigenous peoples', although at that stage only in the Preamble. Substantive rights were generally enumerated without reference to the subject to which they would relate.

After further consideration, the Working Group presented a revised draft of a Declaration on the Rights of Indigenous Peoples in 1989, at the very point when ILO Convention 169 had been adopted. The amended draft included a single reference to self-determination:[56]

> Bearing in mind that nothing in this Declaration may be used as a justification for denying to any people, which otherwise satisfies the criteria generally established by human rights instruments and international law, its right to self-determination.

This provision was very cautious. It was merely a preambular one. It was phrased in the negative, rather than confirming the existence of a right to self-determination in relation to Indigenous people. Moreover, it referred to the right only in relation to those who 'otherwise' satisfy the legal criteria for self-determination. Presumably, therefore, this provision was a safeguard clause, clarifying that the Declaration would not affect the right

[50] ibid para 56. [51] ibid Annex II.
[52] Report of the Working Group on Indigenous Populations on Its Sixth Session (n 16) para 68.
[53] ibid para 20. [54] ibid para 84.
[55] Report of the Working Group on Indigenous Populations on Its Sixth Session (n 16) Annex II.
[56] Discrimination against Indigenous Peoples, Report of the Working Group on Indigenous Populations on Its Seventh Session UN Doc E/CN.4/Sub.2/1989/36 (25 August 1989) Annex 2.

to self-determination traditionally enjoyed by colonial peoples. It mentioned, but did not grant or confirm, self-determination in relation to Indigenous peoples.

Indigenous peoples' representatives, though, seem to have seen this reference to self-determination as a major step forwards. Still, in the debate on the text, there was considerable pressure from representatives of Indigenous peoples pressing for recognition of the right to self-determination as a 'corner-stone' of the UN Declaration.[57]

To accelerate the work, three drafting groups were then formed. The first drafting group proposed a further paragraph:[58]

Convinced that the right of indigenous peoples to self-determination includes their right freely to determine their present and future relationships with the political, economic and social life of States and that the reaffirmation of said right and all others enshrined in this Declaration is not to be construed, at present, as in any way limiting their enjoyment of equal rights with citizens of the States in which they currently reside.

A second drafting group provisionally adopted a paragraph that referred to self-determination in specific contexts:[59]

The right to determine, plan and implement, in the context of the right of self-determination, all health, housing and other social, cultural and economic measures affecting them, and execute such measures through their own institutions.

A third drafting group provisionally adopted a paragraph addressing self-determination outright:[60]

Noting that the International Covenants on Economic, Social and Cultural rights and Civil and Political Rights affirms the fundamental importance of the right to self-determination, as well as the right of all human beings to pursue the material, cultural, and spiritual development in conditions of freedom and dignity,

...

Paragraph 1. Indigenous peoples have the right to self-determination, by virtue of which they may freely determine their political status, pursue their own economic, social, religious and cultural development and determine their own institutions.

The version before the Working Group in 1991 offered a melange of the above propositions. In a preambular paragraph, it confirmed self-determination as stated in the Covenants, but, as proposed by drafting group III, did not relate this to political status of any collective entity, but to the right of all human beings to pursue their development.[61]

A second preambular paragraph noted that nothing in the Declaration may be used as an excuse for denying to any people its right to self-determination. Operative paragraph 1 offered:[62]

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in

[57] ibid para 57.

[58] Discrimination against Indigenous Peoples, Report of the Working Group on Indigenous Populations on Its Eighth Session, UN Doc E/CN.4/Sub.2/1990/42 (27 August 1990) 41.

[59] ibid 44. [60] ibid 48f.

[61] Discrimination against Indigenous Populations, Report of the Working Group on Indigenous Populations on Its Ninth Session, UN Doc E/CN.4/Sub.2/1991/40/Rev.1 (3 October 1991) Annex II.

[62] ibid.

a spirit of coexistence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.

This provision offered self-determination 'in accordance with international law'. This provision could be read in two ways. If self-determination was to be available according to international law as it stood at the time, it would not apply, at least to the full, outside of the colonial context. If, on the other hand, the provision aims to suggest that all of the aspects of the right of self-determination apply also to Indigenous peoples, then it would mean the opposite.

The following sentence, leaving it to Indigenous groups to determine their relationship with the State in which they live, appears to pay homage to the thesis of the Indigenous groups that their relationship with the State remains undefined until they have consented to a constitutional settlement of their status within it.

By the end of the debate, a proposal suggested:[63]

Indigenous peoples have the right to self-determination in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government.

Based on this work, in July 1993, the Chairperson-Rapporteur Erica-Irene Daes offered a draft which referred to self-determination in two preambular paragraphs and in one operative paragraph:[64]

Noting that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used as a pretext to deny any peoples their right to self-determination,

...

Indigenous peoples have the right to self-determination in accordance with international law, subject to the same criteria and limitations as applied to other peoples in accordance with the Charter of the United Nations. By virtue of this, they have the right, inter alia, to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interest.

The paragraph appears to point to the usage of the term 'self-determination' as applied in international law generally ('in accordance with international law'). However, as noted above, the right to self-determination in general international law is a right of peoples freely to determine their political status and to pursue their economic, social, and cultural development.[65] In this draft text, on the other hand, the term is focused on rather a different context. There is no reference to political status. Instead, it points to participation in public affairs and to the issue of self-management.

[63] Discrimination against Indigenous Populations, Report of the Working Group on Indigenous Populations on Its Tenth Session, UN Doc E/CN.4/Sub.2/1992/33 (20 August 1992) Annex 2.

[64] Operative para 3, Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993) para 12.

[65] See, eg, UN General Assembly Friendly Relations Declaration, GA Res 2625 (XXV), The Principle of Equal Rights and Self-Determination of Peoples [paragraphs not numbered].

The commentary offered by Erica-Irena Daes, the Chairperson/Rapporteur of the Working Group, attempted to explain this difference.[66] She emphasized that there would be a 'new category' of the right to self-determination: the right of Indigenous peoples to self-determination. This would not be a second-class right of self-determination. Rather, the context was different. Classically, self-determination had been applied to peoples subjected to alien subjugation, domination, and exploitation. The right of colonial peoples focused on status to address this issue.

In view of the Chairperson/Rapporteur, Indigenous peoples had been excluded from building the State in which they live in a meaningful way, but their situation was not the same as that of colonial peoples. Rather than determining their political status through possible independence, Indigenous peoples had a right to have their status addressed through the structure of the existing State in which they found themselves. The State would need to grant them meaningful representation in it, and meaningful self-government or autonomy.[67] While not seen as a term of art, personal and political autonomy was defined as 'the right to be different and to remain free to promote, preserve and protect values which are beyond the legitimate reach of the rest of society'.[68]

The draft concluded, in operative paragraph 42, with a safeguard clause, indicating that nothing in the Declaration should imply for any State, group, or person any right to engage in any activity or to perform any act contrary to the UN Charter or to the Friendly Relations Declaration. The reference to that Declaration is generally taken as code for maintenance of the territorial integrity and unity of States. However, it is odd that it refers to States, groups, or persons, but does not include 'peoples' as one of its addressees.

The theory of a third way for Indigenous peoples proposed by the Chairperson/Rapporteur, sitting somewhere between the right of colonial peoples to self-determination and the right to all peoples to enjoy, as individuals, democratic and representative government, was not pursued. Instead, the revised Draft Declaration agreed by the members of the Working Group at its Eleventh Session offered a classical rendering of self-determination, restating verbatim the language used in common Article 1(1) of the two international covenants on human rights, while also reflecting language from Resolution 1514 (XV):[69]

> 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.

This was backed up by a series of paragraphs covering the right of Indigenous peoples to maintain and strengthen their own political and legal systems and their own Indigenous decision-making, and to participate at all levels in the decision-making of the State in matters affecting them.[70]

[66] See n 63 above, paras 21–28.

[67] E-I Daes, 'Some Considerations of the Right of Indigenous Peoples to Self-determination' (1983) 3 Transn'l L & Contemporary Problems 1, 9; E-I Daes, 'The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples' (2001) 14 St Thomas L Rev 259f.

[68] See n 63 above, para 32.

[69] Discrimination against Indigenous Peoples, Report of the Working Group on Indigenous Populations on Its Eleventh Session, UN Doc E/CN.4/Sub.2/1993/29 (13 August 1993) Annex 1.

[70] The technical report of the UN Secretariat attributed this reference to the Covenants alone; Discrimination against Indigenous Peoples, Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, Note by the Secretariat, UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994) para 30.

However, demoted downwards to Article 31, and thus somewhat hidden from view, there was a different rendering of self-determination:

> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing their autonomous functions.

It appears that Article 31 took back what Article 3 had given. Article 3 had used the definition of self-determination as applied to colonial peoples and as used in the human rights context. Article 31 had retreated from that formulation by providing that Indigenous peoples would have a 'specific form of exercising their right to self-determination', focusing again on self-governance and autonomy.

The draft also provided, in Article 45, that nothing in the Declaration would be interpreted as implying for any State, group, or person any right to engage in any activity or to perform any act contrary to the UN Charter. This provision was weaker than the reference to the Friendly Relations resolution which is generally taken to deny secession outside of the colonial context. The UN Charter contains a reference to territorial integrity, although it is taken to apply to relations among States, not between peoples and States, and also references to self-determination. According to the technical review of the UN Secretariat, the provision was merely meant to mirror similar Articles featured in the Universal Declaration of Human Rights and the Covenants.[71]

Several governments still opposed the use of the right to self-determination of peoples, arguing that it did not apply in instances where 'a state has a government that represents all of its people, including in this case Indigenous populations'.[72] While Indigenous organizations and campaigners defended the draft, in the subsequent debates governments again challenged the very concept of collective rights as human rights, and the use of both the term 'peoples' and the term 'self-determination' in this context.[73] Others adopted a less frontal attack, adopting a lateral approach that would focus on the substantive elements of any entitlements that might be granted, rather than the label of a right to self-determination of peoples.[74]

Hence, there were four main positions: those of Indigenous rights campaigners on an unqualified right of peoples to self-determination, the proposal to qualify that right by excluding secession, or to give it a specific meaning different from its application in general international law, or to resist the right altogether. All appeared incompatible, leading to prolonged stalemate.[75]

[71] ibid para 120.

[72] eg Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples. Information received from Governments, UN Doc E/CN.4/1995/WG.15/2 (10 October 1995) para 6 (Argentina); Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, Information received from Governments, A/CN.4/1995/WG.15/2/Add.1 (13 November 1995) (Morocco).

[73] Report of the Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/1996/84 (4 January 1996) paras 42–60.

[74] ibid para 48.

[75] See, eg: Report of the Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/1998/106 (15 December 1997); Report of the Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/1999/82 (20 January 1999).

However, over time, resistance to the use of the term as such ebbed, while the understanding that self-determination was a foundational, underlying right, which did not necessarily need to be equated with a right to secession, was more clearly established. Indeed, a larger number of governments started to express themselves strongly in favour of retaining a clear reference to the right to self-determination in this context, asserting that 'without it, the draft declaration would lose a great deal of significance'.[76]

By 2002, a new atmosphere started to emerge in the Working Group and among the governments who had contributed to the long-deadlocked debate. There was finally a sense that the issue of self-determination might be settled. Instead of discussions on principle, drafting suggestions were now being developed. These concerned the context of the right, including reference to human rights instruments, the idea of reserving territorial integrity and unity through references to the Friendly Relations Declaration, and the link between the right and specific applications, such as land rights, political participation, and autonomy.[77]

However, the battle over the text was not, in fact, over, as it turned out when the draft text that emerged moved from the UN Human Rights Council, which had replaced the UN Commission on Human Rights, to the UN General Assembly.

7. The Adoption of the UN Declaration and Its Final Text

The Declaration was adopted by the freshly constituted Human Rights Council on 29 June 2006 by a vote of 30 to 2, with 12 abstentions, with a recommendation that the UN General Assembly adopt it likewise.[78]

The text had retained the two preambular references to self-determination, respectively acknowledging the affirmation of that right in the UN Charter and human rights Covenants, by virtue of which all peoples freely determine their political status and freely pursue their economic, social, and cultural development and noting that nothing in the Declaration would be used to deny any peoples their right to self-determination in conformity with international law.

Article 3 applied the right defined in those terms to Indigenous peoples. Article 3 *bis* (in the end Article 4) was formerly Article 31, now focusing self-determination on autonomy or self-government immediately after Article 3. There was no longer a reference to the irrelevance of the principle of *terra nullius*. The rather soft rider indicating that nothing in the Declaration may be interpreted as implying for any State, people, group,

[76] Report of the Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/2000/84 (6 December 1999) para 77 (France).

[77] Report of the Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/2003/93 (6 January 2003); Information provided by States on the Draft Declaration on the Rights of Indigenous Peoples—Amended Text, UN Doc E/CN.4/2004.WG/15/CRP.1 (6 September 2004); Information provided by States on the Draft Declaration on the Rights of Indigenous Peoples—Explanatory Comments to Amended Text Tabled by Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, UN Doc E/CN.4/WG/15/CRP.2 (6 September 2004); Report of the Working Group on Human Rights and Indigenous Issues, UN Doc E/CN.4/2005/89 (28 February 2005); International Workshop on the draft United Nations Declaration on the Rights of Indigenous Peoples—Information Provided by the Government of Mexico, UN Doc E/CN.4/2005/WG.15/CRP.1 (29 November 2005).

[78] Implementation of GA Res 60/251 of 15 March 2006 entitled 'Human Rights Council', Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Res 49/214 of 23 December 1994, UN Doc A/HRC/1/L.3 (23 June 2006).

or person any rights to engage in any activity or to perform any act contrary to the UN Charter was retained.

However, the mood in the Assembly was very hesitant. A majority of States represented there moved to defer the issue with a view to further consultations on the text.[79] This move was backed by the then Organization of African Unity, which adopted a decision expressing concern at the political, economic, social, and constitutional implications of the Declaration on the African continent.[80] The decision singled out the issues of the definition of Indigenous peoples, self-determination, ownership of land and resources, establishment of distinct political and economic institution, and national and territorial integrity. It noted that the vast majority of the peoples of Africa are Indigenous to the African continent and decided to defend a joint position on this issue at the United Nations.

Faced with deadlock over the issue, the President of the Assembly then commissioned Ambassador Hilario Davide of the Philippines to facilitate a solution. He noted that it would be difficult to go back and renegotiate the language agreed at the level of the Human Rights Council.[81] However, after much effort and consultation, it became clear that further negotiations would be required after all. A coalition of States with significant Indigenous populations noted no less than nine areas of concern in relation to the draft: self-determination, self-government, and Indigenous institutions; lands, territories, and resources; redress and restitution; free, prior, and informed consent; lack of clarity as to who are 'Indigenous peoples'; military defence issues; protection for the rights of others; intellectual property rights; and education. In essence, this would be the bulk of the Draft Declaration.

On self-determination, the States noted:[82]

> The current text could be misconstrued so as to threaten the political unity, territorial integrity and stability of States, and confer a right of secession upon indigenous peoples. Provision dealing with the need to achieve harmony with other levels of government are insufficiently developed.

The facilitator proposed several way of addressing these concerns, including adding riders preserving the positions of States to the UN Resolution adopting the Declaration, rather than amending the resolution itself. However, this was rejected as insufficient. The objecting States continued to insist on renegotiation, indicating in the end that they required discussion of eight thematic areas that arose in no less than sixteen Articles of the draft.[83]

The final text that was to emerge from the consultations contained the following references to self-determination:

> *Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well

[79] UNGA Res 61/178, A/RES/61/178 (20 December 2006).

[80] Decision on the United Nations Declaration on the Rights of Indigenous Peoples, Assembly/AU/Dec.141 (VIII).

[81] Report to the President of the General Assembly on the Consultations on the Draft Declaration on the rights of Indigenous Peoples, Submitted by HE Mr Hilario G Davide, Jr, 13 July 2007, and Supplement, 20 July 2007, No UN Reference Number, <http://www.un.org/ga/president/61/letters/23July07/Report-13July07.pdf> accessed 12 October 2017.

[82] ibid Annex I, Non-Paper, supplied by Australia, Canada, Colombia, Guyana, New Zealand, Russian Federation, and Suriname.

[83] ibid Annex III.

as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

...

Article 3. Indigenous people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic and cultural development.

Article 4. Indigenous people, in exercising their right to self-determination, have a 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.

...

Article 46.

1. 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.

This overall result deserves some comment. Clearly, the text embraces the right to self-determination. This is a right of 'people' rather than populations, although not a right of 'peoples' in the operative paragraphs.

The right is placed in the context of human rights. Its substantive definition reflects common Article 1 of the Covenants, the Preamble refers to the Covenants and to the Vienna Declaration and Programme of Action. Hence, the context is shifted away from the peoples' right to self-determination as enshrined in Resolution 1514 (XV).

However, the focus of self-determination on autonomy is somewhat weakened by moving the reference to autonomy out of the provision on self-determination and into a separate paragraph. On the other hand, it states that Indigenous peoples 'in exercising their right to self-determination' have a right to autonomy or self-government. A restrictive reading would suggest that this is the only way in which Indigenous peoples can exercise their right to self-determination. In any event, moving that provision from Article 31 to Article 4 was meant to restore the focus of the right on internal accommodation.

Of course, focusing self-determination on the issue of autonomy and self-government does not in itself preclude secession. Rather, by implication it contextually reduces the application of the right to self-determination in this instance.

The original argument put by Ms Diaz, the principal drafter of the initial full text, that the Indigenous people would now be empowered to negotiate their status and rights within the State, is not reflected in the provision as adopted. There is no reference to *terra nullius* being a defunct theory, and no insistence that Indigenous peoples remain free to negotiate their status within States. Rather than assuming that Indigenous peoples are essentially a sovereign entity that has not yet been validly incorporated into the State,

pending a negotiation about its autonomous or other status, there is simply an affirmation of autonomy as the default way of accommodating Indigenous peoples. Instead, the Preamble emphasizes harmonious and cooperative relations between the State and Indigenous peoples.

There is also no assignment of international personality. Rather, the Preamble notes that rights affirmed in treaties are 'in some situations' matters of international concern.

The second preambular paragraph concerning self-determination is, as before, phrased negatively, preserving the full right to self-determination for any peoples. The reference to 'in accordance with international law' may be taken to read, 'in accordance with international law as classically understood'. This provision may therefore reserve self-determination in the colonial context, exercised by colonial peoples, including secession. In so doing, it may indirectly remove this element of the right to self-determination in other circumstances, including in relation to Indigenous peoples.

Finally, there is the safeguard clause. There is no simple prohibition of secession, as can sometimes be found in national constitutions. Rather, drawing on known language from the Friendly Relations Declaration, it preserves the State from dismemberment or from impairment of its territorial integrity and political unity. This applies to all sovereign and independent States, rather than only those that conduct themselves in accordance with the principle of equal rights and self-determination and are thus possessed of a government representing the whole people without discrimination, as the Friendly Relations Declaration would have it. In addition to removing this rider, the Declaration adds the words 'people, group or person' as the addressees of its injunction. Having granted the right of self-determination to Indigenous 'people', it is now also 'people' who are precluded from disrupting the unity of the State.

However, this injunction only applies within the terms of the Declaration itself. That is to say, nothing in the Declaration may be invoked in favour of secession. But this does not affect the rights and status of Indigenous peoples in general international law.

The adoption of the Declaration was accompanied by statements of the objecting and other States. Indeed, these were significantly more than the four States that eventually voted against the Declaration. Twenty-four States formally registered their understanding on this point, which would be reminiscent of reservations in the realm of treaties. All of them recorded their sense that the adoption of the Declaration, and of all Articles contained in it, was subject to the application of the reserve contained in Article 46 on territorial integrity.[84]

A final change in the Declaration is noteworthy. A preambular paragraph had been added which recognizes that the situation of Indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration. This paragraph reflects the debate about national particularities in the application, understanding, and implementation of human rights generally.

At the end of the Cold War, an attempt had been made to re-consecrate the human rights project as a truly global undertaking, affirming its indivisibility and genuinely

[84] UNGA Official Records, 13 September 2007, A/61/PV.107: Australia, 11f; United States, 15; Russian Federation, 16; Argentina, 19; Japan, 19f; United Kingdom (also objecting to the collective nature of Indigenous rights), 20ff; Norway, 22; Jordan, 23; Mexico, 23; Sweden, 24f; Thailand, 25; Brazil, 25; Suriname, 27f; UNGA Official Records, 13 September 2007, A/61/PV.108: Iran, 1; India, 1; Myanmar, 2; Namibia, 2f; Nepal, 2; Turkey, 5; Philippines, 5f; Nigeria, 6; Egypt, 7; Guatemala, 8–9; France, 10f.

universal nature. Asian States suddenly combined and opposed the universal nature of human rights, asserting instead that different regions had a differing understanding of them and were entitled to place a differing emphasis on some rights over others, on account of national or regional particularities. The Vienna Declaration very narrowly overcame this divide, favouring the universal view.[85]

On this occasion, however, the argument of national particularities prevailed, being fully reflected in a preambular paragraph without a balancing reference to full universality of obligations.

Overall, therefore, adoption of the text in the end had its price. The understanding of self-determination, in particular, had moved away from the vision of the representatives and supporters of Indigenous groups.

8. International Practice Concerning Self-Determination of Indigenous Peoples

After this prolonged battle, the question arises whether the entitlement to self-determination contained in the Declaration is reflected in actual practice.

Indigenous rights have long been litigated before international human rights bodies, including the Human Rights Committee, as noted in relation to the *Lovelace* case considered above. The Committee has referred to Article 1 of the ICCPR on self-determination, for instance when considering the right of aboriginal populations to exercise greater influence on decision-making on issues affecting them.[86] In *Diergaart*, the Committee noted that 'the provisions of Article 1 may be relevant to the interpretation of other rights protected by the Covenant, in particular Articles 25, 16 and 27'.[87] This was amplified in *Majuika*, where the Committee noted that the extent to which Article 1 might be relevant for the interpretation of another Article of the Covenant, in that case Article 27, would depend on the merits of the case.[88] Or, as phrased in *Ominayak v Canada*:[89]

> the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in Article 1 of the Covenant, which deals with rights conferred upon peoples as such.

The issue of whether or not self-determination might be considered was raised quite expansively in the *Mikmaq* case. The Mikmaq claimed to have been left out of a constitutional

[85] 'Vienna Declaration and Programme of Action', adopted by the World Conference on Human Rights in Vienna on 25 June 1993, A/Conf.157/24.

[86] Concluding Observations of the Human Rights Committee, CCPR/C/USA/CO/3/Rev.1 (18 December 2006) (United States).

[87] *JGA Diergaardt v Namibia*, Comm No 760/1993, UN Doc CCPR/C/69/D/760/1997 (6 September 2000).

[88] *Apirana Mahuika v New Zealand*, Comm No 547/1993, UN Doc CCPR/C/70/D/547/1993 (27 October 2000).

[89] *Chief Bernard Ominayak and the Lubicon Lake Band v Canada*, Comm No 167/1984, UN Doc CCPR/C/38/D/167/1984 (1990) para 13.3.

process undertaken by Canada, infringing upon their right to self-determination. They argued at length that they enjoyed a separate legal status and, based on the right to self-determination, were entitled to participate in the process. In its initial decision on admissibility, the Committee noted that:

> Although initially drafted in terms of an alleged beach of the right of self-determination, the authors, subsequently, and after receiving the State party's objections to the admissibility of the communication as it then stood, asserted the fact that the Mikmaqs were excluded from participation in the constitutional conferences also reveals a breach of Article 25 of the Covenant.

However, on the merits the Committee then rejected the claim of the Mikmaq, asserting that Article 25 did not require a State to ensure representation of every individual in a deliberative process.[90] Controversially, therefore, it failed to take account of the special status of the Mikmaq and their representatives, as would be suggested by the fact that they were an Indigenous people.

In its communications addressing Indigenous issues with governments, however, the Committee has on occasion expressly invoked Article 1 and the term 'self-determination'. This has included a discussion of self-determination in relation to the right of all peoples to freely dispose of their natural resources (Canada) and the invocation of self-determination in the same context in relation to Norway's Saami.[91] Similarly, Article 1 of the Covenant on Economic, Social and Cultural Rights has been found applicable to Indigenous peoples.[92]

The Inter-American Commission on Human Rights was one of the first international bodies confronted with major issues involving Indigenous peoples. In the case of the populations of Nicaragua's Atlantic Coast (Miskito, Sum, and Rama), the Commission denied the application of self-determination to 'any ethnic group as such', evidently seeing such a potential right in the context of secession.[93] It was also negative in relation to potential claims for autonomy. This result contrasts oddly with the actual resolution of the conflict. The Bogota Accord on the situation in Nicaragua refers specifically to 'regional government and self-determination' in the context of autonomy.[94]

Since then, the IACtHR has incorporated the doctrine that the substantive Indigenous entitlements are underpinned by Article 1 of the Covenants into its jurisprudence[95] and imposed very wide-ranging requirements flowing from it, for instance in relation

[90] ibid para 5.5.

[91] Concluding Observations of the Human Rights Committee, CCPR/C/79/Add.105 (7 April 1999) (Canada); Concluding Observations of the Human Rights Committee, CCPR/C/79/Add.112 (1 November 1999) (Norway).

[92] Concluding Observations of the Committee on Economic, Social and Cultural Rights, UN Doc E/C.12/1/Add.94 (12 December 2003) (Russian Federation) para 11.

[93] Informe Sobre La Situacion de los Derechos Humanos de un Sector de la Poblacion Nicaraguense de Origen Miskito, OEA/Ser.L/V/II.65, doc 10, rev.3 (29 November 1983). Cited in Thornberry (n 25) 276ff.

[94] Bogota Accord Art 1(3)(a), 9 December 1984. The subsequent Preliminary accord between the Government of Nicaragua and YATAMA of 2 February 1988 offered, in Art 1, recognition to the right of the peoples of the Atlantic coast to exercise 'autonomy which consists of the right to determine, within their traditional territory, their own political, economic, social, cultural, educational, religious and legal development without external interference according to their historical and ethnic values and traditions, within the framework of the Nicaraguan state'.

[95] IACtHR, *Case of the Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs), Judgment (28 November 2007), IACtHR Series C No 172, para 93.

to constitutional and legal structures and procedures for the exercise of consultation of Indigenous peoples.[96]

There is also some practice on self-determination in relation to Africa stemming from the African Commission on Human Rights.[97] In the *Katanga* case, the Commission left open the question of whether the people of Katanga could be considered a people entitled to self-determination. The question was moot as the African Charter imposed a duty to satisfy such a right, even if it applied, within the territorial unity of Zaire.[98] However, the Commission returned to the issue in greater detail in a further case, this time concerning the Southern Cameroons.[99] The central government denied that the people of that area could qualify as a people, having lost their ethnic distinctiveness. The Commission, however, confirmed their identity under the terms of the African Charter, and that secession would not be available in this instance, but instead pointed to autonomy or other means of self-governance as a way of achieving self-determination.

The case was not really focused, though, on the identity of the people of the Southern Cameroons as an Indigenous population. Instead, their argument was that they were a self-determination unit in the colonial sense, entitled to secession. The Commission appears to have ruled that they might constitute a people in that sense, although it was unable to give effect to that right, being a creature of the African Charter, which specifically precludes challenges to territorial unity.

9. Constitutional Provisions on Indigenous Peoples and Self-Determination

Examples of references to self-determination for Indigenous peoples in constitutional instruments are quite rare, although they do exist. For instance, the Constitution of Mexico states clearly:[100]

> A. This Constitution recognizes and protects the indigenous peoples' right to self-determination and, consequently, the right to autonomy, so that they can:
> 1. ...
> 2. VII. Elect indigenous representatives for the town council in those municipalities with indigenous population.

This formulation seems to focus the meaning of self-determination in the context of Indigenous peoples to a right to autonomy. In that way, it takes on the appearance of giving effect to the right to self-determination, while at the same time reducing it through

[96] IACtHR, *Case of the Kichwa Indigenous People of Sarakayu v Ecuador* (Merits and Reparations), Judgment (27 June 2012), <http://www.corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf> accessed 12 October 2017.

[97] See, eg, the Ogiek issue in Application 006/2012—*African Commission on Human and Peoples' Rights v Kenya*. On Indigenous rights, the African Commission, and the related Working Group on Indigenous Populations, see generally the African Commission on Human and Peoples' Rights, 'Indigenous Peoples in Africa: The Forgotten Peoples?', <http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf> accessed 12 October 2017.

[98] African Commission on Human and Peoples' Rights, Case No 75/92, *Katangese Peoples' Congress v Zaire*.

[99] African Commission on Human and Peoples' Rights, Case No 266/03, *Kevin Mgwanga Gunme and Others / Cameroon*.

[100] Constitution of Mexico, Title I, Chapter I, Art 2.

a limited scope of application that can be accommodated within the territorial unity and integrity of the State.

A more express safeguard for the unity of the State can be found in the Constitution of Bolivia:[101]

In the framework of the unity of the State, and in accordance with this Constitution, the nations and rural native indigenous peoples enjoy the following rights:

...

4. To self-determination and territoriality.

In another part of the constitution, there is reference to 'determination' on the part of Indigenous communities, which is, however, placed firmly in the context of autonomy, and within the overall, controlling framework of the national constitution:[102]

Given the pre-colonial existence of nations and rural native indigenous peoples and their ancestral control of their territories, their free determination, consisting of the right to autonomy, self-government, their culture, recognition of their institutions, and the consolidation of their territorial entities, is guaranteed within the framework of the unity of the State, in accordance with this Constitution and the law.

The constitution of Nicaragua omits the term 'self-determination', but instead refers to an 'inalienable right' of the Indigenous Atlantic Coast people. This attribute ordinarily adheres to self-determination (the inalienable right to self-determination):[103]

The communities of the Caribbean Coast have the inalienable right to live and develop themselves under the forms of political-administrative, social and cultural organization that correspond to their historic and cultural traditions.

The members of Autonomous Regional Councils shall be elected by the people by universal, equal, direct, free and secret vote for a term of five years, in conformity with the law.

Rather than spelling out the inalienable right in terms of the internationally understood right to self-determination as a right to determine political status and economic, social, and political system, there is a far more modest reference to develop themselves under 'forms of political-administrative, social and cultural organization'. Again, it seems as if a semblance of self-determination is to be given, without actually awarding that right in its full, internationally accepted meaning.

The Constitution of Ecuador seems to deploy the term 'self-determination' in rather a different sense. It seems to imply a kind of paternalistic duty on the part of the State to preserve and protect the space in which the Indigenous people can express their identity and maintain their distinctive way of life through self-determination:[104]

Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights:

...

[101] Constitution of Bolivia, Part 1, Title 2, Chapter IV, Art 30(II).
[102] Constitution of Bolivia, Part 1, Title 1, Chapter I, Art 2, and Part 3, Title 1, Chapter VII, Art 289.
[103] Constitution of Nicaragua, Title 9, Chapter II, Art 180.
[104] Constitution of Ecuador, Title 2, Chapter IV, Art 57.

9. To keep and develop their own forms of peaceful coexistence and social organization and creating and exercising authority, in their legally recognized territories and ancestrally owned community lands.

...

The territories of the peoples living in voluntary isolation are an irreducible and intangible ancestral possession and all forms of extractive activities shall be forbidden there. The State shall adopt measures to guarantee their lives, enforce respect for self-determination and the will to remain in isolation and to ensure observance of their rights. The violation of these rights shall constitute a crime of ethnocide, which shall be classified as such by law.

In stark contrast to this cautious practice in Latin America, the 1994 Constitution of Ethiopia assigns an 'unconditional right to self-determination, including the right to secession', to every nation, nationality, and people in Ethiopia.[105] This would include Indigenous peoples, provided it is accepted that the term can be applied at all in the context of a sovereign and fully decolonized State in Africa. However, this extremely open formulation is, of course, to be explained with reference to the internal struggle in Ethiopia that resulted in the secession of Eritrea after a very extensive and destructive conflict, and the termination of such strife, along with the drafting of a new constitution, once the previous communist government had been overthrown by the secessionist opposition.[106] Given this context, and its very broad reach, the provision is really of no immediate relevance to the issue of Indigenous peoples.

This brief review suggests that there is no broad evidence of the meaningful use of self-determination within the domestic law of States with reference to self-determination, at least at the level of constitutional law. Hence, the success in importing the term 'self-determination' into the Declaration as an international standard does not appear to have translated itself into domestic law. Rather, self-determination is referred to as an underlying entitlement, as, for instance, in Australia. Australia asserts that self-determination as defined in international law applies to the people of Australia as a whole. It adds, however:[107]

The right to self determination has particular application to Aboriginal and Torres Strait Islander peoples as Australia's first peoples.

- Self determination is an 'on going process of choice' to ensure that Indigenous communities are able to meet their social, cultural and economic needs. It is not about creating a separate Indigenous 'state'.
- The right to self determination is based on the simple acknowledgment that Indigenous peoples are Australia's first people, as was recognised by law in the historic Mabo judgement.
- The loss of this right to live according to a set of common values and beliefs, and to have that right respected by others, is at the heart of the current disadvantage experienced by Indigenous Australians.
- Without self-determination it is not possible for Indigenous Australians to fully overcome the legacy of colonisation and dispossession.

Hence, it appears that the term 'self-determination' is appropriated in rather a general way, acknowledging historic dispossession without offering a great deal of specific substantive

[105] Constitution of Ethiopia Art 39.

[106] G Fox, 'Eritrea' in C Walter, A Ungern-Sternberg, and K Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014) 273.

[107] Australian Human Rights Commission, 'Right to Self-Determination', <https://www.humanrights.gov.au/right-self-determination#Native> accessed 12 October 2017.

entitlement. Indeed, self-determination in the sense of separate statehood is denied, while there is no corresponding reference to formal and far-reaching autonomy.

Overall, the impact hoped for by Indigenous rights campaigners in pressing for adoption of the concept and term of self-determination of peoples seems to have been lost somewhat in translation where domestic arrangements are concerned.

10. Autonomy, Self Government, and Political Participation

One of the key aspects of the attempt to reorient the focus of the right to self-determination in the context of Indigenous peoples has been to emphasize a right to autonomy and self-governance. This would fall short of self-determination in its fullest sense, but it still adds significantly to the entitlements of other communities, such as minorities.

There certainly is very considerable constitutional practice in States in all regions of the world exhibiting personal, cultural and functional, and territorial autonomy.[108] However, it would be difficult to extrapolate from this practice in municipal law acknowledgement by States of an obligation at the level of international law. There is also no binding international text requiring the provision of autonomy in express terms. At the universal level, Article 27 of the ICCPR does not refer to autonomy. The best that can be said is that: 'While autonomy is not expressly required by article 27, it is a means of protecting and promoting the cultural, religious and linguistic rights with which article 27 deals explicitly.'[109]

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Lingusitic Minorities does, however, refer to the rights of persons belonging to minorities to participate effectively in cultural, religious, social, economic, and public life. In particular:[110]

> Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

The authoritative commentary on the Declaration clearly identifies autonomy as one of the means of achieving effective participation in relation to regions where minorities live.[111] This impression is also strengthened when considering regional instruments, in particular those emanating from the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe. The CSCE Document of the Copenhagen Meeting of the Conference on the Human Dimension provides:[112]

> The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities

[108] A still excellent compendium by H Hannum (ed), *Documents on Autonomy and Minority Rights* (Martinus Nijhoff 1993); and case studies in, eg, Y Dinstein, *Models of Autonomy* (Transaction Books 1981); K Gal, *Minority Governance in Europe* (LGI 2002); Y Ghai, *Autonomy and Ethnicity* (Cambridge University Press 2000); M Suksi (ed), *Autonomy: Applications and Implications* (Kluwer Law International 1998); M Weller and S Wolff, *Autonomy, Self-Governance and Conflict Resolution* (Routledge 2005).

[109] C Palley, Possible Ways and Means to Facilitate the Peaceful and Constructive Resolution of Situations Involving Racial, National, Religious and Linguistic Minorities, UN Doc E/CN.4/Sub.2/1989/49.

[110] UNGA Res 47/135, 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities', A/RES/47/135 (18 December 1992) para 2.3.

[111] Commentary provided by the Chairman of the UN Working Group, Asbjorn Eide, UN Doc E/CN.4.SUB.2/AC.5/2001/2 (2 April 2001) paras 38ff.

[112] Second Conference of the Human Dimension of the CSCE, Copenhagen, Document (5 June–29 July 1990) para 25. See also the CSCE Meeting of Experts on National Minorities (1–19 July 1991) IV, para 7.

by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.

The OSCE High Commissioner for National Minorities has expanded on this issue in quite some detail in the Lund recommendations.[113] Yet, in the context of the legally binding European Framework Convention for the Protection of National Minorities (FCNM), the situation is somewhat different. In contrast to the corresponding provision in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the rather cautious reference to decisions specially affecting 'regions where they live' was struck from the final version of Article 15 of the FCNM.[114] Nevertheless, when addressing Article 15, the official FCNM Explanatory Report encourages governments to consider, for instance, decentralized or local forms of government as a means of achieving effective participation.[115] This is fully in accordance with Article 4(3) of the European Charter of Local Self-Government, which emphasizes that 'public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizens'.

This brief review confirms that international commitments to autonomy outside of the context of Indigenous rights have been rather sparse. While some governments have granted autonomy, and some instances of autonomy are well established (South Tyrol, Aaland Islands), there is no firm obligation as yet to satisfy demands for self-governance in this way.

Indigenous people, on the other hand, have this entitlement without question. The Declaration is very explicit in this respect, touching upon this issue in a number of Articles, for example:

Article 4

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.

It may be noted, however, that the Declaration does not feature a great deal of detail on the essential elements of meaningful and genuine autonomy. These would include permanence of the arrangement, its anchoring in the constitution of the State or through an organic law, extensive competence in relation to legislative, executive, and judicial functions, and an institutional establishment matching these functions.

[113] Lund Recommendations, paras 19–21, where the word 'autonomy' is mostly avoided and instead reference is made to self-government.

[114] Proposals to include a reference to subsidiarity were opposed in the Ad Hoc Committee for the Protection of National Minorities (CAHMIN) as these 'would touch upon the constitutional systems of the Parties'; CAHMIN (94)13, 15 April 1994, 1st meeting, 250, 28 January 1994, para 46. A stronger regional dimension was proposed by Hungary, Norway, and Portugal; CAHMIN, *Proposals concerning the Preliminary Draft Framework Convention for the Protection of National Minorities*, CAHMIN (94) 12 rev, 10 June 1994, 11–14.

[115] Council of Europe, Framework Convention for the Protection of National Minorities and Explanatory Report (February 1995), H (95)10, Explanatory Report, para 80.

On the other hand, there is almost duplication in the various paragraphs addressing the right of Indigenous peoples to establish their own institutions:

Article 5

Indigenous people have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 20
Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

Article 33(2)
Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in cases where they exist, juridical systems or customs, in accordance with international human rights standards.

This is matched by provisions relating to the involvement of Indigenous peoples in the overall decision-making institutions and processes of the State, to the extent that they wish it, and with special emphasis on issues of particular concern to them:

Article 18
Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The detail of these provisions is impressive. Article 5 establishes the general principle of self-governance through their own institutions (mirrored in Articles 20, 33(2), and 34), along with the right to participate in the overall State. The latter right is not particularly well developed, however. There is mention of participation in the political life of the State, rather than representation in the central points of decision within the State, and powers of co-decision or at least mandatory consultation. In this sense, the final version of the text has significantly retreated from earlier proposals.

The right of consultation is more developed in relation to decision-making affecting the rights of Indigenous peoples, where there is a requirement of their participation. Again, it is not entirely clear what the meaning of participation is. The Article in itself requires presence, but not consent. On the other hand, Article 19 requires free, prior, and informed consent in relation to legislative or administrative measures that may affect Indigenous peoples. That sounds like a power of co-decision and veto. That result is not,

however, entirely consistent with the wording at the beginning of the paragraph, which suggests 'consultation and cooperation'.[116]

These provisions add to and amplify the entitlements provided generally by Article 25 of the ICCPR, or in relation to minorities, by the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Lingusitic Minorities or the FCNM.[117] In addition, there are entitlements derived from the enhanced legal personality of an Indigenous population within the State. This includes historical relations, including respect for treaties and other obligations that may have been established over time, and the right to forge relations with other communities and peoples, including cross-border relations.[118]

11. Conclusion

The debate about the right to self-determination for Indigenous peoples, and its provisional conclusion through the adoption of the Declaration, represent a very significant step in the development of concepts of international legal personality.

First, the change in terminology from 'populations' to 'people' marks the emergence of Indigenous peoples as subjects, rather than objects of international law. This is highlighted already in the change in emphasis between ILO Conventions 107 and 169, which confirms that Indigenous peoples are not merely objects of protection of the international legal order, but they are actors within in.

The use of the term 'peoples' is, and in fact remains, highly sensitive in international law, for it is generally understood that 'peoples' are entitled to the inherent right to self-determination. As framed through UNGA Resolutions 1514 (XV) and 1541 (XV), this right of peoples includes a right to unilateral secession. This exceptional, positive entitlement to independence in the case of colonies represents a very major step away from the strong emphasis in international law on maintaining stability and the *status quo* as a tool of maintaining peace. This extraordinary step was justified by the emerging universal consensus of the 1960s to overcome colonialism.

This very potent and exceptional entitlement is highly privileged in the international legal order. It has *erga omnes* effect—it is opposable to all States, and its implementation by one State is of legal interest to all others. Moreover, as a *jus cogens* right, it cannot be derogated from. Its serious violation triggers an obligation on the part of other States not to recognize the situation that results, not to support the State concerned in maintaining that situation, and to consult collectively on means to overturn the situation.

From the perspective of Indigenous peoples, the application of the right to self-determination as generally understood in international law is logical and indeed required. There is no reason to distinguish their fate from colonialism. In both cases, an alien, metropolitan race occupied their land during the time of imperialism, or even before, and dominated them while economically exploiting them and their resources, in particular their lands. Worse than colonialism, the original population was not only repressed, but

[116] See, at length, Chapter 9.

[117] Council of Europe, Framework Convention for the Protection of National Minorities and Explanatory Report (February 1995), H (95)10, Art 15; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (18 December 1992) Art 2(3).

[118] UN Declaration on the Rights of Indigenous Peoples (13 September 2007) Arts 36, 37.

was in many instances brought to the edge of extinction. The fact that in contrast to colonial circumstances, the alien, metropolitan oppressors implanted themselves in the territory and rapidly became numerically far superior does not make any difference.

In addition, Indigenous peoples could rely on the progressive undermining of the idea that their lands were *terra nullius* when occupied by the foreign invaders. This is backed by legal doctrine reaching back to Francisco de Vitoria and Bartolome de las Casas, and even Grotius, who argued that Indigenous peoples were legal subjects and holders of rights at that time.[119] This is also evidenced by the fact that many colonial States concluded treaties with them, as had been noted in the more recent pronouncement of the ICJ in the *Western Sahara* case.[120]

Given the precise analogy to colonialism in international law, the representatives of Indigenous peoples were most insistent on the application of the right to self-determination as it applied to colonies. This recognition was highly important to them, as it meant symbolic recognition of their status and of the need to address it on a par with classical colonialism. But it also would have meant in more practical terms that they could still negotiate their relationship with the State from a blank sheet of paper. Few would wish to seek independence, although some more radical elements insisted on that possibility. But there was a strong need to confirm their original legal personality, both as a matter of national pride and also as a matter of determining the starting point for establishing their relations with the State.

The principal drafter of the initial text of the Declaration, Daes, understood this as a necessary process of nation-building—a process that had encompassed other ethnic elements of the State, but left out the Indigenous peoples.[121] The problem, however, was how to accommodate this process in a world where international legal rules were made by governments. Furthermore, many governments were highly reluctant to accept the very far-reaching claims of Indigenous peoples, including the basic assertion that the sovereignty of existing States never validly extended to them.

In ILO Convention 169, it had been possible to square the circle by using the term 'peoples', but immediately clarifying, in a substantive provision of the Convention, that that term would not attract the meaning and consequences ordinarily attaching to it in international law. While this solution had been possible in the more technical context of the ILO Convention, it was not available in the environment of the UN Working Group, whose deliberations on this issue attracted at times some 150 well-organized, educated, and funded representatives of Indigenous peoples and NGOs defending their claims.

Daes, the UN drafter and Rapporteur, proposed a third way. This was to confirm that the right to self-determination of peoples would apply, but to give it a distinct meaning in the context of Indigenous rights. To facilitate State-building that had, in her view, excluded Indigenous peoples, self-determination would offer space to negotiate relations between them and the State. This would focus on autonomy, political participation, and substantive rights relating to land, culture, education, etc. There was also the possibility of clarifying that self-determination in this setting did not include

[119] See, eg, GC Marks, 'Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas' (1991) 2 Australian YB Int'l L 1; SJ Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004) 16–19.

[120] *Western Sahara Advisory Opinion*, [1975] ICJ Rep 12, 39 (16 October 1975).

[121] See n 37 above.

a right to secession. Hence, the Indigenous peoples would achieve the label, but not really the content, of the right to self-determination in its full sense.

This attempt to shift the focus of the right to self-determination away from secession was assisted by two further moves. First, there was the use of the common Article 1 to the two human rights Covenants, rather than of Resolution 1514 (XV), as the source of self-determination in this context. Clearly, the Covenants addressed human rights, and they appeared to make self-determination available in that general human rights context, outside of the colonial context. Hence, it should be possible to refer to self-determination as a human rather than a peoples' right, ie in a way that would not necessarily encompass secession.

Second, there was the possibility of drawing on existing international legal language in relation to a safeguard clause, which was eventually adopted in line with the General Assembly's venerable Friendly Relations resolution. Without the adoption of this clause, it is unlikely that the Declaration could have been adopted with a significant majority, if at all.

Last-minute attempts to change the Declaration in its substantive elements were partially successful. And yet its substantive provisions are, for the most part, surprisingly strong and meaningful. Indeed, the Declaration offers at least analogies to many of the substantive elements that would traditionally attach to the right to self-determination. First, there is the choice of political status. Clearly, the Declaration does not establish a new, positive entitlement to secession for Indigenous peoples. But neither does it diminish their potential entitlement, should one exist, in general international law to form a new State. This might occur on the basis of a constitutional grant of authority, in response to disenfranchisement or persistent and widespread repression of a very serious nature, or on the basis of effectiveness.

This point is perhaps an important one to make. International law does not prohibit secession. This was made clear by the ICJ in the *Kosovo Advisory Opinion*.[122] The injunction contained in the Declaration does not change that situation in relation to Indigenous peoples. It does not add a positive prohibition of secession as a matter of general international law. It merely confirms that nothing contained in the Declaration itself shall be taken as encouragement or justification for secession. As such, all it states is that the Declaration does not furnish any additional entitlement to self-determination in the sense of secession.

With regard to the second element of self-determination as known in general international law, the choice of political, social, and economic system, the Declaration advances upon the legal standard that applies in other cases. As noted, there is a generous provision for autonomy which is not ordinarily available to populations by virtue of general international law. Moreover, the Declaration goes quite far in allowing Indigenous populations to establish autonomous jurisdiction and institutions to administer them.

Similarly, on the issue of political participation, Indigenous peoples are reasonably well served by the Declaration, which advanced upon the limited provisions of the UN Declaration on the Rights of Persons Belonging to National, *or Ethnic, Religious and Linguistic Minorities* and even the only international treaty on minority rights, the European Framework Convention. However, it will be important to avoid over-interpreting the occasional reference to participation in relation to issues of particular

[122] Above, n 2, para 80.

concern to Indigenous rights. Obviously, such a right is most relevant where issues of particular concern to Indigenous peoples arise. However, one should not forget the right and interest of such peoples in the construction and functioning of the State overall in terms of representation at the most senior levels of decision-making. This point was emphasized in earlier drafts, but was somehow lost in the final phases of the negotiations.

The particular link of Indigenous peoples with the territory they inhabit, which is recognized in the debate about self-determination in this context, was accommodated through strong provisions on land rights. This legal regime is not the same as the principle of permanent sovereignty over natural resources that would apply to States and colonial self-determination entities. Yet, it is very far-reaching and represents what must be quite painful concessions on the part of the affected governments.

In terms of implementation practice, it is clear that there are few references to self-determination as such in domestic legislation, at least at the constitutional level. Similarly, there have been few occasions where litigation on Indigenous self-determination as such has been possible before international fora. However, it can be expected that a gradual trend in this direction will strengthen over time.

Given this record, the question arises whether the tug of war over self-determination in relation to Indigenous people was worth the effort, and the delay of the adoption of the Declaration by perhaps a decade. Clearly, the thesis that States were not entitled to exercise jurisdiction over Indigenous peoples unless they could point to Indigenous consent did not win the day. Indigenous peoples were not put in a position to negotiate their relations with existing States afresh or even to contemplate secession. In this sense, the award of the label 'self-determination of peoples' seems hollow and not on a par with the practice of decolonization.

On the other hand, the fact that the application of that label was won is quite astounding, given the sensitivity of governments on this point, even if last-minute changes had been accepted. The confirmation of the panoply of other rights in the Declaration is also impressive.

Of course, it is merely a Declaration and not a binding legal instrument. However, ten years after its adoption, it is clear that it served, and continues to serve, as an important benchmark of achievements by which governments and domestic legislation are measured. Yet, the cursory review of domestic practice noted here suggests that self-determination, when employed as a term in this context, rather serves to legitimize the solutions that have been adopted, instead of fundamentally questioning them.

In the end, the answer to the question of whether or not the battle was worth fighting can only be decided with reference to the Indigenous peoples themselves, whose long-standing extermination and exploitation was meant to be recognized and addressed.

Chapter 6. The UNDRIP and the Rights of Indigenous Peoples to Existence, Cultural Integrity and Identity, and Non-Assimilation

Articles 7(2), 8, and 43

Jessie Hohmann[*]

Article 7(2)

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
   (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
   (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
   (d) Any form of forced assimilation or integration;
   (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

1. Introduction

1.1 Relevance and Importance of the Issue Area

Articles 7(2), 8, and 43 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) together enshrine a right to the protection of Indigenous peoples' continued survival and existence, both physically as individuals, and as collective entities, in accordance with levels of human dignity and well-being.

Indigenous peoples pressed for the inclusion of such principles in the UNDRIP in the recognition that pre-existing international, regional, and national laws had failed to protect their survival as communities with distinct cultures, or recognize them as

[*] I received invaluable research assistance on this chapter from Nicolás Rodríguez Serna, Emma Vogelmann, and Christopher Hall. I would also like to thank Professors Shin Imai and Alexandra Xanthaki for their very helpful comments on the draft.

distinct peoples. Accordingly, the Articles discussed in this chapter must be understood as premised on an understanding that individual survival for Indigenous people is only fully meaningful in the context of cultural survival and non-assimilation, and, further, as linked crucially with rights to ancestral lands and territories. As Judges Cançado-Trindade and Ventura Robles of the Inter-American Court of Human Rights put it in their separate opinion in the *Yakye Axa* case:

> Cultural identity has historical roots, and under the circumstances of the instant case of the Yakye Axa indigenous Community, it is tied to ancestral lands. We must emphasize that cultural identity is a component or is attached to the right to life *lato sensu*; thus, if cultural identity suffers, the very right to life of the members of said indigenous community also inevitable [sic] suffers ... During their displacement, in recent years, from their 'ancestral lands,' the cultural identity, as well as the very right to life of the members of an indigenous community such as the Yakye Axa, has seriously suffered.[1]

This underlying premise, in which cultural and individual survival are inherently linked, and which rejects the long history of assimilation of Indigenous peoples into dominant cultures, illuminates the difficult negotiations over genocide and its extension to cultural genocide or ethnocide in Article 7; the debates on what actions or omissions amount to forced assimilation or destruction of culture in Article 8—notably including the forced dispossession of land; and the meaningful enjoyment of survival, well-being, and dignity in Article 43.

This underlying premise must also be used to understand the entanglements of questions of *cultural* rights to the three provisions considered here. Cultural survival has become entwined with physical survival in the Indigenous quest for full rights in international law, and the analysis shows the motivations—and at times limitations—of taking this approach.

The three provisions analysed reflect this central concern of Indigenous group/cultural survival and flourishing as peoples. As such, the final agreed text of Articles 7(2), 8, and 43 must be seen as containing norms aimed at the development of existing international law, which would protect and confirm Indigenous collectivities in ways not currently recognized or only now emerging. This is despite the fact that the Articles remain more limited in their scope and content than many Indigenous negotiators had hoped.

1.2 The Provisions: Articles 7(2), 8, and 43

Article 7 includes both the right to physical *individual* survival, and the right to *collective* survival, through the 'collective right to live in freedom, peace and security as distinct peoples'. Moreover, Article 7 specifically includes the right not to be 'subjected to any act of genocide or other act of violence', including 'forcibly removing children of the group', as genocide clearly vitiates the right to exist. The focus of the discussion here is on collective or peoples' rights. It is for this reason that Article 7(1) is addressed separately in Chapter 7, although the UNDRIP as a whole is notable in the way it illustrates the intertwined relationship between group and individual, and their inseparable nature in the context of Indigenous rights.[2]

[1] *Yakye Axa v Paraguay*, IACtHR, Cancado-Trindade and Ventura Robles (2005) paras 18–19.

[2] See S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011) 2; F Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press 2008) 98.

Article 8 protects the cultural survival of Indigenous peoples and individuals, preventing any forced assimilation or destruction of their culture. It imposes, in Article 8(2), positive duties to prevent, and standards for redress and restitution on States (restitution and redress being dealt with in Chapter 19), with specific reference to a range of issues of particular historical and continuing significance for Indigenous peoples across the world.

Finally, Article 43 sets out: 'The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world.' The particular way in which Indigenous rights are interconnected explains both the difficulty in separating out different issues for analysis, but also, and importantly for this chapter, the importance of Article 43: rather than a footnote, Article 43 should be read as a central and overriding principle of the Declaration.

Thus, the three Articles considered in this chapter form the platform from which other rights can be enjoyed, and represent the minimum level of protection for the continued existence of Indigenous communities as unique and distinct peoples.

The specific issues raised by these provisions are the issue of collective rights; the relationship between cultural and individual assimilation; the prohibition of genocide; the legal status of the concept of ethnocide or cultural genocide; the question of legal duties to *prevent* harms and violence against Indigenous peoples and communities; and the concept of minimum standard rights in the context of Indigenous peoples' dignity and well-being. These issues are drawn out in the analysis below, with reference to their relationship to pre-existing and subsequently developing law at the international, regional, and domestic levels.

1.3 Historical Context of Standards for Indigenous Non-Assimilation, Cultural and Personal Survival, Well-Being and Dignity

The importance of international legal provisions protecting the right to Indigenous survival, both individually and collectively, can only be understood in light of the fact that, to date, legal standards have not protected Indigenous peoples from much of the violence perpetrated against them. Rather, international and domestic laws have often served as instruments to perpetrate cultural and personal extinction and assimilation. From the earliest encounters between Westphalian international law and Indigenous peoples, international law operated so as to bring Indigenous peoples within its reach, yet deny them the benefits of its protection.[3] Simultaneously, in encounters between Indigenous peoples and settler societies or colonizing populations, laws and legal doctrine were used to devastating effect. For example, the law of the new foreign power effected territorial dispossession, such as through the non-recognition of Indigenous title to land, thus resulting in its vitiation through law.[4] Newly imposed laws prohibited important cultural practices such as, in North America, the Potlatch.[5] They denied autonomy, with Brazilian laws, for example, requiring levels of 'civilization' to be attained before

[3] A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 21.

[4] See K McNeil, 'Judicial Treatment of Indigenous Land Rights in the Common Law World' in BJ Richardson, S Imai, and K McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart 2009) 257–84. The use of housing policies to both displace and acculturate Indigenous peoples is discussed in J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart 2013) 189–96.

[5] The Potlatch was outlawed in Canada from the 1880s until the revision of the Indian Act in 1951. For example, s 140(1) of the Indian Act 1927 provided that:

Indigenous people were recognized as autonomous, rather than 'incapacitated'.[6] Legal personhood of Indigenous individuals was ignored, such as through denial of identity documents and birth registration.[7] Even the factual existence of Indigenous persons was legally denied through doctrines such as *terra nullius*.[8] Colonial or imperial laws also were used to destroy cultural integrity and reproduction through forced sterilization,[9] and the forced or coerced removal of children.[10]

International law's role in the assimilation and acculturation of Indigenous peoples has been explicit. The International Labour Organization's (ILO) Indigenous and Tribal Populations Convention, 1957 (ILO 107)[11] adopted a 'humanitarian' stance premised on the eventual assimilation of Indigenous peoples.[12] While the Convention was declared closed for ratification with the subsequent coming into force of its successor,

> Every Indian or other person who engages in, or assists in celebrating or encourages either directly or indirectly another to celebrate any Indian Festival, dance or other ceremony of which the giving away or paying or giving back of money, goods or articles of any sort forms a part, or is a feature, whether such gift of money, goods or articles takes place before, at, or after the celebration of the same, or who engages or assists in any celebration or dance of which the wounding or mutilation of the dead or living body of any human being or animal forms a part or is a feature, is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding six months and not less than two months.

See further SL Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (University of Toronto Press 1998) 268–69.

[6] Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Brazil, Chapter VI: Human Rights of the Indigenous Peoples in Brazil, IACHR Doc 29 rev 1 (Washington, DC 1997) para 11.

[7] See *Sawhoyamaxa v Paraguay* (Merits, Reparations, and Costs), IACtHR (2006) paras 190–94, where the Court held that lack of official identity documents meant 'members of the Community have remained in a legal limbo in which, though they have been born and have died in Paraguay, their existence and identity were never legally recognized, that is to say, they did not have personality before the law' (para 192). See also *Moiwana Community v Suriname* (Preliminary Objections and Merits) (2005) para 178. *Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs) (2007) shows a different angle. Here, violation of Art 3 of the American Convention on Human Rights (right to juridical personality) is not based on the personality of the individual members, but of the group itself (paras 167–75). See also *Case of the Xákmok Kásek Indigenous Community v Paraguay* (Merits, Reparations, and Costs) (2010) paras 245–55; *Rio Negro Massacres v Guatemala* (Preliminary Objection, Merits, Reparations, and Costs) (2012).

[8] *Terra nullius* deemed lands inhabited by Indigenous peoples empty, as though their inhabitants simply were not there at all. See *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992) paras 33–34 (High Court of Australia). Canada's Indian Act (1876) achieved a similar outcome through enfranchisement, as 'an enfranchised Indian ceased, in law, to be an Indian'. A Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (University of British Columbia Press 1995) 77–78.

[9] *Maria Mamerita Mestanza Chávez v Peru*, Case 12.191, Report No 71/03, IACtHR, OEA/Ser.L/V/II.118 Doc 70 rev 2 (2003). See also J Lawrence, 'The Indian Health Service and the Sterilization of Native American Women' (2000) 24(3) American Indian Q 400; and MV Carpio, 'The Lost Generation: American Indian Women and Sterilization Abuse' (2004) 31(4) Social Justice 40.

[10] The Australian State's 'stolen generations' practices were characterized in a national inquiry as genocide: Human Rights and Equal Opportunity Commission, 'Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (1997) 188 (although domestic Australian courts subsequently disagreed (*Kruger v Commonwealth* [1997] HCA 27 and *Cubillo and Gunner v Commonwealth* [1999] FCA 518)). Canada's last federally run residential school closed only in 1996, and the residential schools programme in Canada has been subject to a national truth and reconciliation process, which found that Canada engaged in 'a conscious policy of cultural genocide' of its Indigenous peoples. Truth and Reconciliation Commission of Canada (TRC), 'Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada' (TRC 2015) 55, 133; TRC, 'Canada, Aboriginal Peoples and Residential Schools: They Came for the Children' (TRC 2012) 20. See further below, Section 3.2.

[11] ILO Indigenous and Tribal Populations Convention, 1957 (No 107) (entered into force 2 June 1959).

[12] ibid. The Preamble addresses those Indigenous peoples 'not yet integrated into the national community': see also Art 2.

ILO Convention 169 (ILO 169),[13] it remains in force for those State Parties to it which have not subsequently ratified ILO 169.[14] As such, it remains an important reminder of the significant achievement of the UNDRIP's provisions on non-assimilation when seen against the backdrop of extant international law and practice.

The creation of ILO 169 in 1989 was explicitly undertaken in response to the 'assimilationist orientation' of ILO Convention 107,[15] and as such represented an important, even 'revolutionary',[16] legal and philosophical development as regards the survival of Indigenous peoples.

The rights in Part I on 'General Policy' protect cultural norms and institutions. Lenzerini writes that ILO 169 contains 'all basic features which are essential for preserving the integrity and identity of each indigenous community'.[17] For example, Article 2 protects cultural identity and integrity, while Article 8(2) states that individuals have the right 'to retain their own customs and institutions', thus providing protection for cultural survival as distinct populations. Yet, overall, ILO 169 remains couched within the terms of State responsibility, rather than Indigenous rights. Article 2 is emblematic:

> Article 2
>
> 1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
> 2. Such action shall include measures for:
>   (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
>   (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
>   (c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

It is important to note that the revision of ILO Convention 107 into ILO 169 occurred *during* the early drafting and negotiation process of the UNDRIP. Highlighting this temporal parallel brings into focus the significant importance of the UNDRIP: despite the conclusion of ILO 169, States and Indigenous peoples remained committed to the process of negotiating a Declaration on the Rights of Indigenous Peoples. As such, as much as the UNDRIP may reflect, in many respects, existing international law and human rights standards, its significance cannot be reduced to a mere restatement. Rather, it represents a new way of thinking about Indigenous peoples and their place in the world. Importantly in the context of this chapter, it goes some distance towards recognizing the fundamental importance of cultural and group survival for the meaningful individual survival of Indigenous persons.

[13] ILO Indigenous and Tribal Peoples Convention, 1989 (No 169) (entered into force 5 September 1991).
[14] ILO Convention 107 (n 11) Art 36.
[15] ILO Convention 169 (n 13) Preamble.
[16] F Lenzerini, 'The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law' in Lenzerini (n 2) 84.
[17] ibid 86.

1.4 Pre-existing Standards

In addition to ILO Conventions 107 and 169, it is clear that by virtue of their status as human beings, the survival and dignity of Indigenous *individuals* is protected by a wealth of rights. Moreover, as discussed further in Section 3.1, a range of international standards protect collective rights either explicitly, as in the African Charter on Human and Peoples' Rights, or by necessary implication, such as in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and in Article 30 of the Convention on the Rights of the Child (CRC).

The genocide of groups, the definition of which would include Indigenous peoples, is clearly prohibited in international law, not only by the Genocide Convention, but also as a *jus cogens* norm of customary international law, as further elucidated in Section 3.2 below. Whether the definition of genocide might include cultural, as well as physical, destruction was a major point of negotiation during the drafting of the Genocide Convention.[18] Because of the deeply important point Indigenous negotiators made regarding the connection between group and cultural survival, and meaningful individual survival, the question raised its head again in fearsome fashion during the negotiations over the UNDRIP. The status of ethnocide or cultural genocide as a principle of international law is discussed further in Section 3.3.

It is also clear that, with regard to these pre-existing rights, States have well-established duties to respect, protect, and fulfil the rights in question. Whether the UNDRIP imposes additional duties through Article 8(2) is also discussed further in Section 3.4.

Before turning to examine how these pre-existing provisions have been developed in the UNDRIP, and particularly their legal status, it is necessary to touch on the negotiations of the Declaration itself. Only in light of this history can the relationship of the final provisions of the UNDRIP to existing and emerging international law be understood.

2. The Drafting History of Articles 7(2), 8, and 43.

2.1 Early Development of Principles

The genesis of Articles 7, 8, and 43 can be traced to initial principles for a Draft Declaration, presented to the UN Working Group on Indigenous Populations (WGIP) in 1985.[19] The third principle submitted at that time called for the protection of:

> The collective right to exist and be protected against genocide, as well as the individual right to life, physical integrity, liberty, and security of person.[20]

It is this principle of collective survival that lies behind the Articles in question in this chapter.

The first revised text of the Draft Universal Declaration of the Rights of Indigenous Peoples, examined by the WGIP in 1989, reflected discussion on the question of collective versus individual rights, a controversy present from the start. It also revealed important questions regarding the status of Indigenous peoples as *peoples*: even at this

[18] H Abtahi and P Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008) 233–37.

[19] Report of the WGIP on Its Fourth Session, Chairman-Rapporteur: Mrs Erica-Irene Daes, UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985) Annex II.

[20] ibid.

stage, the right to be protected against genocide was phrased to include the right to exist as distinct peoples.[21] It was also from this session that the 'collective and individual right to protection against ethnocide' was introduced, defined to include 'in particular, prevention of any act which has the aim or effect of depriving [Indigenous peoples] of their ethnic characteristics or cultural identity, of any form of forced assimilation or integration, of imposition of foreign life-styles and of any propaganda derogating their dignity and diversity'.[22] This reflected the view that even activities which were not 'explicitly' hostile often in effect led to the 'destruction of indigenous peoples as groups'.[23]

It was also here that the statement that 'these rights constitute the minimum standards for the survival and well-being of the indigenous peoples of the world'[24] emerged, a phrase that remained largely intact throughout the two decades of negotiations, albeit with the addition of the word 'dignity' in the draft agreed by the WGIP at its 11th Session.[25]

In 1990, governments were invited to comment on the text.[26] Subsequently, in 1993, the WGIP agreed a revised text of forty-two operative paragraphs, which was submitted to the Human Rights Council's (HRC) Sub-Commission on Prevention of Discrimination and Protection of Minorities.[27] The prohibitions on genocide and on cultural genocide or ethnocide were further elucidated at this point. Operative paragraph 5 read that: 'Indigenous peoples have the collective right to exist in peace and security as distinct peoples and to be protected against any type of genocide. Consequently, they have the individual rights to life, physical and mental integrity, liberty and security of person.' This wording was interesting in that it appeared to make the individual right to life reliant on cultural existence. Although this might have had unsavoury legal consequences for the right to life, it again illuminates the position that Indigenous group survival and non-assimilation is crucial for meaningful individual survival for Indigenous persons.

Operative paragraph 6, meanwhile, was set out as follows:

> Indigenous peoples have the collective and individual right to be protected against ethnocide and cultural genocide, including the prevention of and redress for: (a) Removal of indigenous children from their families and communities under any pretext; (b) Any action which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities; (c) Any form of forced assimilation or integration by imposition of other cultures or ways of life; (d) Dispossession of their lands, territories or resources; (e) Any propaganda directed against them ...

[21] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, First Revised Text of the Draft Universal Declaration on Rights of Indigenous Peoples Prepared by the Chairman-Rapporteur of the Working Group on Indigenous Populations, Mrs Erica-Irene Daes, pursuant to Sub-Commission Resolution 1988/18, UN Doc E/CN.4/Sub.2/1989/33 (15 June 1989) para 3: 'The [collective] right to exist AS DISTINCT PEOPLES and to be protected against genocide, as well as the [individual] rights to life, physical integrity, liberty and security of person' (emphasis in original).

[22] ibid para 5. The Report of the Working Group on Its Fifth Session had already noted that for Indigenous observers, the 'question of ethnocide ... was at the heart of the task entrusted to the Working Group'. Report of the Working Group on Its Fifth Session, UN Doc E/CN.4/Sub.2/1987/22 (24 August 1987) para 60.

[23] Report of the Working Group on Its Fifth Session, para 60.

[24] ibid para 29.

[25] Annex I: Draft Declaration as Agreed upon by the Members of the Working Group at Its Eleventh Session, UN Doc E/CN.4/Sub.2/1993/29/Annex I (23 August 1993) Art 42.

[26] See Report of the Working Group on Indigenous Populations on Its Eighth Session, UN Doc E/CN.4/Sub.2/1990/42 (27 August 1990).

[27] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft Declaration on the Rights of Indigenous Peoples, Revised working paper submitted by the Chairman-Rapporteur, Ms Erica-Irene Daes, pursuant to Sub-Commission Resolution 1992/33 and Commission on Human Rights Resolution 1993/31, UN Doc E/CN.4/Sub.2/1993/26 (8 June 1993).

These versions of the Articles were clearer and served to spell out cardinal concerns of Indigenous peoples about the manifestations of cultural destruction experienced by them. In addition, a right of redress was introduced.[28]

When the WGIP agreed on a text at its 11th session in 1993,[29] Article 6, previous operative paragraph 5, now read:

> Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.
>
> In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

This draft included the right to live in freedom, as well as peace and security, and strengthened the 'right to be protected against any type of genocide' to 'full guarantees' against genocide or 'any other act of violence'. It also explicitly referred to the removal of Indigenous children from their families and communities as genocide. It sought to prohibit this practice under 'any pretext', moving this requirement from previous operative paragraph 6.

Article 7, transposed from operative paragraph 6, now included four sub-paragraphs, dealing with prevention and redress for specific acts:

> Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
>
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
> (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
> (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
> (e) Any form of propaganda directed against them.

What became Article 43 was introduced at this time in its final form (as then Article 42).

It was the draft text as agreed upon by the members of the WGIP at its 11th session,[30] which was then adopted by the UN Sub-Commission on Prevention and Discrimination and Protection of Minorities in July 1994.[31]

2.2 The Continuing Debate before the Working Group on the Draft Declaration

This draft text was referred to the Commission on Human Rights, which created a further ad hoc working group.[32] Over the next decade, the working group met on eleven occasions to attempt agreement on the final text.

[28] The concept and development of this aspect of the provision is discussed further by Lenzerini, Chapter 19, this volume, Section 1.

[29] Draft Declaration (n 25). [30] ibid.

[31] See UN Sub-Commission on Prevention and Discrimination and Protection of Minorities Res 1994/45 (26 August 1994).

[32] Working Group Established in Accordance with Commission on Human Rights Res 1995/32.

Although all Indigenous organizations had called for the adoption of Part II as it stood, only one government supported the full draft.[33] Issues which continued to dog agreement on the text included the status of collective rights. In the context of the provisions analysed in this chapter, one specific manifestation of this issue was linked to concerns regarding the collective right to live as 'distinct peoples' and its relationship to the territorial integrity and sovereignty of States, in what was then Article 7(b).[34] Then Article 7 was also difficult for States because of the link in sub (b) of Article 7, between prevention and redress for removal from lands and territories, and the prohibition of a crime of ethnocide or cultural genocide.[35]

The terms 'ethnocide' and 'cultural genocide' were met with hostility by States, some of which argued that the terms were 'not clear concepts that could be usefully applied in practice'.[36] As to the sub-headings of then Article 7, States resisted the prohibition of population transfer 'under any pretext' in Article 7(c) of the Draft as too restrictive, since the best interests of a child might require removal in some circumstances.[37]

However, many Indigenous groups, NGOs, and some States continued to resist any dilution of the Draft, and called for its adoption as set out in the Draft Text.[38] They continued to insist that the Draft represented the minimum standard for the protection of Indigenous peoples,[39] reiterating that it was important for all States to understand the Declaration as a floor of protection. Indigenous representatives warned that if the contents of the Declaration were to be 'watered down', they would no longer support the statement that the UN Declaration constituted minimum standards.[40] For example, the Grand Chief of the Council of the Crees stated that the Draft Declaration was already the product of 'substantial compromise'.[41] This point received strong support from a broad range of Indigenous representatives and observers. In addition, it was widely supported by States,[42] although some States did suggest that 'minimum' standards could be replaced by 'indicative' standards.[43] Some States also suggested that Article 42, as it then was, should be considered in light of existing standards on progressive implementation in international human rights.[44] Both of these suggestions indicate resistance to the text as a statement of minimum standards.

In March 2002, the Working Group reported on informal discussions which it had held on then Articles 6 to 11,[45] and during which it had solicited concrete proposals for redrafting.[46] These discussions revealed significant disagreements over the draft text.

With regard to draft Article 6 on the right to collective survival and freedom from genocide, the first issue was of collective rights to freedom, peace, and security; the

[33] Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/1996/84 (4 January 1996) para 58 (which government is not recorded in the text).

[34] ibid paras 59 and 63 respectively. [35] ibid para 66.

[36] Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/1997/102 (10 December 1996) para 188 (United States). See also UN Doc E/CN.4/1996/84 (n 33) para 64.

[37] ibid para 65. See also UN Doc E/CN.4/1997/102, para 176.

[38] See, eg, UN Doc E/CN.4/1998/106 (15 December 1997) para 30 (observer for the Association Nouvelle pour la Culture et les Arts Populaires); UN Doc E/CN.4/1999/82 (20 January 1999) para 35 (observer for the Shor People); UN Doc E/CN.4/2000/84 (6 December 1999) para 33; UN Doc E/CN.4/2001/NGO /54 (23 January 2001) (written statement ATSIC).

[39] ibid. [40] UN Doc E/CN.4/1996/84 (n 33) para 100.

[41] UN Doc E/CN.4/1997/102 (n 36) para 20. [42] ibid, eg, paras 54–59, 61–62, 115, 118.

[43] UN Doc E/CN.4/1997/102 (n 36) para 107 (Brazil). [44] ibid para 117 (Canada).

[45] UN Doc E/CN.4/2002/98 (6 March 2002). [46] ibid para 45.

second the question of the interpretation of genocide, and whether that definition should be included as in the Genocide Convention of 1948; and the third, the legal nature of the terms, specifically 'physical and mental integrity', 'violence', and 'distinct peoples'.[47]

On the question of draft Article 7, again the main issue concerned the inclusion of the terms 'ethnocide' and 'cultural genocide'. Indigenous representatives stated that the whole purpose of the Declaration was to establish standards, not merely to mirror existing international and domestic laws. As such, it was important to understand that draft Article 7 had 'the specific purpose ... to address and/or prevent historical and contemporary acts of ethnocide and cultural genocide'.[48] They stressed the important link between ethnocide and the dispossession of lands and territories, noting that as 'land was a key component of indigenous culture ... dispossession of land was paramount to ethnocide'.[49] The relevant provision in the 1993 draft UN Declaration referred to 'full guarantees against genocide'.[50] Indigenous representatives argued that this phrasing required States to provide redress for genocides already committed.[51] The subsequent Report of the Working Group of January 2003 illustrates that a major negotiating issue remained the status of ethnocide and cultural genocide within international law.[52]

It was not until 2004 that headway was made on these issues. The text of what finally became Article 7 emerged from a proposal by Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland in 2004.[53] In the explanation accompanying the change, they noted that this proposal achieved the result of clarifying that genocide, which now appeared in sub (2), was applicable only to collectives, not to individuals, to reflect the international legal position in Article 2(e) of the Genocide Convention.[54] The same proposal suggested a new text for what finally became Article 8, which excluded the terms 'ethnocide' and 'cultural genocide'.[55] These phrasings of the two Articles gained momentum,[56] and in the Report of the Working Group on its Eleventh Session,[57] representatives reported that, based on Consultations during that session, no further discussion was required on Articles 6, 7, and 42,[58] which finally became 7, 8, and 43 respectively of the HRC's UN Draft Declaration.[59]

2.3 The Text Approved by the Human Rights Council

Despite the statement that no further discussion on the Draft was needed, there were some further changes to the text at this stage.[60] Article 7 remained as proposed, while Article 8 was given a further set of sub-headings which clarified the acts for which States owed obligations of prevention and redress. The adjective 'forced' was introduced before the prohibition of population transfer in Article 8(2)(c) and before 'assimilation or

[47] ibid para 64. [48] ibid para 74. [49] ibid.
[50] Draft Declaration (n 25) Art 6. [51] UN Doc E/CN.4/2002/98 (n 45) para 63.
[52] UN Doc E/CN.4/2003/92, para 52.
[53] UN Doc E/CN.4/2004.WG.15/CRP.1 (6 September 2004).
[54] UN Doc E/CN.4/2004.WG.15/CRP.3 (6 September 2004).
[55] UN Doc E/CN.4/2004.WG.15/CRP.1 (n 53), although note that in Art 8 States' duties to prevent in Art 8(2) was suggested by the Chairman in UN Doc E/CN.4/2004/WG.15/CPR/14.4 (14 October 2004).
[56] See Chairman's Summary of Proposals (Mr Luis-Enrique Chávez), UN Doc E/CN.4/WG.15/CRP.4 (14 October 2004); Information Provided by the Sami Council and the Tebtebba Foundation endorsed by the Sami Parliamentarian Council, UN Doc E/CN.4/2004/WG.15/CRP.5 (28 October 2004).
[57] UN Doc E/CN.4/2005/WG.15/CRP.1 (22 March 2006). [58] ibid para 25.
[59] Res No 1/2 of 29 June 2006, UN Doc A/HRC/1/L.10 (30 June 2006). [60] ibid 58ff.

integration' in Article 8(2)(d). Finally, Article 8(2)(e) became '[a]ny form of propaganda designed to promote or incite racial or ethnic discrimination directed against them'.

2.4 Discussion on the Adoption of the Text at the UN General Assembly

After further controversies, set out in Chapters 2 and 19 of this volume, the issue of the possible adoption of the Declaration was opened at the plenary GA on 13 September 2007.[61] A range of States took the opportunity to issue statements on their votes. Many took the opportunity to express concern about the provisions on land rights, implicitly or explicitly calling into question Article 8(2)(b),[62] particularly with regard to the question of redress.[63]

There were frequent statements that the Declaration should be seen only as aspirational, rather than as conferring legal rights or as reflective of international law.[64] Yet, such statements sit awkwardly with Article 43's requirement that the Declaration constitutes a minimum standard. Such statements must also be considered in light of the subsequent adoption of the Declaration by States which previously voted against it. Moreover, many States (including those voting against) also asserted that their own domestic policies met or exceeded the standards set by the Declaration in various ways.[65] Meanwhile, some States explicitly stated that the Declaration represented progress on the rights of Indigenous peoples.[66]

3. Legal Status and Implications of the Rights in Articles 7(2), 8, and 43

This section sets out the legal status and implications of the provisions in question. The analysis sets the UNDRIP within the context of its relationship to previous international legal provisions, State practice, and relevant judicial and other quasi-judicial decisions at the international, regional, and national levels. It assesses the developments brought about by the UNDRIP, as well as considering when the UNDRIP provisions discussed in this chapter can be considered the culmination of other legal developments. The analysis is pursued through the main issues raised by provisions 7(2), 8, and 43. These are: collective rights; genocide under Article 7(2); cultural genocide or ethnocide; obligations to prevent harms under Article 8(2); and the concept of minimum standards under Article 43. The relationship of these legal standards to each other must be understood in the context of the efforts of Indigenous peoples to gain international legal recognition of the crucial connections among their individual survival, cultural rights, non-assimilation, and land rights. It is these interconnections which explain the intractable discussions over genocide—the prohibition

[61] See UN Doc A/61/PV.107, GA Official Records, Sixty-First Session, 107th plenary meeting—Thursday, 13 September 2007, 10 am.

[62] ibid, eg: Canada, 12–13, NZ, 14, USA, 15, Russia 16. On the issue of lands, see further Charters, Chapter 14, this volume.

[63] See further Lenzerini, Chapter 19, this volume.

[64] UN Doc A/61/PV.107 (n 61): 12 (Australia); 13 (Canada, Suriname); UN Doc A/61/PV.108: 3 (Nepal); 5 (Turkey).

[65] UN Doc A/61/PV.107 (n 61): 17 (Colombia), 21 (Chile), 22 (Norway); UN Doc A/61/PV.108 (n 64): 5 (Philippines), 6 (Nigeria).

[66] UN Doc A/61/PV.107 (n 61) (Benin).

of which otherwise appears as a clear *jus cogens* norm of international law—and its relationship to cultural destruction and to dispossession from lands and territories, and which explain the need to examine the connections between these three provisions and the existing cultural rights of Indigenous peoples or groups in international law.

3.1 Collective Rights to Cultural Survival

Although during the drafting process, some States argued that international law does not recognize collective rights,[67] a view to which some States held after the adoption of the Declaration,[68] a range of pre-existing standards of international law belie this position. Both ILO Conventions 107 and 169[69] recognize the need for protection of Indigenous collective practices, even if it could be argued that these (particularly ILO Convention 107) are not couched explicitly in terms of rights, but rather in States' duties of protection of the collective.[70]

Article 27 of the ICCPR provides:

> 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 other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 27 of the ICCPR enshrines a right;[71] however, the Human Rights Committee (HRComm) in General Comment 23 is careful to point out that the right inheres to each individual, not the collective as such.[72] Nevertheless, cases decided under the optional protocol to the ICCPR reveal that the collective element of this right is crucial.[73] Thus, as Anaya notes, the 'practical application' of Article 27 results in the protection of group rights.[74] A similar approach is evidenced in the Committee on the Elimination of Racial Discrimination's (CERD) General Comment on Indigenous Peoples,[75] while the Organization of American States (OAS) American Declaration on the Rights of Indigenous Peoples[76] dedicates Section Two to 'Human Rights and Collective Rights'.

[67] UN Doc E/CN.4/2003/92 (n 52) para 39 (Australia). See also UN Doc E/CN.4/1997/102 (n 36) paras 108 (France), 112 (Japan), 113 (Sweden, stating that Human Rights are individual rights); UN Commission on Human Rights (1995), UN Doc E/CN.4/1995/WG.15/2/Add.1 (13 November 1995) para 4 (Japan).

[68] UN Doc A/61/PV.107 (n 61) 21 (United Kingdom); see also 20 (Japan).

[69] See, eg, ILO Convention 107 (n 11) Art 3 (on special measures for non-integrated populations); Art 7 (on the right of the relevant populations to follow their own customs). See also ILO Convention 169 (n 13) Art 5.

[70] Other international and regional standards which have a protective collective element, though do not enshrine a collective right, include, eg, the UN Charter, ECOSOC Res 1503 on gross violations of Human Rights (ECOSOC Res 1503 (XLVIII)), 48 UN ESCOR (No 1A) 8, UN Doc E/4832/Add.1 (1970); and the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (entered into force 12 January 1951).

[71] HRComm, General Comment 23: Article 27: Rights of Minorities, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) para 6.1.

[72] ibid paras 1, 3.1. See also 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc A/RES/47/135 (18 December 1992) (which protects rights individually or in community with others in Art. 3.1), similarly to the Framework Convention for the Protection of National Minorities, Strasbourg, 1.II.1995's Art 3.

[73] See, eg, *Lubicon Lake Band v Canada*, HRComm Comm No 167/1984 (26 March 1990) para 32.2; *Angela Poma Poma v Peru*, HRComm Comm No 1457/2006 (27 March 2009) paras 7.3, 7.4.

[74] SJ Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004) 135.

[75] CERD, General Recommendation 23: Rights of Indigenous Peoples, UN Doc A/52/18 (18 August 1997) Annex V.

[76] OEA/Ser.P AG/doc.5537/16 (8 June 2016).

Specifically, Article VI on Collective Rights states that 'Indigenous peoples have collective rights that are indispensable for their existence, wellbeing, and integral development as peoples. In this regard, the states recognize and respect, the right of the indigenous peoples to their collective action', going on to list a number of rights: 'to their juridical, social, political, and economic systems or institutions; to their own cultures; to profess and practice their spiritual beliefs; to use their own tongues and languages; and to their lands, territories and resources ...'.

Article 30 of the CRC,[77] interpreted in General Comment 11 on the Rights of Indigenous Children, explains that the best interests of the Indigenous child can only be understood as both a collective and individual right, and that 'the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights'.[78]

Finally, the Committee on Economic, Social and Cultural Rights' (CESCR) General Comment 21 on the Right to take Part in Cultural Life under Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that 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, as well as the United Nations Declaration on the Rights of Indigenous Peoples.[79]

Even if these provisions could be interpreted as falling short of *explicitly* collective rights, rather than as rights with merely collective dimensions, the African Charter on Human and Peoples' Rights Articles 19 to 24 enshrine collective rights as peoples' rights, and the African Commission has held, in the context of Indigenous peoples' rights, that human rights in Africa necessarily have a collective dimension. In the *Ogoni* case, the Commission stated that '[c]learly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa'.[80]

Likewise, the Inter-American Court and the Inter-American Commission on Human Rights have interpreted rights, particularly in cases affecting Indigenous peoples, as having collective dimensions or as creating collective rights. The landmark *Awas Tingni v Nicaragua* case's recognition of the collective right to property in traditional lands pre-dates the final adoption of the UNDRIP by more than half a decade, and the Court here stated that: 'article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.'[81]

[77] Convention on the Rights of the Child, Adopted by General Assembly Resolution 44/25 of 20 November 1989 (entry into force 2 September 1990). Article 30 states 'in those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her culture, to profess and practice his or her own religion, or to use his or her own language'.

[78] CommRC, General Comment 11: Indigenous Children and their Rights under the Convention, UN Doc CRC/C/GC/11 (12 February 2009) para 30.

[79] CESCR, General Comment 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1(a), of the ICESCR), UN Doc E/C.12/GC/21 (21 December 2009) para 7, see also para 36.

[80] *SERAC and CESR v Nigeria* (*Ogoni* case), Comm No 155/96, ACHPR/COMM/A044/1 (27 May 2002) para 68; see also paras 63 and 67 on the collective violations of other rights in the case.

[81] *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment (31 August 2001), IACtHR Series C No 79 (2001) paras 148ff. The Court noted that the Nicaraguan constitution also recognized such

Latin American domestic constitutions have also recognized the collective rights of Indigenous peoples in explicit terms.[82]

As such, the UNDRIP cannot be said to create a new *category* of collective rights. Yet, the UNDRIP remains an important development in collective rights for Indigenous peoples. Articles 7(2), 8, and 43 make explicit that Indigenous groups enjoy collective rights *to survive as distinct peoples*. The three provisions serve to clarify the relationship between existing individual human rights with collective dimensions, and peoples' rights in international law, such as codified in common Article 1 of the human rights conventions. These Articles thus clearly inform newly emerging approaches to the rights of Indigenous peoples, particularly in the Inter-American system and in Africa.[83]

In addition to the OAS American Declaration on the Rights of Indigenous Peoples, which now includes the right to cultural identity and integrity in Article XIII, the Inter-American Commission has discussed the concept of cultural integrity at length.[84]

The IACtHR, in *Kichwa of Sarayaku v Ecuador*,[85] invoked Article 8(1) of the UNDRIP in particular, and the UNDRIP as a whole, in noting that 'the right to cultural identity is a fundamental right—and one of a collective nature—of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society'.[86] The case as a whole is important as it shows the developing recognition in law that protection of rights to land and territory are necessarily inherent in the protection of cultural survival, reflecting Article 8(2) of the UNDRIP.

Similarly, the CESCR's General Comment 21 of 2009 on the Right of Everyone to Take Part in Cultural Life under Article 15 of the ICESCR is heavily influenced by and reliant on the UNDRIP. With regard to cultural survival, the CESCR recognizes the collective element of Indigenous peoples' right to culture, noting that 'the strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'.[87]

Overall, Articles 7(2), 8, and 43 of the UNDRIP serve to clarify the rights to collective cultural survival of Indigenous peoples as distinct peoples, and illuminate the intimate relationship among culture, land, and cultural survival. While this relationship may be becoming increasingly non-contentious in international law, the interconnections between land, forced-assimilation of Indigenous peoples, and the international crime of genocide—particularly the question as to whether that crime has a

a right. See also Colombian Constitution Art. 329, Colombian Constitutional Court: Judgments T/188 of 1993, T/652 of 1998, T/907 of 2011, T/282 of 2011, T/433 of 2011. See also: Bolivian Constitution Art 394; Venezuelan Constitution Art 181; Peruvian Constitution Art 89.

[82] See the constitutions in n 81. See also the Bolivian Constitution Ch 4. The Venezuelan Constitution Ch 8, Art 126 states that '[t]he term people cannot be interpreted in this Constitution in the sense that is given to it under international law', thus overriding any doubt about the collective rights of Indigenous peoples stemming from questions of the non-status of Indigenous peoples as peoples in international law.

[83] *Ogoni* case (n 80); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission of Human Rights, Comm No 276/03 (2010).

[84] Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II, Doc 56/09 (2009) paras 57, 205–06, fn 647.

[85] *Kichwa Indigenous Peoples of Sarayaku v Equador* (Merits and Reparations), IACtHR (2012).

[86] ibid para 217 and fn 288. See also para 215.

[87] CESCR, General Comment 21 (n 79) para 36.

cultural dimension—revealed major disagreements among the negotiating parties, and illuminated aspects of the UNDRIP which sought to push the law on Indigenous rights beyond limits currently acceptable to States.

3.2 The Prohibition of Genocide

The question of the prohibition of genocide of Indigenous peoples was the subject of intense debate during the UNDRIP drafting process, due to efforts by negotiators to include a prohibition on ethnocide or cultural genocide based on forced cultural assimilation *within* the international crime of genocide, and to link such a crime to past dispossession of land.

The concept of genocide was given international legal status in the 1948 Genocide Convention,[88] where it is defined in Article 2:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

The Rome Statue of the International Criminal Court (ICC) incorporates the same definition in Article 6,[89] while the International Criminal Tribunals for Yugoslavia (ICTY) and for Rwanda (ICTR) also repeat this definition verbatim in Article 2 of each statute.[90] The American Declaration on the Rights of Indigenous Peoples states baldly in Article XI that: 'Indigenous peoples have the right not to be subjected to any form of genocide or attempts to exterminate them.'

Guatemala has been held to account for the genocide of the Maya people living in its territories, part of its brutal repression and civil war, which spanned the 1960s to the 1990s.[91] The vast majority of the victims were Mayan.[92] The Commission for Historical Clarification reported in 1999, finding that Guatemala had committed genocide of Maya Communities. The States' 'criminal acts and human rights violations' were 'directed systematically against groups of the Mayan population',[93] who were targeted for mass killings, starvation, and torture. The Guatemalan armed forces carried out the government's 'strategically planned policy, manifested in actions which had a logical and coherent sequence'.[94] The Commission found that the killings and human rights violations were carried out 'with intent to destroy, in whole or in part these groups' as

[88] Genocide Convention (n 70).

[89] Rome Statute of the International Criminal Court, 2187 UNTS 90 (adopted 17 May 1998, entered into force 1 May 2002).

[90] ICTY, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/RES/827 (1993); ICTR, Statute of the International Criminal Tribunal for Rwanda, UN Doc S/Res/955 (1994).

[91] See Guatemala, 'Memory of Silence Tzínil Natabál: Report of the Commission for Historical Clarification, Conclusions and Recommendations' (1999).

[92] ibid para 15. [93] ibid para 112. [94] ibid para 120.

set out in Article 2(1) of the Genocide Convention.[95] The Commission found that the government's actions fell under Article 2(b), II(c), in that 'serious bodily or mental harm was inflicted', and 'the group was deliberately subjected to living conditions calculated to bring about its physical destruction in whole or in part'.[96]

Not only is genocide prohibited by treaty, its prohibition has clearly attained customary international legal status as a *jus cogens* norm,[97] and as imposing obligations *erga omnes*.[98] Thus, Article 7(2) reflects customary international law, while reinforcing that Indigenous peoples fall within those groups whose destruction, in whole or part, constitutes genocide.

The addition of the phrase preventing 'forcibly removing children of the group to another group' in Article 7(2) is already explicitly covered in Article 2(e) of the Genocide Convention; however, its inclusion in the UNDRIP is of particular symbolic significance for Indigenous communities, for whom the acculturation of future generations has often been sought through forced removal. For example, in the report into Australia's 'stolen generations', Australia's Human Rights and Equal Opportunities Commission characterized the forced removal of Indigenous children as genocide,[99] noting that the predominant aim of the removal of Indigenous children was their assimilation into European settler culture, with the gradual disappearance of their cultural values.[100] Nevertheless, domestic courts in Australia subsequently rejected the presence of the intent required for a finding of genocide.[101]

Of course, it should also be noted that Article 7(2) is phrased so as to protect Indigenous peoples not only against genocide, but against 'any other act of violence', and should as such not be confined to situations which fit the narrow and stringent legal tests for genocide, but also to acts of violence falling outside this narrow range.

The significance of including in Article 7(2) a principle of international law which is already clearly prohibited is twofold. First, it reiterates the importance of the prohibition, and the criminal repercussions of the perpetration of genocide. Second, it is important because of the historical experience of physical and cultural extermination which lies in the often not-too-distant past of many Indigenous communities.[102] In addition, it is linked to efforts to include a crime of ethnocide or cultural genocide, and thus to deal with the legacy and continuing policies of forced cultural assimilation. This is discussed below.

3.3 An Emerging Prohibition of Ethnocide or Cultural Genocide?

3.3.1 The Concept of Ethnocide or Cultural Genocide in International Law

The controversy over draft Article 8 was due in no small part to the fact that it sought to *introduce* a crime of ethnocide or cultural genocide to international law, so as to deal with

[95] ibid para 111. [96] ibid para 122.

[97] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep 15, 23.

[98] ibid, see also *Barcelona Traction, Light and Power Co, Ltd* (*Spain v Belgium*), Judgment, [1970] ICJ Rep 3, para 33.

[99] HREOC, 'Bringing Them Home' (n 10) 186, 188, 229ff. [100] ibid 232.

[101] See *Kruger* (n 10) and *Cubillo* (n 10). The *dolus specialis*, or specific 'genocidal intent', has been considered a necessary element of the crime. See, eg, ICTR, *Prosecutor v Akayesu*, Case No ICTR-96-4-T, Judgment (2 September 1998) para 498; ICTY, *Prosecutor v Jelisic*, Case No IT-95-10-T, Judgment (14 December 1999) para 78, although arguments have been raised that no such particular intent is required by the wording of the Convention: see O Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such' (2001) Leiden J Int'l L 399, 404–05.

[102] See Section 1.3, above.

the legacy of forced assimilation of Indigenous peoples, and to recognize the devastating effects of forced removal from lands and territories. A note by the Secretariat on the technical review of the Draft UNDRIP[103] noted the novelty of the concepts in current international human rights instruments,[104] while Indigenous representatives argued that the UNDRIP explicitly sought to establish new standards in this respect.[105]

Early drafts of the Genocide Convention included ethnocide or cultural genocide.[106] Nevertheless, the *travaux préparatoires* show that the final definition was explicitly confined to physical destruction of persons,[107] a position subsequently confirmed by international tribunals.[108] The issue was raised again in 1978 by the Special Rapporteur's Report on the Study of the Question of the Prevention and Punishment of the Crime of Genocide,[109] which considered whether expulsion of groups from their territories should constitute genocide, but answered in the negative.[110]

Conceptually, the concepts of ethnocide or cultural genocide remain linked to physical genocide in that genocide may be committed with the specific intent to destroy or assimilate a culture.[111] This was recognized in the ICTY's *Krstić* judgment, where the tribunal noted that one could 'conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community'.[112] However, they concluded that 'an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide'.[113]

More recently, the Canadian Truth and Reconciliation Commission argued in its Final Report that 'the extinguishment of peoples' languages and cultures ... the forced assimilation of children through removal of their families and communities—to be placed with people of another race for the purpose of destroying the race and culture from which the children come—can be deemed an act of genocide under Article 2(e) of the UN's Convention on Genocide'.[114]

Lenzerini also argues that the definition of genocide in the Genocide Convention can be extended to the forced assimilation of Indigenous peoples. He argues that forced

[103] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Technical Review of the UN Draft Declaration on the Rights of Indigenous Peoples, Note by the Secretariat, UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994).

[104] ibid para 36. [105] UN Doc E/CN.4/2002/98 (n 45) para 74.

[106] UN Doc A/362 GAOR Second Session, 6th Committee, Summary Records (16 September–26 November 1977) Annex 3.

[107] For the General Assembly discussion, see 3 UN GAOR (178th and 179th mtgs) 810-52, UN Docs A/760, A/760/Corr. 2 (1948); 3 UN GAOR, Legal Committee (83rd mtg) 191-207, UN Docs E/794, A/633 (1948). It is relevant to note that the policies of States towards Indigenous peoples in their colonies and dependent territories motivated the exclusion of cultural genocide at that time. See WA Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press 2000) 183–84.

[108] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), ICJ Judgment No 91 (26 February 2007) para 194. See also ICTY, *Prosecutor v Radislav Krstić*, Trial Judgment, No IT-98-33-T, Trial Chamber 1 ICTY (2 August 2001) paras 25, 576; in the US jurisdiction, see *Beanal v Freeport-McMoran, Inc*, 197 F3d 161, Court of Appeals, 5th Circuit 1999.

[109] UN ESCOR 31st Sess, 120, UN Doc E/CN.4/Sub.2/416 (1978). [110] ibid paras 23–24.

[111] See J Crawford, '"Peoples" or "Governments"?' in J Crawford (ed), *The Rights of Peoples* (Clarendon Press 1988) 60 fn 9.

[112] *Krstić* (n 108) para 480. [113] ibid. [114] TRC Final Report (n 10) 202.

removal from ancestral lands and 'the consequent sudden impact with the Western society' could constitute causing 'serious bodily or mental harm to members of the group' as contemplated in Article 2(b) and 'inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' (Article 2(c)) because such actions 'may in fact lead many indigenous persons to a physical and psychological decline that may eventually bring them to death'.[115] However, he concedes that the intent element—the requirement of the *dolus specialis*—is not revealed in State practice in current times.[116] This, however, says more about the legal limits of the crime of genocide than the standards of treatment meted out to Indigenous peoples by States.

Yet, while no binding international instrument includes a defined prohibition of ethnocide or cultural genocide, neither concept is wholly new in international standards. The 1982 UNESCO Declaration of San José condemns ethnocide.[117] In this Declaration, ethnocide is most clearly defined in the preambular paragraphs, the second of which states that:

> Ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture, whether collectively or individually. This involves an extreme form of massive violation of human rights and, in particular, the right of ethnic groups to respect for their cultural identity, as established by numerous declarations, covenants and agreements of the United Nations and its Specialized Agencies, as well as various regional intergovernmental bodies and numerous non-government organizations.

The Declaration of San José sets out that ethnocide and cultural genocide are one practice with two names, equivalent to genocide. Article 1 states:

> We declare that ethnocide, that is, cultural genocide, is a violation of international law equivalent to genocide, which was condemned by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide in 1948.

It is not clear, however, that the two terms are *necessarily* equivalent. In discussions over the terms during the drafting of the UNDRIP, clarification was sought, and it was suggested by the then Chairperson-Rapporteur of the WGIP that cultural genocide 'referred to the destruction of the physical aspects of a culture, while ethnocide referred to the elimination of an entire "ethnos"'.[118] The Canadian Truth and Reconciliation Commission's 2015 Final Report on the Canadian residential schools system defines cultural genocide as 'the destruction of those structures and practices that allow the group to continue as a group'.[119]

Ethnocide has variously been defined by scholars as occurring where 'the entire culture ceases to exist as a distinct, separate cultural system—indeed, it becomes obliterated',[120] or, similarly, 'ethnocide, refers to the destruction of the culture of a people—their lifestyle

[115] Lenzerini (n 2) 103. See also S Mako, 'Cultural Genocide and Key International Instruments: Framing the Indigenous Experience' (2012) 19 Int'l J Minority & Group Rights 175, 190.

[116] Lenzerini (n 2) 103–04.

[117] UNESCO Declaration of San José on Ethno-Development and Ethnocide (1982).

[118] E-I Daes, 'The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal' in Allen and Xanthaki (n 2) 30, reflecting on the discussions at the 1993 meeting; see further Draft Declaration (n 25).

[119] Canada TRC Final Report (n 10) 1.

[120] G Weiss, 'The Tragedy of Ethnocide: A Reply to Hippler' in JH Bodley (ed), *Tribal Peoples and Development Issues: A Global Overview* (Mayfield 1988) 124–33, 128.

and thoughts, permitting the people (or some part) to survive'.[121] Ethnocide can also be expressed as occurring in 'those cases in which a group disappears without mass killing'.[122] The ILA Interim Report on the Rights of Indigenous Peoples has subsequently noted that Article 8(1) of the UNDRIP 'includes all elements of ethnocide, as defined by the 1982 UNSECO Declaration of San José' and that 'the expression in point also covers the scope that the Secretariat of the Genocide Convention gave to cultural genocide'.[123]

In any event, a settled and binding legal definition, whether from convention or case law, and whether expressed as ethnocide or cultural genocide, cannot at this time be said to exist. This is not to say, however, that States are free to commit all acts which fall within the terms 'ethnocide' or 'cultural genocide'. As analysed below, existing international law prohibits many of these harms, although it does not link them to international criminal responsibility as a crime of ethnocide or cultural genocide would.

3.3.2 Related Concepts and Protections in International Law: Standards of Non-Assimilation and Cultural Survival

If ethnocide and cultural genocide are understood in the way proposed by the overlapping definitions above, it is clear that the right not to be subjected to such practices is linked to other existing standards of international law that prohibit forced assimilation, and protect cultural integrity or cultural survival. As such, many of the elements of harm that would make up cultural genocide or ethnocide are already prohibited by international law.

The protection of cultural integrity can be found in a range of existing international legal texts, which include Common Article 1 of the ICCPR and ICESCR's right to self-determination. The Article's protection of cultural development illustrates it as a right which protects cultural integrity.[124] In addition is the protection of cultural rights for minorities in Article 27 of the ICCPR. The Secretariat on the technical review of the Draft UNDRIP held that 'the incidence of ethnocide or cultural genocide may fall within the scope of ICCPR Art 27'.[125] Article 1(1) of the CERD prohibits racial discrimination, recognizing its 'purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. Article 15 of the ICESCR protects the right to culture, and while the Article itself makes no mention of Indigenous or minority cultures, the CESCR's General Comment 21 reaffirms the rights of Indigenous peoples to enjoy culture as a collective,[126] and includes reference to Article 8 of the UNDRIP.[127] The UN Committee on the Rights of the Child's (CommRC) General Comment 11 on Indigenous Children also calls on States 'to recognize and respect indigenous distinct cultures, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation'.[128]

Other relevant elaborations of these principles of non-assimilation include the 1995 European Framework Convention for the Protection of National Minorities, which in

[121] SB Kohl, 'Ethnocide and Ethnologics: A Case Study of the Mississippi Band of Choctaw, A Genocide Avoided' (1986) 1 Holocaust & Genocide Studies 91, 93.

[122] F Chalk and C Jonassohn, *The History and Sociology of Genocide* (Yale University Press 1990) 23.

[123] International Law Association (ILA), Hague Conference (2010), 'The Rights of Indigenous Peoples', Interim Report, 17, footnotes omitted.

[124] See Anaya (n 74) 131–41. [125] UN Doc E/CN.4/Sub.2/1994/2 (n 103).

[126] CESCR, General Comment 21 (n 79) para 7. See also, eg, paras 16(c), 36–37, 49(d), 59(e).

[127] ibid para 3 and fn 9. [128] ibid para 18. Emphasis removed.

Article 5 prohibits forced assimilation and places duties on the State to prevent it,[129] the 1992 UN Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities,[130] the 1992 Rio Declaration on Environment and Development,[131] the Vienna Declaration and Programme of Action,[132] and several UNESCO documents.[133] Most recently, the OAS Declaration on the Rights of Indigenous Peoples also included Article X: 'Rejection of Assimilation: (1) Indigenous peoples have the right to maintain, express, and freely develop their cultural identity in all respects, free from any external attempts at assimilation.' Paragraph (2) says: 'States shall not carry out, adopt, support, or favor any policy to assimilate the indigenous peoples or to destroy their cultures.'

A long-standing thread of international jurisprudence also protects the rights of minorities to cultural integrity, which would encompass a right of non-assimilation. As early as 1935, the Permanent Court of International Justice stated in the *Minority Schools in Albania* Advisory Opinion that the *raison d'être* of minority rights was to enable minorities to live peaceably alongside a dominant population, 'while at the same time preserving the characteristics which distinguish them from the majority'.[134] More recently, the Inter-American human rights bodies have reiterated these obligations specifically in the context of Indigenous rights, in the cases of the *Yanomami*[135] and *Yakye Axa*.[136]

The right of Indigenous communities to maintain their distinct cultures thus receives increasingly strong protection in international law. Both the CESCR and the CommRC's recent General Comments appear to extend the understanding of cultural rights: with regard to Indigenous peoples, these comments appear to suggest a heightened prohibition on assimilation.

The ILA Interim Report on the Rights of Indigenous Peoples[137] argues that the cumulative weight of international standards amounts to a customary international legal norm that Indigenous peoples have the right to recognition and preservation of their cultural identity, which includes a prohibition of ethnocide. Ethnocide, the report argues, 'presupposes that all the prerogatives that are essential to preserve the cultural identity of indigenous peoples *according to their own perspective* must be preserved'.[138]

It is important to note, however, that none of these pre-existing standards on cultural integrity can be said to give rise to *international criminal responsibility* for their violation, as the incorporation of ethnocide or cultural genocide into the international legal definition of genocide through the UNDRIP would have done. Neither do they link such international criminal responsibility to the fact of dispossession from land, as was sought during the negotiations, and which is discussed further below.

[129] See n 72 above, Art 5. [130] ibid Arts 1 and 2.

[131] UN Doc A/CONF.151/26 (vol 1) (12 August 1992) Annex 1, Principle 22.

[132] UN Doc A/CONF.157/23 (12 July 1993) Pt 1, para 20.

[133] Declaration of the Principles of International Cultural Cooperation, UNESCO Fourteenth Session (4 November 1966); UNESCO Universal Declaration on Cultural Diversity UNESCO Thirty-First Session (2 November 2001); UNESCO Convention against Discrimination in Education, 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962).

[134] *Minority Schools in Albania Advisory Opinion*, 1935 PCIJ (ser A/B) No 64 at 17.

[135] *Yanomami*, Case No 7615 (Brazil) IACHR Res No 12/85 (5 March 1985).

[136] *Yakye Axa* (n 1). [137] ILA Interim Report (n 123) 43–45.

[138] ibid 51 (emphasis in original). See also CC Tennant and ME Turpel, who argue that the pre-existing protection of Indigenous cultural rights points to an emerging prohibition against ethnocide. 'A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-determination' (1990) 59 Nordic J Int'l L 287, 297–98.

3.3.3 Developing Standards on Cultural Survival and the Link with States' Duties to Protect Lands and Territories

The importance of cultural, spiritual, and collective ties to ancestral or traditionally used lands has long been a characteristic of Indigenous populations. Where the UNDRIP is particularly important in extending the protection of Indigenous cultural survival in international law is in the link created in Article 8 between rights to land and territory, and cultural or collective survival.

Although Article 7 of the Draft UNDRIP would have established a decisive link between Indigenous peoples' land dispossession and international criminal prosecution, this connection 'was strongly resisted by states' and was consequently excluded from the final draft.[139] It is thus in connection with the dispossession of lands and territories that ethnocide as an international crime remains most controversial. However, the 'middle ground'[140] of the final text of Article 8 remains important.

Final Article 8 recognizes that dispossession of Indigenous peoples from their lands constitutes a threat to culture, and could thus amount to forced assimilation, even if not an act of genocide in and of itself: 'Hence, Article 8 recognises the crucial connection between indigenous peoples' survival and land rights but remains in conformity with international law on genocide.'[141]

The recognition of the connection between dispossession from land and territory, and cultural integrity and survival, is an important recent development in international law. Although the HRComm's *Lubicon Lake Band* case was an early example of moves in this direction,[142] the UNDRIP's Article 8, and its link with other Articles on the right to lands and territories, discussed in Chapter 14, has given a renewed impetus to international protection of lands and territories as the locus of Indigenous identity, non-assimilation, and thus survival. Recently, the UN Expert Mechanism on the Rights of Indigenous Peoples noted that:

> The maintenance and development of indigenous peoples' cultures requires the protection of their lands, territories and resources. Indigenous peoples' traditional territories, where their homes and kinships are located, are the spaces in which they practise their cultures. Indigenous peoples' connections to traditional territories, to their homes and to their communities, are important, even for those who have migrated elsewhere for work and education, to maintaining and developing indigenous cultures.[143]

The way land and collective cultural survival are now seen as necessarily inherent to the enjoyment of Indigenous rights, and to the very survival of Indigenous peoples, is further illustrated in cases on collective rights.

For example, in *Yakye Axa*, the IACtHR held that '[d]isregarding the ancestral right of the members of the Indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the Indigenous communities and their members.'[144] This reinforces the right of

[139] J Gilbert and C Doyle, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent' in Allen and Xanthaki (n 2) 295–96 (footnotes omitted).

[140] ibid. [141] ibid. [142] *Lubicon Lake* (n 73).

[143] EMRIP, Role of Languages and Culture in the Promotion and Protection of the Rights and Identity of Indigenous Peoples, Study of the Expert Mechanism on the Rights of Indigenous Peoples, UN Doc A/HRC/21/53 (16 August 2012) para 24. See further paras 20–28.

[144] *Yakye Axa* (n 1) para 147.

non-assimilation, while foregrounding again the crucial connection of cultural and individual survival to the enjoyment of land rights. In the *Endorois* case, after detailed attention to the approach of the Inter-American Court and Commission, the African Commission stated:

> a common theme that usually runs through the debate about culture and its violation is the association with one's ancestral land. It notes that its own Working Group on Indigenous Populations/Communities has observed that dispossession of land and its resources is 'a major human rights problem for indigenous peoples.' It further notes that a Report from the Working Group has also emphasised that dispossession 'threatens the economic, social and *cultural survival* of indigenous pastoralist and hunter-gatherer communities.'[145]

3.3.4 Conclusions on the Prohibition of Ethnocide and Cultural Genocide in the Declaration

The exclusion of the term 'cultural genocide' or 'ethnocide' from Article 8 of the Declaration has, as Lenzerini notes, symbolic importance as a defeat of Indigenous aims, on account of the 'high emblematic significance' placed on the terms by Indigenous representatives.[146] Yet, this is not to say that those acts which might constitute ethnocide or cultural genocide—such as forced assimilation and destruction of culture—are permitted under international law, as the section above reveals.

Moreover, in effect, Article 8 is now capable of broader application. Uncoupling Article 8(2) from criminal liability opens the provision to the possibility of bringing it to bear on 'any act of violence' and imposes concrete obligations to *prevent* specific assimilationist acts, examined below. The innovation of the Article, as Ana Vrdoljak notes, lies in the way it sets out an international legal definition of what constitutes assimilation or destruction of culture, 'straddling the divide between the international crime of genocide and positive human rights related to culture and cultural heritage'.[147] Whether or not it represents normative progress towards the recognition of cultural genocide or ethnocide in international law per se remains to be seen as it is interpreted and translated into binding legal norms.

3.4 The Specific Heads of Article 8(2) and the Duty to Prevent

The specific sub-headings of Article 8(2) should be read as further elaborating the actions which constitute 'forced assimilation or integration' in Article 8(1). They are thus illustrative as well as definitional. However, Article 8(2) serves a further purpose, as it places a *positive* duty on States to prevent the specific harms set out in sub-sections (a) through (e).

Where prevention would lie on the spectrum of the obligations to respect, protect, and fulfil,[148] the rights set out in the Declaration would need to be considered on a case-by-case basis. However, positive measures are expected. In addition, these measures must be

[145] *Endorois* (n 83) para 244 (footnotes omitted, emphasis in original). See also *Yakye Axa* (n 1) para 16, See further the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-Eighth Session, 2000), DOC/OS(XXXIV)/345, 20.

[146] Lenzerini (n 16) 87 fn 64.

[147] A Vrdoljak, 'Reparations for Cultural Loss' in Lenzerini (n 2) 209.

[148] International Commission of Jurists, Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (29 February 2012) para 6.

'effective'. This mirrors existing human rights standards, such as Article 2 of the ICCPR and ICESCR.

As such, Article 8(2) is closely linked both with the UNDRIP's requirements of reparation, considered further in Chapter 19 and with free, prior, and informed consent (FPIC), considered in Chapter 9. There is also a link to Article 38 where 'States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of the declaration', which is discussed in Chapter 18.

The obligation to prevent should be interpreted in line with general international law, including the obligation of due diligence,[149] now expressed as a rule of customary international law,[150] and as such will involve the State in the regulation of private activities which affect Indigenous individuals and peoples.

Although the international law on each of these specific heads has been canvassed throughout this chapter, they are set out here specifically with regard to the positive obligations to which States are subject should they violate these rights. Setting out this additional aspect guaranteed by Article 8(2) provides an added level of conceptual clarity.

3.4.1 Article 8(2)(a): The Duty to Protect Cultural Integrity and Identity

Article 8(2)(a) places duties on States to protect cultural integrity and identity. This provision reflects existing international law, particularly ILO 169. As noted in Section 1.4, above, although ILO 169 contains rights, it is mainly concerned with elucidating States' duties and as such prefigures aspects of Article 8(2)'s focus on obligations. For example, Article 2 of ILO 169 states that:

> (1) Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

Article 2 goes on to spell out positive obligations, particularly in the realm of economic and social rights, to achieve this aim. Article 4(1) of ILO 169 provides for special measures, while Article 5(b) requires States to have respect for the 'integrity of the values, practices and institutions of these peoples' when applying provisions of the Convention.

States' obligations for the right to take part in cultural life are extensively commented upon by the CESCR in General Comment 21, including attention to core obligations,[151] international obligations,[152] obligations of non-State actors,[153] and the substance of violations by States.[154] The Comment makes specific reference to Indigenous peoples' cultural survival,[155] and thus provides an influential statement of the legal obligations for this area of law. Such legal obligations are also emerging in the case law, for example, the IACtHR's *Yakye Axa* case.[156]

[149] See *Corfu Channel* (*UK v Albania*) (Merits), Judgment, [1949] ICJ Rep 22; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, para 29; *Velásquez-Rodriquez v Honduras* (Merits), Judgment (29 July 1988), IACtHR Series C No 4, paras 172–77.

[150] *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*), Judgment, [2010] ICJ Rep 14: 'The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory' (para 101).

[151] CESCR, General Comment 21 (n 79) para 55. [152] ibid paras 56–59.

[153] ibid paras 73–76. [154] ibid paras 60–65. [155] ibid paras 36–37.

[156] *Yakye Axa* (n 1). See particularly paras 179–83 on reparations as customary international law and the principle of *restitutio in integrum*.

With regard to Indigenous children, the CommRC in General Comment 11 explicitly invokes Article 8(2) of the UNDRIP, stating that:

> The Committee encourages States parties to bear in mind article 8 of the United Nations Declaration on the Rights of Indigenous peoples which sets out that effective mechanisms should be provided for prevention of, and redress for, any action which deprives indigenous peoples, including children, of their ethnic identities.[157]

These pronouncements on State obligations must also be seen in light of the legal position on collective cultural rights, discussed in further detail in Section 3.1, above.

3.4.2 Article 8(2)(b) and Dispossession from Lands, Territories, and Resources

Article 8(2)(b) concerns dispossession from lands and territories, and of resources. The prohibition of forced dispossession reflects existing international law on Indigenous peoples in the form of Article 16 of ILO 169:

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

It thus reflects the principle of *restitutio in integrum*, and establishes a hierarchy of remedies placing return at the apex, and monetary compensation as acceptable only where specifically requested, or where land is not available. Article 16 of the Framework Minorities Convention is also of relevance.[158]

Importantly, even before the UNDRIP, States were held by the HRComm to a positive duty to protect Indigenous cultures, including *through* the protection of their lands, territories, and resources, and through their traditional activities: General Comment 23 (1994) on Article 27 of the ICCPR noted that the 'enjoyment of [cultural] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them'.[159] Meanwhile, *Lubicon Lake Band* made these links clear.[160] In the *Endorois* case the African Commission

[157] See n 78 above, para 45.

[158] Framework Convention for the Protection of National Minorities (n 72) Art 16:

> The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention.

[159] HRComm, General Comment 23 (n 71) para 7.

[160] See also *Lubicon Lake* (n 73); CESCR, General Comment 21 (n 79) para 49(d).

noted the connection between cultural integrity and identity on the one hand, and access to traditional territory on the other:

> the Respondent State has overlooked that the universal appeal of great culture lies in its particulars and that imposing burdensome laws or rules on culture undermines its enduring aspects. The Respondent State has not taken into consideration the fact that by restricting access to Lake Bogoria, it has denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the Lake.[161]

International bodies have held States to duties to *prevent* forced displacement of Indigenous peoples on several occasions. As discussed in further detail above, the two rights—and corresponding obligations—now set out in Article 8(2)(a) and (b) are increasingly recognized not only as linked, but as requiring States to take positive obligations of prevention and redress. They are also linked to, and must be read in light of, Article 10 and the requirement of FPIC, discussed in Chapter 9. This linkage remains the case despite the uncoupling of these provisions from the crime of genocide set out in Article 8(1), and while this severance was a sticking point for Indigenous negotiators, it is arguable that Article 8(2) now provides greater scope for Indigenous peoples to hold States to account over a broader range of harmful or violent practices which result in their forced removal or dispossession from lands, or of use or exploitation of natural resources in these territories.

3.4.3 Article 8(2)(c) and the Prohibition of Forced Population Transfer

The prohibition on population transfer regulates two distinct situations both governed by the *jus in bello*. The first is transferring the native population outside its territory, the second, transferring the occupier's population into the occupied territory.

Transfer of peoples outside their territory is prohibited in every circumstance, except when it is done for the protection of the population itself or in military necessity, and otherwise constitutes a 'grave breach' of the Hague Convention and its protocols,[162] and the Rome Statue of the ICC.[163] The International Committee of the Red Cross (ICRC) notes that forced population transfer can constitute ethnic cleansing as it alters the 'demographic constitution of a territory'.[164] International law also links such transfers with genocidal intent on several occasions.[165] Transfer of occupier populations into territory is also prohibited by the Geneva Conventions.[166] Both aspects have been dealt with comprehensively by the UN Economic and Social Council, which records the prohibition as a general principle of international law and concludes that:

> Forcible population transfer, save in areas when derogation or military necessity permits, are prima facie internationally wrongful acts. In circumstances when the purpose or method of transfer constitutes genocide, slavery, racial or systematic discrimination and torture, the

[161] *Endorois* (n 83) para 250.

[162] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 (entered into force 21 December 1950) Arts 147 and 49(6); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) I Art 85(4).

[163] Rome Statute (n 89) Art 7.

[164] J-M Henckaerts and L Doswald-Beck, *ICRC Customary International Humanitarian Law*, vol I: *Rules* (Cambridge University Press 2005) Rule 129, 457–62; see also UN Security Council, Res 752 S/RES/752 (15 May 1992).

[165] Judgment of the International Military Tribunal for the Trial of German Major War Criminals (1946), Ulrich Greifelt and Others, Indictment, US Military Tribunal (1948) 52.

[166] Geneva Convention (IV) (n 162) Art 49; Additional Protocol I (n 162) Art 85(4). See also Henckaerts and Doswald-Beck (n 164) 462.

transfer may qualify as a crime within the meaning of article 19 (part I) of the International Law Commission's draft articles on State responsibility and carry all the consequences for internationally wrongful acts and, in addition, those normally associated with crimes. Within this purview fall acts such as 'ethnic cleansing', dispersal of minorities or ethnic populations from their homeland within the State, and the implantation of settlers amounting to the denial of self-determination ... Less grave actions of population transfer, while not amounting to crimes, may qualify as internationally wrongful acts; thus, the State engaged in such actions is under the obligation of cessation and reparation.[167]

Thus, Article 8(2)(c) reflects strong prohibitions in international law, which clearly carry with them pre-existing obligations for reparations.

3.4.4 Article 8(2)(d) and Forced Assimilation or Integration

Article 8(2)(d) should be understood as reiterating the importance of cultural survival and integrity to Indigenous peoples, and the crucial role non-assimilation plays in that survival, despite the exclusion of the terms 'cultural genocide' or 'ethnocide' from the provision. It is clear that forced assimilation or integration lie, and have historically always been, at the heart of State efforts to erase Indigenous peoples' existence through acculturation. As such, the inclusion of Article 8(2)(d) is of immense symbolic importance, if little additional legal effect. For example, Article 27 of the ICCPR already places a positive obligation on States to protect cultural integrity, and thus survival.[168] All relevant legal aspects of forced assimilation or integration would also be covered by Article 7(2), and would breach the existing international law with regard to Indigenous people, discussed in Section 3.3.2 above. Nevertheless, Article 8(2)(d) may be understood as pushing international law in a new direction if it is interpreted as giving Indigenous peoples a stronger right of non-assimilation, and greater rights to redress, than those international law has designated as minority populations have enjoyed.

3.4.5 Article 8(2)(e) and Propaganda Designed to Promote or Incite Racial or Ethnic Discrimination

Propaganda designed to promote or incite racial hatred or ethnic discrimination is prohibited in existing international law. Article 4 of the ICERD establishes three main obligations on States. First, States must criminalize acts of racial hatred and violence, including 'the dissemination of ideas based on racial superiority or hatred'. Second, they must ban organizations carrying out these activities, and third, forbid public authorities from promoting or inciting racial discrimination. Article 6, meanwhile, binds States to ensure effective remedies, including reparations, for acts of racial discrimination. These obligations have been interpreted by the CERD as imperative, and as having a preventative nature.[169] Neither international criminal law nor international humanitarian law directly forbids this type of propaganda, and during the drafting of the Genocide Convention a proposal banning such propaganda was rejected.[170] Nevertheless, the

[167] UN ECOSOC, The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers—Progress Report Prepared by Mr Awn Shawhat Al-Khasawneh, Special Rapporteur, UN Doc E/CN.4/Sub.2/1994/18 (30 June 1994) paras 131–33.

[168] HRComm, General Comment 23 (n 71) para 6.1.

[169] CERD, Concluding observations on Belize, UN Doc CERD/C/BLZ/CO/1 (2012) para 9.

[170] Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr. Nicodème Ruhashyankiko, Special Rapporteur, UN Doc E/CN.4/Sub.2/416 (1978) para 117.

prohibition on the incitement of genocide,[171] albeit requiring a more severe standard of conduct, is a related prohibition in international law, as case law demonstrates.[172]

3.5 Minimum Standards, Dignity, and Well-Being

3.5.1 Minimum Standards

In 2008, S James Anaya, then UN Special Rapporteur on the Rights of Indigenous Peoples, stated that 'the adoption of the Declaration marks the height of decades of standard-setting regarding the rights of indigenous peoples'.[173] While this is certainly the case, the juxtaposition of Anaya's statement with the phrase 'minimum standards' in Article 43 points to a potential tension in the UNDRIP.

While it is evident from the drafting history that the language of Article 43 posed few problems, continual compromises in the text led Indigenous representatives, and some States, to call repeatedly for a recognition that each draft—whether stronger or weaker—represented the minimum standard of rights for the survival, dignity, and well-being of Indigenous peoples. This is particularly evident in discussions before the working group on Indigenous peoples.[174]

In light of important regional, domestic, and international practice and jurisprudence, which in some cases provides stronger protection for the rights of Indigenous peoples, it is best to understand Article 43 in its plain text interpretation: as a floor, rather than as a ceiling. This was also the approach advocated at the 1994 Technical Review, when the Secretariat noted that Article 43 (then 42) might be comparable to Article 23 of the Convention on the Elimination of All Forms of Discrimination against Women, which states that 'nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women'.[175] Article 43 must also be read in light of provisions which state that the UNDRIP cannot be interpreted as stripping away any pre-existing rights, whether guaranteed on the international plane, or at the domestic level, such as provided in Article 42.[176] This interpretation would be in conformity with the international legal position that international rights standards, wherever set out, provide the minimum with which domestic legislation and practice must comply, but provide no bar to a more generous level of protection.

Notably, the OAS Declaration's Article XLI also clearly treats the UNDRIP as a floor. It states: 'The rights recognised in this Declaration and in the United Nations Declaration on the Rights of Indigenous Peoples constitute the minimum standards for the survival,

[171] Genocide Convention (n 70) Art 7; Rome Statute (n 89) Art 35(3)(3).

[172] *Akayesu* (n 101) para 673; International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, 1948) vol 22, 502, where the defendant was charged with persecution for 'the virulently anti-Semitic articles he had published'.

[173] Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, S James Anaya, UN Doc A/HRC/9/9 (11 August 2008) para 42.

[174] See Section 2, above, and in particular, UN Doc E/CN.4/1998/106 (n 38) 30 (observer for the Association Nouvelle pour la Culture et les Arts Populaires); UN Doc E/CN.4/1999/82 (n 38) para 35 (observer for the Shor People); UN Doc E/CN.4/2000/84 (n 38) para 33; UN Doc E/CN.4/2001/NGO /54 (n 38) (written statement ATSIC).

[175] UN Doc E/CN.4/Sub.2/1994/2 (n 103) para 116.

[176] See further Chapter 18 in this volume.

dignity, and well-being of the indigenous peoples of the Americas.' This phrasing would seem to ensure protection at the higher standard, whether that standard is contained in the UNDRIP or in the OAS Declaration.

The phrase 'minimum standards' also has specific implications for the substantive content of rights set out in the Declaration. This is especially the case for rights with a positive component, or with an economic or social aspect,[177] which links into the discussion of the legal requirements suggested in the word 'survival', discussed below.

3.5.2 Dignity, Survival, and Well-Being

Although survival and well-being do not appear as specific doctrines of international law, dignity certainly holds a position as a principle of international human rights law.[178] As such, the interpretation of the word 'dignity' in Article 43 of the UNDRIP can call on a rich vein of existing thought and practice, which posits that dignity is the underlying principle in every other right, recognizing that human beings as subjects of international human rights law are not protected merely in their biological existence, but rather in their existence within the parameters of dignity, and that those parameters are set by human rights. However, dignity may be subjectively or objectively determined, and moreover, as McCrudden notes, dignity is not always treated as a free-standing element of rights, but is at times used as a 'principle with specific content, or as a right, or as an obligation, or as a justification'.[179] It is thus far from a simple concept upon which to ground rights.[180]

It is unclear in which sense dignity will be interpreted in the UNDRIP, where it appears both in Article 43 and also in Article 15. Interestingly, it is not included as an express term in the Preamble (where it is so often found in international human rights covenants), suggesting that in the UNDRIP's provisions it is intended to express legal, rather than merely exhortatory, content.

The development of the concept of dignity in the context of human rights is notable before the IACtHR. The Court has developed a line of cases that recognize the right to a dignified life or *vida digna*.[181] This doctrine has been used to place positive

[177] See further Pérez-Bustillo and Hohmann, Chapter 17, this volume.

[178] See Universal Declaration of Human Rights (adopted UN General Assembly 10 December 1948), Preamble, which begins: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...'; American Declaration of the Rights and Duties of Man OAS Res XXX (1949) 43 AJIL Supp 133 (beginning with: 'The American peoples have acknowledged the dignity of the individual'; and stating in the Preamble that: 'All men are born free and equal, in dignity and in rights ...'); see further African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 rev 5 (1982) Art 5 ('Every individual shall have the right to the respect of the dignity inherent in a human being ...'). See also O Schachter, 'Human Dignity as a Normative Concept' (1983) 77(4) AJIL 848; M McDougal, HD Lasswell, and L-C Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980); RD Glensy, 'The Right to Dignity' (2011) 43 Columbia Human Rights L Rev 65.

[179] C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655, 685.

[180] See K Young, 'The Minimum Core of Economic, Social and Cultural Rights: A Concept in Search of Content' (2008) 33 Yale Int'l LJ 113, 133–38.

[181] J Pasqualucci, 'The Right to a Dignified Life (*Vida Digna*): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System' (2008) 31 Hastings Int'l & Comparative L Rev 1, 12.

obligations on States where the claimants are particularly vulnerable, including in cases where Indigenous peoples have been excluded from or lost their ancestral lands.[182] A similar approach has been taken by the Colombian Constitutional Court.[183]

To say that survival and well-being do not appear as specific principles of international law is not to suggest that they invoke no legal standards. Cultural survival in Article 43 is clearly linked to individual physical survival, and thus cannot be understood absent the emerging positive obligations for the right to life, not only including the concept of the *vida digna*, but also as discussed in Chapter 7 of this volume, and the content of economic and social rights, discussed in Chapter 17. A requirement of well-being is also suggested by obligations for the substantive content to economic and social rights, and, importantly, must be seen as an underlying principle of the UNDRIP as a whole.

4. Conclusion

Articles 7(2), 8, and 43 should be seen as central to the underlying aims of the UNDRIP. Cultural survival, identity, and integrity are protected in the three provisions, which in turn are intertwined with the substantive content of other rights set out in the Declaration and its remedial provisions.

The importance of these Articles can only be understood in light of the history of cultural destruction, assimilation, and extermination experienced by Indigenous peoples, often facilitated, rather than prohibited, by legal doctrine. Articles 7(2), 8, and 43 should also be understood in light of their particular symbolic importance to Indigenous peoples given the common historical experience of Indigenous communities. Their importance can be seen in the fraught debates detailed in the drafting history.

Importantly, the three Articles show how Indigenous peoples and advocates of Indigenous rights have in some respects succeeded, in others failed, to make connections between individual survival, non-assimilation or group survival, and cultural survival, and to link these concepts with rights to land and territory. These emerging linkages in international law point to an understanding of Indigenous place in the world which rejects compartmentalized visions of human rights, and which seeks to overcome long-standing conceptual and practical divisions over what constitute individual versus group rights, and collective culture versus individual identity and survival.

While more radical legal principles—notably an explicit criminal prohibition of cultural genocide or ethnocide—were, in the end, excluded from the UNDRIP, the three Articles discussed in this chapter cannot be understood merely as a restatement of existing international law. Rather, they push the law in new directions, and make important contributions to the continuing existence, even flourishing, of Indigenous peoples as peoples, across the world.

[182] *Sawhoyamaxa* (n 7) para 20; *Yakye Axa* (n 1) para 162; *Case of the Pueblo Bello Massacre v Colombia* (Merits, Reparations, and Costs), Judgment (31 January 2006), para 254.

[183] Constitutional Court of Colombia, Cases T-099 of 1999, T-1059 of 2001, T-137 of 2003, T-034 of 2012, T-073 of 2013.

Chapter 7. Equality and Non-Discrimination in the UNDRIP

Articles 2, 6, and 7(1)

*Kirsty Gover**

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 6

Every indigenous individual has the right to a nationality.

Article 7(1)

Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

1. Introduction

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[1] is an unusual document. In the corpus of international human rights law, the broadest treaties address the universal rights of all human beings (the ICCPR,[2] the ICESCR,[3] and the major regional human rights' treaties: the ACHR,[4] the ECHR,[5] and the ACHPR[6]); others address the particular rights of individuals and groups susceptible to discriminatory treatment (the ICERD[7] and the CEDAW[8]), and later instruments elaborate on and refine these rights in application to particular classes of vulnerable individuals (the CRC,[9] the ICRMW,[10] and

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[1] Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).

[2] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.

[3] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3.

[4] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123 (ACHR or American Convention).

[5] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), 213 UNTS 221 (European Convention on Human Rights, or ECHR).

[6] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), 1520 UNTS 217.

[7] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969), 660 UNTS 195.

[8] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), 1249 UNTS 13.

[9] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3.

[10] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3.

the CRPD[11]). The UNDRIP covers the full spectrum of rights contained in international and regional instruments, adapted to the circumstances of Indigenous peoples. Because the UNDRIP has an exceptionally wide substantive scope, debates about equality and non-discrimination were a central part of the negotiations leading to its adoption. Where provisions of the UNDRIP were thought to deviate from rights already expressed in international law, they were perceived by some States to compromise the fundamental principles of equality and non-discrimination that underpin existing human rights' instruments. In this way, the extensive discussions about equality and Indigeneity that characterized the development of the UNDRIP are also debates about the continuity and coherency of international human rights law. Unsurprisingly, the most controversial of the UNDRIP's provisions are those protecting rights and interests that cannot be held by non-Indigenous groups or individuals.

In this chapter, I have been invited to consider Articles 2, 6, and 7(1) of the UNDRIP. My aims are to situate these provisions within existing international and regional human rights law, to point to some major decisions of international bodies and domestic courts on the principles they contain, and, more generally, to draw attention to the different concepts of equality and non-discrimination that animate and justify the various rights contained in the UNDRIP. Section 2 provides a backdrop to the concepts of equality and non-discrimination used in the UNDRIP. Section 3 considers international and domestic law on discrimination *against* Indigenous individuals and peoples. Section 4 addresses the complex questions that arise where the recognition of Indigenous rights and interests is challenged as a form of discrimination against non-Indigenous people or non-members of the rights-holding group, and considers the ways in which international bodies and domestic courts have addressed these tensions. This section also provides a critical analysis of the concepts of 'legitimate differentiation', 'special measures', 'specific rights', and 'minority rights' that have emerged in international human rights law, and discusses the ways in which these can support protections contained in the UNDRIP.

As Article 2 raises vastly more complex issues in its application to Indigenous peoples than Articles 6 and 7(1), and is framed in broad terms open to multiple interpretations, the bulk of the analysis in this chapter is devoted to concepts implicated by that Article.

2. Equality, Non-Discrimination, and Indigenous Rights in the UNDRIP

2.1 Articles 2, 6, and 7(1) in the Context of the UNDRIP

The Declaration, like the more recent American Declaration on the Rights of Indigenous Peoples (2016), brings together a menu of rights for Indigenous peoples that covers the full spectrum of their interests. Rights protected by UNDRIP provisions are, as Charters observes, 'different in quality and based on various, sometimes competing, justifications'.[12] Because the UNDRIP must take its place among existing human rights instruments, these justifications usually include attempts to reconcile liberal principles

[11] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), 2515 UNTS 147.

[12] C Charters, 'The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples' in C Charters and R Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009) 289.

of equality and non-discrimination with the particularism of Indigenous experiences and the history of State–Indigenous encounters and relationships. For most of the rights articulated in the Declaration, this is a straightforward endeavour. Indigenous individuals and groups are the beneficiaries of existing human rights instruments and are entitled to all the protections they contain. By the same logic, however, equality-based justifications for Indigenous rights become contentious when brought to bear on provisions and rights that vest only in Indigenous groups, especially where these protect interests held or claimed by Indigenous peoples by virtue of their distinctive status as historically continuous polities. Most prominently, these include rights to traditional territories and to self-governance. The accommodation of these rights within liberal traditions of equality and non-discrimination poses a major conceptual challenge, the complexity of which is evident in both domestic and international judicial responses to Indigenous claims. The assistance offered by the UNDRIP in this regard is limited by the absence in its text of any clear guidance on how Indigenous historic-collective rights are to be reconciled with the rights of individuals and collectives to be free from discrimination.[13] In the text of the UNDRIP, this tension manifests in the relationship between Article 2, protecting the right of Indigenous peoples to be free from discrimination, and Article 46, which allows limitations on rights only if those limitations are non-discriminatory,[14] and requires an interpretation of UNDRIP provisions that accords with respect for human rights, equality, and non-discrimination.[15] Further, Article 2 implies that rights vested in Indigenous peoples must not be exercised in a way that discriminates against Indigenous individuals,[16] as do the internal limitations expressed in certain of the collective UNDRIP rights.[17]

The framing of Article 2 is broad enough to support a range of methods already used in international and domestic law to situate Indigenous rights within jurisprudence on rights to equality and non-discrimination. For the time-being, however, given the agnosticism of the Declaration on conflicts of rights, the lack (to date) of an adjudicatory body to assist with the interpretation of the UNDRIP at the international level, and the absence so far of an established international jurisprudence on the meaning and interpretation of the UNDRIP, the methodologies to be used in balancing or limiting the rights of Indigenous collectives, Indigenous individuals, the public, and third parties are left to States and Indigenous peoples to resolve in their interactions with each another. That said, international and regional treaty bodies have considered Indigenous claims and interests in their advice on the ICERD, the ICCPR, and the ACHR. These have given the distinctive claims and rights of Indigenous peoples purchase in mainstream international

[13] Article 46 functions as something like a proportionality and 'reasonable limits' provision, but its meaning is unclear and remains contested. For further discussion of Art 46, see Weller, Chapter 5, this volume.

[14] Art 46(2). [15] Art 46(3).

[16] eg Art 2 could qualify Art 33(2), so that the right of Indigenous peoples 'to select the membership of their institutions in accordance with their own procedures' must be exercised in a non-discriminatory manner.

[17] See, eg, Art 34, which provides that Indigenous peoples have the right to promote, develop, and maintain their institutional structures, distinctive customs, spirituality, traditions, procedures, practices, and juridical systems 'in accordance with international human rights standards'. This right was described as limited by UNDRIP Art 46(2) by the New Zealand Court of Appeal: 'It is noteworthy that the United Nations Declaration on the Rights of Indigenous Peoples, to which New Zealand has subscribed, while recognising the rights of indigenous peoples to develop and maintain "juridical systems or customs" in Art 34, also states in Art 46(2) that nothing in the exercise of the rights under the Declaration undermines "fundamental freedoms".' *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at 309 per Chambers J. See also para 250 and fn 259 per Glazebrook and Wild JJ.

human rights law. Likewise, Indigenous claims have been progressed in the domestic law of States, albeit with some major setbacks and with varying degrees of attentiveness to international human rights norms. These bodies of jurisprudence will influence the application of the UNDRIP in international and domestic fora.

Articles 6 and 7(1) of the UNDRIP are relatively uncontroversial restatements of established individual human rights' protections found in existing human rights instruments. Both draft Articles remained intact during intergovernmental negotiations in the inter-sessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples (hereafter, 'the Working Group'), and were included unaltered in the text adopted by the UN General Assembly in 2007. The right to a nationality confers certain collateral rights on individuals, including the right to diplomatic protection and the right to enter the country of one's nationality. It appears in Article 15 of the Universal Declaration of Human Rights (UDHR)[18] and Article 20 of the ACHR, and is affirmed as a right that is to be protected on a non-discriminatory basis in the ICERD (Article 5), the CEDAW (Article 9), and the CRPD (Article 18). The right of children 'to acquire a nationality' is additionally recognized in Article 24(3) of the ICCPR, and the right of a child to 'a legally registered name and nationality' is protected in Article 8 of the CRC. Article 6 of the UNDRIP (then draft Article 5) was one of the only two draft Articles of the UNDRIP to be formally adopted by the Working Group (in 1997), alongside draft Article 43 (now Article 44, affirming that UNDRIP rights apply equally to male and female Indigenous persons).[19] States raised few queries with regard to draft Article 5, although some questioned the relationship between this provision and the provisions dealing with Indigenous citizenship and membership in Indigenous communities,[20] and others sought to clarify that the reference to 'nationality' denoted 'State nationality'.[21]

The wording of Article 7(1) of the UNDRIP amalgamates the established right of 'life, liberty and security of person' with the phrase 'physical and mental integrity'. The right to 'life, liberty and security of the person' is protected in the UDHR (Article 3); and the right to 'liberty and security of the person' is protected in the ICCPR (Article 9), the ECHR (Article 6), and the ACHPR (Article 6). The reference to 'physical and mental integrity' may be drawn from Article 4 of the ACHPR, which provides that '[e]very human being shall be entitled to respect for his life and the integrity of his person.'[22] The

[18] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

[19] See endorsement by Australia: '... it is a universal right that individuals have a nationality and, of course, it is a right that must be extended to every indigenous individual': Australia, 'Comments of the Australian Delegation on Article 5', Doc 010a (1997) in Docip, *United Nations Declaration on the Rights of Indigenous Peoples: Documents 1994–2010* (CD-ROM 2011) (on file with author).

[20] See, eg, Australia, stating: '... as a matter of consistency in the drafting, it would be useful for this working group to consider how the use of the word "citizenship" in [Article 32] relates to use of the term "nationality" in Article 5': Australia, 'Statement on Behalf of the Australian Government Delegation to the Working Group on the Rights of Indigenous Peoples', Doc 237a (1996) in Docip (n 20) (on file with author). See also Canada, 'Articles 1, 2 & 43' (25 October 1996), Doc 228a (1996) in Docip (n 20) (on file with author).

[21] United States, 'USDEL Comments on Section 1 of the Draft Declaration', Doc 027a (1995) in Docip (n 20) (on file with author); and United States, 'US Comments on Articles 5, 9, and 32' (25 October 1996), Doc 231a (1996) in Docip (n 20) (on file with author); and Canada, 'Articles 5, 9 & 32' (25 October 1996), Doc 228a (1996) in Docip (n 20) (on file with author): 'We understand this right to apply to nationality within an existing state.' See also Canada, 'Canada: Preliminary Comments on Part I, 95-11-23', Doc 019a (1995) in Docip (n 20) 4 (on file with author): 'My Government understands this to be a restatement of the right included in Article 15(1) of the [UDHR], and supports its inclusion here.'

[22] African Charter (n 7) Art 4.

wording of Article 7(1) was not amended during the Working Group negotiations. States raised very few concerns about the content of the draft Article, except to note that the phrase 'physical and mental integrity' is novel and indeterminate,[23] and to propose that references to 'mental integrity' be moved to form part of provisions dealing with the prohibition against torture.[24] Thus, in respect of Articles 6 and 7(1), the UNDRIP records commitments that States regard as extant in international or regional human rights instruments. Article 2, on the other hand, poses more difficult questions for existing human rights law, and its relevance to the interpretation of the UNDRIP as a whole is hence of particular import.

Article 2 confirms the rights of Indigenous individuals and peoples to 'equality' and 'non-discrimination'. These concepts are interdependent, but functionally distinct. Treating individuals and groups alike, in a formally non-discriminatory way, does not necessarily promote substantive equality. 'Substantive equality' requires measures that are responsive to structural disadvantage and negative stereotyping and is understood variously as the equal enjoyment of human rights and fundamental freedoms, and the legal recognition of all human beings as 'equally deserving of concern, respect and consideration'.[25] In circumstances characterized by structural or cultural difference, non-discrimination norms can promote formal equality while leaving substantive inequalities intact, and can exacerbate disadvantage.[26] Accordingly, established international legal norms requiring States to ensure that all persons are protected in the full enjoyment of fundamental human rights and freedoms also oblige States to take special measures to achieve substantive equality by securing the advancement of groups denied the full enjoyment of those rights. Equality norms also oblige States to ensure that members of minorities are protected in the communal enjoyment of their languages and cultures, thereby helping to ensure their substantive equality with members of the majority, and with members of other minorities.

It is well established in international law (and in the jurisprudence of some States)[27] that discrimination against Indigenous persons or groups on the basis of their Indigeneity or Indigenous origin is prohibited, usually as a form of racial discrimination (a ground that typically encompasses cognates of race, including ethnicity, nationality, colour, descent, and national origin).[28] However, the symmetry of non-discrimination norms means that measures benefitting Indigenous peoples can appear to constitute or enable discrimination against non-Indigenous communities and individuals. Fundamental questions arise, then, if distinctive rights protections for Indigenous peoples seem not to be designed with the sole purpose of alleviating Indigenous disadvantage—for example, because they are measures intended to protect historic Indigenous entitlements to land and authority. In the context of

[23] See, eg, United States, 'US Intervention: Article 6', Doc 148a (2001) in Docip (n 20) (on file with author).

[24] Australia, 'Comments of the Australian Delegation on Discussion Paper on Article 6' (4 February 2002), Doc 155a (2001) in Docip (n 20) (on file with author); New Zealand, 'WGDD7—Article 6' (4 February 2002), Doc 159a (2001) in Docip (n 20) 2 (on file with author).

[25] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (Can) at 171, per McIntyre J.

[26] H Charlesworth and A Durbach, 'Equality for Indigenous Peoples in the Australian Constitution' (2011) 15 AILR 64, 67.

[27] See the Canadian cases of *R v Drybones* [1970] SCR 282 and *R v Kapp* [2008] 2 SCR 483.

[28] See, eg, *R v Kapp* (n 28) paras 29, 56, 114.

the UNDRIP, Article 2 raises a tension that poses a major political and legal challenge for the settler liberal democracies: what concepts of equality and non-discrimination can accommodate or support the distinctive collective rights of Indigenous peoples? These issues provoked some of the most polarizing debates in the Working Group, especially where the rights of Indigenous groups to traditional lands, property, self-governance, and 'free, prior, and informed consent' were in issue. As is discussed further below, because Article 2 refers to the rights of Indigenous individuals alongside those of Indigenous peoples, some States were of the view that it should condition the protection and exercise of the Declaration's collective rights provisions.

In the Second Session of the Working Group, held in 1996, an order of work was agreed, in which draft Articles were organized into clusters and arranged in order of least-to-most controversial.[29] Article 2, the centrepiece non-discrimination provision of the Declaration, was included in the 'least controversial' cluster, along with draft Articles 1, 44, and 45. In its final form, Article 1 guarantees 'the full enjoyment, as individuals or collectives, of all human rights and fundamental freedoms' to Indigenous individuals and peoples;[30] Article 45 specifies that 'nothing in the UNDRIP should be construed as diminishing or extinguishing the rights Indigenous peoples have now or may acquire in the future'; and, as noted, Article 44 attributes the rights in the UNDRIP equally to male and female Indigenous individuals. Together, these Articles comprise the general 'equality and non-discrimination' protections in the UNDRIP, linking the Declaration as a whole to the existing body of human rights law by confirming that extant rights are also vested in Indigenous persons and groups. The UNDRIP's suite of equality norms is further supported by the omnibus Article 46, added in 2006 after intergovernmental negotiations on the text had concluded, which specifies, inter alia, that 'in the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected', and that 'the provisions set forth in this Declaration shall be interpreted in accordance with the principles of ... respect for human rights, equality, [and] non-discrimination'.

The prohibition of discrimination *against* Indigenous peoples on the grounds of their Indigeneity, affirmed by Article 2, is uncontroversial. The principle of non-discrimination on prohibited grounds is deeply embedded within international and regional human rights law. It finds expression as a general fundamental right in the UDHR (Articles 2 and 7), the ICCPR (Articles 2 and 26), the ICESCR (Articles 2(1) and 2(2)), and the CRC (Article 2). Comparable general protections appear in the ECHR (Article 14 and Protocol 12), the ACHR (Articles 1 and 24), the American Declaration of the Rights and Duties of Man (Article II),[31] and the ACHPR (Article 2). Non-discrimination in the general human rights' instruments protects against discrimination on the grounds of: sex or gender; race, colour, descent, ethnic origin, national origin, and nationality; language;

[29] UNCHR, Report of the Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/1997/102 (10 December 1996).

[30] See the comparable Arts V, XXXV, and XXXVI in the American Declaration on the Rights of Indigenous Peoples. Article XXXV provides that: 'Nothing in this Declaration may be interpreted so as to limit, restrict, or deny human rights in any way, or so as to authorize any action that is not in keeping with international human rights law.' General Assembly, Organization of American States (OAS), Draft Resolution American Declaration on the Rights of Indigenous Peoples, OEA/Ser.P/AG/doc.5537/16 (8 June 2016) Arts V, XXXV, XXXVI.

[31] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1, 17 (1992).

religion and religious belief; disability; age; political belief; and marital, parental, and familial status.

The concept of discrimination in human rights law is furthered elaborated in the anti-discrimination treaties, the ICERD and CEDAW, which address discrimination on the basis of race and sex respectively. 'Racial discrimination' is defined in Article 1 of the ICERD as:

> ... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

A substantively similar definition is used in Article 1 of the CEDAW to define 'discrimination against women', and while the ICCPR does not contain a definition of discrimination, the Human Rights Committee (HRComm) has recommended one that is nearly identical to the ICERD and CEDAW definitions.[32] Of particular relevance for Indigenous peoples, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides that persons belonging to minorities should be protected in the exercise of their human rights 'individually as well as in community with other members of their group, without any discrimination',[33] and ILO Convention 169 affirms in its Article 3 that '[i]ndigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination'.[34] Finally, the American Declaration on the Rights of Indigenous Peoples specifies that:

> Indigenous peoples have the right not to be subject to racism, racial discrimination, xenophobia, and other related forms of intolerance. The states shall adopt the preventive and corrective measures necessary for the full and effective protection of this right.[35]

Against this backdrop, Article 2 of the UNDRIP draws expressly on the phrasing used by the ICERD Committee in its General Recommendation 23 on Indigenous Peoples. The Committee calls on State Parties to the Convention to '[e]nsure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity'.[36] Thus, Article 2 reflects general concepts of non-discrimination extant in international law, and extends them to expressly prohibit discrimination on the grounds of 'indigenous origin and identity', effectively adding these to the list of 'prohibited grounds' already enumerated in other international human rights treaties. In so doing, however, Article 2 does not address outstanding questions about the meaning and interaction of equality and non-discrimination in human rights law, nor does it resolve the problem of whether and how

[32] HRComm, General Comment 18: Non-Discrimination, UN Doc HRI/GEN/1/Rev.1 (1989) para 7.

[33] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135, UN Doc A/Res 47/135 (18 December 1992) Art 3(1). See also Arts 2 and 4(1).

[34] ILO Convention 169: Indigenous and Tribal Peoples Convention (Convention concerning Indigenous and Tribal Peoples in Independent Countries) (Seventy-Sixth Conference Session, Geneva, 27 June 1989) Art 3.

[35] General Assembly, OAS, Draft Resolution American Declaration on the Rights of Indigenous Peoples, OEA/Ser.P/AG/doc.5537/16 (8 June 2016) Art XII.

[36] CERD, General Recommendation 23: Rights of Indigenous Peoples, UN Doc A/52/18 (18 August 1997) Annex V, 122, para 4(b).

these concepts support, or undermine, the various distinctive rights vested in Indigenous peoples and reflected in the UNDRIP.

2.2 Article 2 and Group Rights

One outstanding question implicated by Article 2, of particular import for the UNDRIP as a whole, is whether and in what circumstances the rights of groups can limit or take precedence over the human rights of individuals. As a starting point, the reference to the collective rights of 'peoples' in Article 2 is in keeping with the protection extended to groups by Article 2(1) of the ICERD, which provides that 'each state party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions', and requires State Parties to take measures to 'ensure the adequate development and protection of certain racial groups or individuals belonging to them'.[37] Accordingly, notwithstanding their concerns about references to the collective rights of Indigenous peoples in other parts of the UNDRIP, the vast majority of States commenting on the draft text of Article 2 in the Working Group were satisfied that the principle of non-discrimination should apply to both individuals and groups. An intervention by Canada on Article 2 is illustrative:

> As we mentioned in our statement on Article 1, we will have to review the document with respect to the use of the terms 'indigenous peoples' and 'indigenous individuals' to ensure consistency. In this case, we agree that this right of non-discrimination should be enjoyed by both the individuals and their collectivities.[38]

New Zealand likewise endorsed the reference to 'peoples' in Article 2, expressly referencing the ICERD on this point:

> Discrimination against individuals is also the focus of most international instruments, although some refer to discrimination against groups. The provisions of the [ICERD], encompasses [sic] racial discrimination or incitement directed at groups.[39]

A few States, however, were so comprehensively opposed to the concept of collective rights that they objected to the use of the phrase even in a provision protecting groups against discrimination. France, Japan, and the United Kingdom, for example, questioned whether the concept of 'group rights' could ever be compatible with principles of equality and non-discrimination, and qualified their acceptance of the Declaration with interpretative statements to this effect.[40] In 1998, for example, Japan expressed the view that Articles 1

[37] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969), 660 UNTS 195, Art 2(1).

[38] Canada, 'Articles 1, 2 & 43' (25 October 1996), Doc 228a (1996) in Docip (n 20) (on file with author) on Art 2. See also US Working Group on the 'Draft United Nations Declaration on the Rights of Indigenous Peoples', Representative GA Smith, 'US Comments on Articles 1, 2, 12–14, 24, 29, and 42–44' (24 October 1996), Doc 231a (1996) in Docip (n 20) 2 (on file with author), in which the United States expressed support for Arts 1 and 2 'subject to satisfactory resolution of the use of the term "peoples" '.

[39] New Zealand, 'Article 2: New Zealand Intervention', Doc 030a (1998) in Docip (n 20) 1–2 (on file with author).

[40] HRC Summary Record of the 21st Meeting, UN Doc A/HRC/1/SR.21 (29 June 2006) paras 46 (Japan) and 56 (United Kingdom); UNGA Verbatim Record, UN Doc A/61/PV.107 (13 September 2007) 21 (United Kingdom): 'with the exception of the right to self-determination, we therefore do not accept the concept of collective human rights in international law. Of course, certain individual human rights can often be exercised collectively, in community with others. Examples would include freedom of association, freedom of religion or a collective title to property.' Japan was of the view that collective rights 'cannot be found in international instruments drafted and adopted by the United Nations in the past': Japan, 'General Statement by the Government of Japan on "the draft declaration on the rights of indigenous peoples" ', Doc 033a (1995) in

and 2 should be redrafted because 'human rights basically belong to individuals and so-called collective rights should result in ... individual rights'.[41]

Other States suggested that the reference to individuals in Article 2 could condition the exercise of the group rights recorded elsewhere in the UNDRIP. These States suggested that Articles 1 and 2 should guide the interpretation of other provisions of the UNDRIP, and that the Declaration should 'specifically acknowledge that role for those Articles'.[42] This would have had the effect of bringing equality and non-discrimination norms to bear upon all other provisions of the UNDRIP, potentially requiring rights vested in 'peoples', including self-governance rights, to be conditioned by individual rights to non-discrimination (a possibility which is anyhow left open by the interpretative directive in Article 46(3)). Canada, for example, pointed to the need to specify that Indigenous self-governance powers referred to in draft Articles 31 and 34 should be 'consistent with ... human rights standards',[43] while the United States insisted that the separate Indigenous juridical systems that might be supported by Article 34 (then draft Article 33) should 'nonetheless be consistent with principles of non-discrimination and minimum standards of protection for all members'.[44] Article 34, like its draft predecessor, protects Indigenous institutional structures, distinctive customs, spirituality, traditions, procedures, practices, and 'juridical systems or customs', and is internally qualified by a clause specifying that the rights it protects must be exercised 'in accordance with international human rights standards'. Notably, draft Article 31, protecting Indigenous rights to 'autonomy and self-government', was not internally qualified in this way, nor was its abbreviated equivalent in the final text of the UNDRIP, Article 4.[45]

Other States were of the view that draft Article 32 (now Article 33, protecting the right of Indigenous peoples to determine their membership), read in combination with Article 9 (protecting the right of Indigenous individuals to belong to an Indigenous community or nation), raised the possibility of discrimination in membership governance, and implicated 'an individual's right to nondiscrimination and due process in questions of membership'.[46] Some States argued that the matter could be resolved by subjecting Articles 9 and 32 to the overarching non-discrimination principle in Article 2, and proposed that Articles 2 and 9 should be consolidated to emphasize the non-discrimination requirement inherent in each.[47] Canada, for example, was of the view that:

Docip (n 20) para 4 (on file with author). See also United States on Art 1, 'USDEL Comments on Section 1 of the Draft Declaration', Doc 027a (1995) in Docip (n 20) (on file with author).

[41] Japan, 'Statement read by the Japanese Government Delegation' (9 December 1998), Doc 024a (1998) in Docip (n 20) (on file with author; see handwritten comments at rear of document).

[42] Australia, 'Comments of the Australian Delegation on the Discussion Paper on Article 9' (5 February 2002), Doc 156a (2001) in Docip (n 20) (on file with author).

[43] Canada, 'Part VII: Preliminary Comments', Doc 024a (1995) in Docip (n 20) (on file with author). See also Australia, suggesting that 'it be made clear that this text cannot provide the basis for action inconsistent with recognised human rights and fundamental freedoms': Australia, 'Australian Delegation Statement: Part VII of the Declaration', Doc 044a (1995) in Docip (n 20) (on file with author).

[44] United States, 'Preliminary Comments' (29 November 1995), Doc 029a (1995) in Docip (n 20) (on file with author).

[45] The wording of the qualification changed, however, from 'in accordance with internationally recognized human rights standards' in draft Article 33 to 'international human rights standards' in Article 34.

[46] United States, 'Comments by USA', Doc 028a (1995) in Docip (n 20) (on file with author). See further discussion in Imai and Gunn, Chapter 8, this volume.

[47] United States, 'US Intervention: Article 9', Doc 149a (2001) in Docip (n 20) (on file with author); Australia on Art 9, 'Comments of the Australian Delegation on the Discussion Paper on Article 9' (5 February 2002), Doc 156a (2001) in Docip (n 20) (on file with author).

Although we recognize the community's right to determine membership, as with all other aspects of government, this power must be subject to the individual's right to fairness. We therefore believe that the article would be strengthened by a reference ensuring that the decisions to deny membership in a community to an individual are not made on an arbitrary or illegal basis.[48]

While the final text of the Declaration contains no expressly 'overarching' provision affirming the priority of individual rights over the rights of peoples, the tension between collective rights and equality norms was eventually addressed, albeit obliquely (and belatedly), in Article 46.[49] This Article expressly allows limitations to be imposed on rights contained in the UNDRIP, where those limitations 'are determined by law and in accordance with international human rights obligations', and are 'non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society'. Further, as noted, Article 46(3) provides that the UNDRIP is to be interpreted in accordance with, inter alia, the principles of 'respect for human rights, equality [and] non-discrimination'. International, regional, and domestic adjudicatory fora have provided a variety of responses to claims by Indigenous peoples that they have been discriminated against. This body of law is likely to influence the interpretation of Article 2, by giving content to the broad references in that Article to equality and non-discrimination.

3. Discrimination against Indigenous Peoples: Indigenous Origin and Racial Discrimination

In this section of the chapter, I consider judicial responses to non-discrimination claims made by Indigenous groups or individuals, with a view to assessing the likely impact of the UNDRIP on this emerging body of jurisprudence. While the prohibition of discrimination against Indigenous peoples on the grounds of their Indigeneity is well established in international law, contentious cases in treaty bodies and domestic courts are relatively rare, even in jurisdictions where constitutional or legislative anti-discrimination laws have been in place for some time. In the last several decades, however, non-discrimination norms have emerged as the justificatory basis for the recognition and protection of Indigenous *property rights* by domestic and regional courts. These developments are discussed below.

In international law, non-discrimination norms have been most thoroughly developed with respect to Indigenous peoples as a prohibition on racial discrimination. The ICERD Committee has confirmed that 'race', as defined in Article 1(1) of the Convention, 'relates to all persons who belong to different races, national or ethnic groups or to indigenous peoples'.[50] The direct influence of the ICERD Committee on the development of a body of non-discrimination law on Indigenous peoples is limited, however, by the fact that of the 177 State Parties to the ICERD, only 56 have accepted the Committee's jurisdiction

[48] Canada, 'Articles 5, 9 & 32' (25 October 1996), Doc 228a (1996) in Docip (n 20) (on file with author).

[49] See 'Final UNGA 2007', *UNDRIP Comparative Table* (Docip 2011) in Docip (n 20) 34 (on file with author).

[50] CERD, General Recommendation 24: Concerning Article 1 of the Convention, UN Doc A/54/18 (27 August 1999) Annex V,105, para 1.

to hear individual complaints.[51] Thus, while no contentious case concerning discrimination against Indigenous peoples has yet been heard under the ICERD's individual complaints mechanism, the Committee has addressed discrimination against Indigenous peoples in its General Recommendations,[52] routinely refers to Indigenous peoples in its concluding observations on State Party reports,[53] and has considered Indigenous rights in communications with States under its urgent action and early-warning procedures.[54] The HRComm, in contrast, *has* heard complaints from Indigenous individuals under its Optional Protocol jurisdiction, including claims based on alleged breaches of the ICCPR's non-discrimination and equality provisions (Articles 2 and 26). The Committee has so far declined to consider the substance of these non-discrimination allegations on their merits, electing instead to deal with Indigenous complaints as claims arising under Article 27 (protecting the rights of individuals as members of minorities), discussed below.[55] Like the CERD, however, the HRComm has also recorded its concern about the rights of Indigenous peoples in concluding observations on State Party reports.[56]

[51] 'Status of Treaties: International Convention on the Elimination of All Forms of Racial Discrimination' (UN Treaty Collection, status as at 28 June 2014), <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en> accessed 16 October 2017.

[52] CERD, General Recommendation 23 (n 37).

[53] See, for recent examples, the Concluding Observations of the CERD, Namibia, UN Doc CERD/C/NAM/CO/13-15 (13 May 2016) paras 15–16, 19–20, 22, 24; the Holy See, UN Doc CERD/C/VAT/CO/16-23 (11 December 2015) para 17; Mongolia, UN Doc CERD/C/MNG/CO/19-22 (11 December 2015) para 27; Colombia, UN Doc CERD/C/COL/CO/15-16 (28 August 2015) paras 8, 12, 16, 18, 20, 22, 24, 28, 32, 34, 36, 38, 40, in Spanish; Costa Rica, UN Doc CERD/C/CRI/CO/19-22 (25 September 2015) paras 14, 16, 18, 22, 24, 26, 28, 32; the Niger, UN Doc CERD/C/NER/CO/15-21 (25 September 2015) para 17; Norway, UN Doc CERD/C/NOR/CO/21-22 (25 September 2015) paras 24, 28; Suriname, UN Doc CERD/C/SUR/CO/13-15 (25 September 2015) paras 22, 24, 26, 28, 32, 34–35, 37.

[54] CERD, Working Paper—Prevention of Racial Discrimination, Including Early Warning and Urgent Procedure, UN Doc A/48/18 (19 January 1994) Annex III. See, for recent examples, 'Letter from Jose Franscisco Cali Tzay, Chairperson of the Committee on the Elimination of Racial Discrimination to Triyono Wibowo, Ambassador, Permanent Representative, Permanent Mission of Indonesia to the United Nations at Geneva' (28 August 2015); 'Letter from Jose Franscisco Cali Tzay, Chairperson of the Committee on the Elimination of Racial Discrimination to John Otachi Kakonge, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Kenya to the United Nations at Geneva' (7 March 2014); 'Letter from Alexei Avtonomov, Chairperson of the Committee on the Elimination of Racial Discrimination to Luis Enrique Chávez Basagoitia, Ambassador, Permanent Representative to the United Nations at Geneva' (1 March 2013) (in Spanish); 'Letter from Alexei Avtonomov, Chairperson of the Committee on the Elimination of Racial Discrimination to Betty E King, Ambassador, Permanent Representative, Permanent Mission of the United States to the United Nations at Geneva' (1 March 2013); 'Letter from Alexei S. Avtonomov, Chairperson of the Committee on the Elimination of Racial Discrimination to Alberto Navarro Brin, Ambassador Extraordinary and Plenipotentiary, Permanent Representative to the United Nations at Geneva' (9 March 2012) (in Spanish); 'Letter from Alexei Avtonomov, Chairperson of the Committee on the Elimination of Racial Discrimination to Janine Elizabeth Corle-Felson, Ambassador, Permanent Representative, Permanent Mission of Belize to the United Nations at Geneva' (9 March 2012).

[55] See *Apirana Mahuika and Others v New Zealand*, Comm No 547/1992, UN Doc CCPR/C/70/D/547/1993 (HRComm 1995) para 2; *Lovelace v Canada*, Comm No R.6/24, UN Doc Supp No 40 (A/36/49) at 166 (HRComm 1981) para 18; *Lubicon Lake Band v Canada*, Comm No 167/1984, UN Doc Supp No 40 (A/45/40) at 1 (HRComm 1990) para 32.2.

[56] For examples from 2016, see HRComm, Concluding Observations of the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Burkina Faso, UN Doc CCPR/C/BFA/CO/1 (17 October 2016) paras 41–42; Ecuador, UN Doc CCPR/C/ECU/CO/6 (11 August 2016) paras 35–38; Argentina, UN Doc CCPR/C/ARG/CO/5 (10 August 2016) paras 37–38; Costa Rica, UN Doc CCPR/C/CRI/CO/6 (21 April 2016) paras 9–10, 15, 41–42; Sweden, UN Doc CCPR/C/SWE/CO/7 (28 April 2016) paras 38–39; New Zealand, UN Doc CCPR/C/NZL/CO/6 (28 April 2016) paras 17–18, 21–22, 24–26, 29–30, 45–48; Rwanda, UN Doc CCPR/C/RWA/CO/4 (2 May 2016) paras 47–48;

Unlike the UN Treaty Bodies, the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (hereafter, 'the Inter-American Commission') have produced an extensive body of jurisprudence in contentious cases dealing with claims brought by Indigenous and tribal communities. In a series of cases decided in the last fifteen years, the Court and Commission have found that the failure of State Parties to recognize and protect Indigenous property rights to the same degree as private property rights of other citizens has breached the non-discrimination and equality provisions of the ACHR, read in conjunction with the Convention's Article 21 property guarantee.[57] In the landmark 2001 case of *Mayagna v Nicaragua*,[58] for example, the IACtHR found that the failure of the Nicaraguan State to 'delimit and demarcate' the lands of the Mayagna (Sumo) Awas Tingni people 'violated the right to property protected by article 21 of the American Convention on Human Rights, to the detriment of the members of the ... Community, in connection with articles 1(1) and 2 of the Convention'.[59] Similarly, according to the Inter-American Commission:

> States violate the right to equality before the law, equal protection of the law, and non-discrimination when ... they do not grant indigenous peoples 'the protections necessary to exercise their right to property fully and equally with other members of the ... population'.[60]

In addition to deploying the non-discrimination provisions of the ACHR to require States to recognize Indigenous property rights by formalizing them, the Inter-American Commission has also applied those provisions to advise that discriminatory legal infringement of Indigenous property rights is prohibited by the American Declaration on the Rights and Duties of Man.[61] In its 2002 findings in *Mary and Carrie Dann (United States)*, the Inter-American Commission observed that the historic expropriation of the traditional lands of the Western Shoshone was not accompanied by the procedural and compensatory guarantees offered to the holders of private property rights, and accordingly concluded that:

> ... to the extent the [United States] has asserted as against the Danns' title in the property in issue based upon the ICC proceedings, the Danns have not been afforded their right to equal protection of the law under Article II of the American Declaration.[62]

Namibia, UN Doc CCPR/C/NAM/CO/2 (22 April 2016) paras 9–10, 43–44; South Africa, UN Doc CCPR/C/ZAF/CO/1 (22 April 2016) paras 45–47.

[57] *Case of the Saramaka People v Suriname*, IACtHR Series C No 18 (17 September 2003) para 110. See also *Kuna Indigenous Peoples of Madungandi and Embera Indigenous People of Bayano and their Members v Panama*, Advisory Opinion Report No 125/12, IACHR (13 November 2012) 196; *Maya Indigenous Community of the Toledo District v Belize*, Report No 40/04, IACtHR, OEA/Ser.L/V/II.122 Doc 5 rev 1, 727 (12 October 2004) para 193; *Case of the Kaliña And Lokono Peoples v Suriname*, IACtHR Series C No 309 (25 November 2015) para 142.

[58] *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR Series C No 79 (31 August 2001).

[59] ibid para 173(2). See also *Saramaka People v Suriname* (n 58) para 91.

[60] *Kuna Indigenous Peoples v Panama* (n 58) para 303, also 305; *Maya Indigenous Community v Belize* (n 58) paras 61, 171.

[61] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

[62] *Mary and Carrie Dann v United States*, IACHR, Report No 75/02, Case 11.140 (27 December 2002) para 143.

In domestic legal systems, however, while Indigenous claims are seldom litigated as non-discrimination or equal protection claims,[63] anti-discrimination law has played a crucial role in prompting State recognition of Indigenous property rights. Domestic anti-discrimination laws have supported claims that Indigenous customary property rights should be protected to the same extent as the legally granted rights of private and registered property owners. In this way, non-discrimination principles have helped to protect those rights, *once recognized*, from discriminatory infringement or extinguishment. Unlike the IACtHR, domestic courts have not found that anti-discrimination norms and property protections *require* recognition of Indigenous customary property rights. The decision to recognize customary law as a source of rights instead tends to be regarded by courts as a logically separate and prior one, not a move that States are obliged to take to remedy discrimination.[64] That said, ambient human rights and equality principles have been taken into account by courts as reasons to judicially recognize property rights sourced in customary law, as, for example, in Australia and South Africa.

In the Western settler States of Canada, the United States, and New Zealand, Indigenous property claims find purchase in commitments made in historic treaties, and in Indigenous-specific 'special trust relationships', concepts of the 'honour of the Crown', and fiduciary responsibilities that attend those commitments and govern dealings with Indigenous common law property rights.[65] Matters arising from the negotiation of land claim settlements by the settler executives are typically regarded as largely non-justiciable political questions[66] or else are rendered non-justiciable by the terms of those agreements.[67] Accordingly, Indigenous–State relationships in those countries are increasingly structured

[63] Some early cases emerged alongside the adoption of anti-discrimination legislation. See, eg, the Canadian Supreme Court's decision in *R v Drybones* (n 28), applying the Canadian Bill of Rights, SC 1960, c 44 to strike down a provision of the Indian Act, RSC 1952, c 149, s 94(b), which made it illegal for Indians to be intoxicated outside of reserve lands.

[64] See generally *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (High Court of Australia); *Western Australia v Commonwealth* (1995) 183 CLR 373 (High Court of Australia); *Calder v British Columbia* [1973] SCR 313 (Supreme Court of Canada); *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256 (Supreme Court of Canada); *Te Weehi v Regional Fisheries Office* (1986) 1 NZLR 682 (New Zealand High Court).

[65] See, eg, *Nor Nyawai and Others v Borneo Pulp Plantation Sdn Bhd and Others* [2001] 2 CLJ 769 HC (ref'd) (Malaysia); *Kerajaan Negeri Selangor and Others v Sagong Tasi and Others* [2005] 4 CLJ 169 (Malaysia); *Guerin v The Queen* [1984] 2 SCR 335 (Canada); *Wewaykum Indian Band v Canada* [2002] 4 SCR 245; *Manitoba Metis Federation v Canada (Attorney General)* [2013] 1 SCR 623 (Canada); *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC and CA) at 664; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 at 304 (Court of Appeal of New Zealand); *Tsilhqot'in Nation v British Columbia* (n 65).

[66] See, eg, the commentary in the New Zealand courts: *Hayes and Another v Waitangi Tribunal and Others*, CP 111/01 (Unreported, High Court Wellington, Goddard J, 10 May 2001) 17; see also *Kai Tohu Tohu o Puketapu Hapu Inc v Attorney-General*, CP344/97 (Unreported, High Court Wellington, Doogue J, 5 February 1999). P McHugh, 'What a Difference a Treaty Makes—the Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law' (2004) 15 Public L Rev 87; K McNeil, *The Inherent Right of Self-Government: Emerging Directions for Legal Research* (Osgoode Hall Law School 2004); on the absence of a fiduciary duty in Australian law, see K Gover, 'The Honour of the Crowns: State–Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38 Sydney L Rev 338; C Hughes, 'Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada' (1993) 16 University New South Wales LJ 75.

[67] See, eg, in New Zealand, where a 'boiler plate' privative clause is included in modern Treaty of Waitangi Deeds of Settlement. See *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 (NZ), para 43. In Australia, similar clauses preventing future native title claims are typically included in Indigenous Land Use Agreements as part of Recognition and Settlement Agreements concluded under Victoria's Traditional Owner Settlement Act 2010. See Indigenous Land Use Agreement between Dja Dja Wurrung Native Title Group, Dja Dja Wurrung Clans Aboriginal Corporation and the State of Victoria (2013), cl 14 and 15; also Indigenous Land Use Agreement between Gunditj Mirring and the State of Victoria (2007), cl 23.

by political bargains and characterized by inter-governmental forms of relations, and by claims based on the special attributes of those arrangements, rather than by independent reference to equality-based human or minority rights norms.[68] Canada, for example, has provided constitutional protection to Indigenous property and treaty rights in section 35 of the Constitution Act,[69] a provision notably positioned outside of the human rights protections of the Charter of Human Rights and Freedoms, and 'shielded' from the application of the Charter by section 25.[70] New Zealand's Bill of Rights Act (NZBORA) and Human Rights Act (HRA) have never been used to advance Māori claims in New Zealand's courts,[71] even while Māori successfully sought a decision under the CERD's urgent action decisions by the ICERD Committee on the Foreshore and Seabed Act 2004 (now repealed), a statute that denied to Māori the right to litigate customary title claims to the foreshore.[72] The Committee advised that the Act appeared to 'contain discriminatory aspects against the Māori'.[73] The emphasis on inter-governmental avenues for claims-making in these countries is a reflection of the politically strategic choices of Indigenous peoples, as well as of traditions of judicial deference to the executive in matters involving Indigenous interests and the limited utility of non-discrimination norms in the resolution of disputes requiring the redistribution of property and expenditure of public resources. The equality and non-discrimination provisions of the UNDRIP will support in general terms the reparative ethos of these processes, even if they do not provide an independent basis for Indigenous historic claims.

In Australia, no historic treaties were signed with Indigenous peoples and no trust doctrine resulted from the common law recognition of aboriginal title rights. As a result, anti-discrimination norms have provided the major vehicle for the recognition and protection of Indigenous historic property rights.[74] The federal Racial Discrimination Act 1975 (RDA), which incorporates the ICERD into Australian law, has been of pivotal importance, especially given the absence in Australia of a constitutional Bill of Rights or federal legislative bill of rights. The RDA's prohibition on racial discrimination is especially significant given the constitutional power of Australian federal and State governments to

[68] See generally M Langton, L Palmer, M Tehan, and others (eds), *Honour among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne University Press 2004); JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (University of Toronto Press 2009).

[69] Constitution Act, 1982, being Sch B to the Canada Act 1982 (UK), 1982, c 11.

[70] Supreme Court of Canada jurisprudence emphasizes the specificity of s 35 Aboriginal rights relative to Charter rights. See discussions in *R v Kapp* (n 28) and *R v Van der Peet* [1996] 2 SCR 507, para 19: 'Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, aboriginal rights must be viewed differently from Charter rights because they are rights held only by aboriginal members of Canadian society.'

[71] New Zealand Bill of Rights Act 1990 (NZBORA) s 20, Human Rights Act 1993 (HRA) s 21(1)(f). See F Adcock, 'Māori and the Bill of Rights Act: A Case of Missed Opportunities?' (2013) 11 NZJPIL 183, 199 and C Charters, 'Māori, Beware the Bill of Rights Act' (2003) NZLJ 401.

[72] CERD, Sixty-Sixth Session, 17 February–11 March 2005, Decision 1 (66): New Zealand, UN Doc CERD/C/DEC/NZL/1 (27 April 2005) para 6.

[73] Likewise, the New Zealand Attorney-General observed in her pre-enactment advice on the Foreshore and Seabed bill that there was 'a significant argument for a prima facie breach of [the non-discrimination provision of the NZBORA] section 19', concluding that any limit could nonetheless be justified as a reasonable limit on that right in accordance with the NZBORA's s 5. Attorney-General, Foreshore and Seabed Bill (6 May 2004) paras 56, 79, 103.

[74] *Gerhardy v Brown* (1985) 159 CLR 70 (High Court of Australia); *Mabo v Queensland* (1988) 166 CLR 186 (High Court of Australia); *Mabo v Queensland (No 2)* (n 65); *Western Australia v Commonwealth* (1995) 183 CLR 373 (High Court of Australia); *Western Australia v Ward* (2002) 213 CLR 1 (High Court of Australia).

make laws with regard to 'the people of any race for whom it is deemed necessary to make special laws',[75] a controversial provision that has been interpreted by the High Court to allow the passage of laws that impose burdens as well as benefits on 'the people of any race'.[76] This power has only been used to pass federal laws for Indigenous Australians. The enactment of the RDA thus provided a measure by which to condition or guide the exercise of the constitutional 'race power' by state and federal legislatures (although subsequent federal legislation can override the RDA by implication or by express repeal). The RDA has accordingly been suspended three times,[77] each time to enable the enactment of federal laws with regard to Indigenous peoples that might otherwise have breached the Act's non-discrimination provisions. Importantly, however, the RDA has been used to invalidate racially discriminatory laws passed by state legislatures,[78] and thus has played a pivotal role in the development of the common law doctrine of aboriginal title by preventing legislative attempts at uncompensated extinguishment. The Australian experience shows the utility of anti-discrimination laws as protection for Indigenous interests in circumstances where other legal and political avenues are not available. The equality and non-discrimination norms of Article 2 of the UNDRIP could resonate substantively with this body of law (and augment it by emphasizing states' consultative obligations), if Australian courts were amenable to considering the Declaration as a determinative influence on statutory interpretation. Recent jurisprudence suggests, however, that the Australian High Court is not currently inclined to consider the UNDRIP in matters involving the RDA's application to Indigenous law and policy, even in circumstances where the relevance of international law to the interpretation of the Act is directly in question (see further discussion below).[79]

Older decisions of the Australian High Court, however, show the crucial influence of international human rights law, and of concepts of equality and anti-discrimination, in the development of the common law on Indigenous property rights. The key case is the landmark 1992 High Court decision: *Mabo (No 2) v Queensland* (*Mabo* (*No 2*)).[80] This case provided recognition in common law of 'native title' derived from Indigenous traditional laws and customs, finding that native title rights and interests survive the acquisition of sovereignty by the British Crown and remain enforceable where they have not been validly extinguished, surrendered, or abandoned. The RDA was a pivotal precondition of this decision. In its 1988 decision *Mabo v Queensland* (*Mabo* (*No 1*)),[81] the High Court had accepted the proposition that if the property rights claimed by the Meriam Islanders were recognized as common law rights, then an Act passed by the State of Queensland to extinguish such rights on terms less favourable than those required in compulsory acquisition of freehold title would be racially discriminatory. The striking down of the Queensland Act for inconsistency with the RDA preserved the 'status quo ante' in respect of the claimed native title rights, so that those rights in existence when the Act was passed in 1975 were to be protected prospectively against discriminatory infringement. The 1988 decision paved the way for the High Court's

[75] Commonwealth of Australia Constitution Act (1900) s xxvi.

[76] *Kartinyeri v Commonwealth* [1998] 195 CLR 337 (High Court of Australia).

[77] RJ Miller, J Ruru, L Behrendt, and T Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press 2010) 190.

[78] *Western Australia v Commonwealth* (n 75).

[79] *Maloney v The Queen* (2013) 252 CLR 168 (High Court of Australia).

[80] *Mabo v Queensland* (*No 2*) (n 65). [81] *Mabo v Queensland* (n 75).

native title decision in *Mabo* (*No 2*) by allowing the substantive issue of recognition to be tried. In the lead judgment, Brennan J framed the judicial recognition of native title as a necessary development of Australian common law, influenced by the growing importance of anti-discrimination principles in domestic and international law:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people ... A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[82]

The existence of the RDA, therefore, enabled the High Court to find that the common law native title rights of Indigenous Australians could not be extinguished on terms less favourable than those afforded to the holders of private freehold title in a compulsory acquisition.[83] On this basis, subsequent State legislation passed with the aim of extinguishing native title and replacing it with statutory entitlements has been invalidated as racially discriminatory and contrary to the RDA.[84]

Equality and non-discrimination principles in post-apartheid South Africa have also facilitated the recognition of Indigenous property rights. In 2001, the South African Constitutional Court held that the Indigenous Richtersveld community was entitled to the restitution of their customary property rights over territory in the Northern Cape Province of South Africa, in accordance with post-apartheid legislation restoring property rights to communities dispossessed of land 'as a result of past racially discriminatory laws or practices'. In doing so, the Court rejected the argument put forward by the South African government and the registered title holder (the mining company Alexkor Ltd) that any customary rights held by the community had not survived the acquisition of sovereignty by the British Crown.[85] The Court went on to find that the community had been dispossessed of property rights by discriminatory laws, and declined to accept the defendant's argument that because the relevant statute left the registered title of some black South Africans intact, it did not discriminate on the basis of race. The Court stated:[86]

> ... given that indigenous law ownership is the way in which black communities have held land in South Africa since time immemorial, the inevitable impact of the Precious Stones Act's failure to recognise indigenous law ownership was racially discriminatory against black people who were indigenous land owners. The laws and practices by which the Richtersveld Community was dispossessed of the subject land accordingly discriminated against the Community and its members on the ground of race.[87]

[82] *Mabo v Queensland* (*No 2*) (n 65) 42 per Brennan J.

[83] ibid 112 [xiii]; *Western Australia v Ward* (n 75) paras 122–24 (High Court of Australia). The first case upholding the requirement of compensation for extinguished native title rights was decided in 2016: *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900.

[84] *Western Australia v Commonwealth* (n 75) 418, 437, 451, 483–84 (Mason CJ and Brennan, Deane, Toohey, Gaudron, and McHugh JJ); *Western Australia v Ward* (n 75) paras 122–24.

[85] *Alexor Ltd and Another v Richtersveld Community and Others* (CCT19/03) 2004 (5) SA 460 (Constitutional Court of South Africa) paras 68–69, 82.

[86] ibid para 95. [87] ibid para 96.

To summarize, the non-discrimination principle contained in Article 2 of the UNDRIP gives effect to a prohibition against racial discrimination that forms part of international and regional human rights treaties, and is a central aspect of domestic anti-discrimination law in many States. In some countries, the prohibition serves to confirm that Indigenous property rights should be given the same protections afforded to non-Indigenous property holders, and can encourage political and judicial actors to recognize Indigenous property rights based on customary law. The UNDRIP may yet offer support for Indigenous peoples advancing claims premised on anti-discrimination norms, including claims to historic property, especially where relational, agreement-based justifications for such rights are not available. The next section considers the human rights methodologies that have been used to *defend* distinctive Indigenous interests and entitlements where these have been challenged as forms of prohibited racial discrimination against non-Indigenous people or against non-members of the right-holding community.

4. Defending Indigenous Rights: Legitimate Differentiation, Special Measures, and Minority Rights

4.1 The Problem of 'Preferential Treatment'

In addition to supporting non-discrimination, the methodologies developed by the ICERD Committee and the HRComm provide guidance on ways to defend Indigenous rights against discrimination-based claims. Of particular significance are the concepts of 'legitimate differentiation', 'special measures', 'specific rights', and 'minority rights'. In this section, I address these concepts in turn, showing first how they have developed in international law and jurisprudence, and then illustrating the use that has been made of them by domestic courts.

The human rights treaty bodies have varied in their explanations of how these justifications differ from one another, and how they relate to principles of non-discrimination and equality. As discussed below, some references to 'legitimate differentiation' in the jurisprudence of the HRComm and CERD suggest that this denotes differentiation that is not *prima facie* discriminatory, while the concept of 'special measures' is positioned as an exception that 'saves' some discriminatory measures from invalidation. The concept of permanent 'specific rights'—recently developed by the ICERD Committee—appears to align methodologically with 'legitimate differentiation', because it does not depend on overarching concepts of substantive equality. However, 'legitimate differentiation' seems to be premised on the idea that the distinction in question is not based on a prohibited ground, or that the corresponding harm is insufficient to render the distinction a 'discriminatory' one,[88] while the ICERD's references to 'specific rights'

[88] This approach is similar to that developed by the Canadian Supreme Court in some discrimination cases arising under the Charter of Human Rights and Freedoms, in which the Charter's non-discrimination clause was triggered only by differentiation that impacted on the applicant's dignity, assessed by reference to, inter alia, the 'pre-existing disadvantage, if any' of the person or group challenging the measure. *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, paras 62–75 (Supreme Court of Canada). Courts in Australia and New Zealand, on the other hand, have tended to read the non-discrimination principle very widely at the outset, and to turn then to the possibility that the act is a special measure, and so an exception to discrimination (Australia, see *Maloney v The Queen* (n 80) or else a 'reasonable limitation' on the rights of the affected party (New Zealand, *Atkinson v Minister of Social Welfare* [2012] NZCA 1 (New Zealand Court of Appeal)).

do not so far rely on a calculus of this kind. Thus, important questions remain to be addressed about the application of equality and non-discrimination norms to the 'specific rights' of Indigenous peoples. The UNDRIP has generated further debate on questions of this kind.

Concerns about the potentially discriminatory impacts of certain Indigenous rights were a dominant theme of negotiations in each of the eleven UNDRIP Working Group sessions. Some States were concerned that draft Articles of the UNDRIP could amount to or enable discrimination against non-Indigenous individuals and peoples. The debates that attended discussion of draft Articles 19 and 20 (now Articles 18 and 21 respectively) are illustrative. Draft Article 19 affirmed, inter alia, that Indigenous peoples have the right to 'participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights', and draft Article 20 required that '[s]tates shall obtain the free and informed consent of the peoples concerned before adopting and implementing [measures that may affect them].'[89] State interventions on these draft Articles show a resistance to the implication that Indigenous peoples should have a 'privileged' position in the democratic functioning of the State. Canada commented in 1996, for example, that draft Article 19 'could be read as meaning that indigenous individuals have special rights in relation to matters that may affect them in the same way that they affect their non-indigenous neighbours'.[90] In an attempt to address this question, some States unsuccessfully sought to amend draft Articles 19 and 20 to include reference to principles of equality and non-discrimination, urging consideration of Article 25 of the ICCPR and Article 2 of the Declaration on the Rights of Minorities (both of which confirm individual rights to vote and participate in public life)[91] as possible ways to 'reflect the principle that indigenous individuals have the right to participate fully in public affairs, like any other citizen', while providing for 'special measures to allow participation in decisions of the state which directly affect certain areas of particular concern to indigenous people'.[92]

Some States were also concerned that the draft Articles might confer a 'veto right' on Indigenous peoples by allowing them to withhold consent to activities affecting them.[93] The possibility that such a right could discriminate against non-Indigenous persons was a major concern of the four CANZUS States (Canada, Australia, New Zealand, and the United States), and is one of the reasons those States have given for their rejection of the draft in the 2007 General Assembly vote, as well as for qualifications in the interpretative statements accompanying their subsequent endorsement of the Declaration. In their joint submission to the Human Rights Council in 2006, the governments of New Zealand, Australia, and the United States explained their opposition to draft Article 20 in these terms:

[89] 'Draft 1994', *UNDRIP Comparative Table* (n 50) 17, 18.

[90] Canada on Arts 19 and 20, 'Articles 19, 20, 22 & 23' (28 October 1996), Doc 228a (1996) in Docip (n 20) (on file with author).

[91] ibid. See also HRComm, General Comment 18 (n 33) 26, para 3.

[92] Canada on Arts 19 and 20, 'Articles 19, 20, 22 & 23' (28 October 1996), Doc 228a (1996) in Docip (n 20) (on file with author).

[93] UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, UN Doc E/CN.4/1997/102 (10 December 1996) para 209 (France); Norwegian Working Group on the Draft Declaration on the Rights of Indigenous Peoples, 'Statement by Norway on Articles 19, 20, 22 and 23', Doc 350a (1996) in Docip (n 20) (on file with author; see handwritten comments).

The Chair's text also appears to confer upon a sub-national group, a power of veto over the laws of a democratic legislature (Article 20). We strongly support the full and active engagement of indigenous peoples in democratic decision-making processes, but no government can accept the notion of creating different classes of citizenship. Nor can one group in society have rights that take precedence over those of others. In this context, it is important to be mindful of the [ICERD].[94]

Given this backdrop, where a government is compelled to articulate a basis for beneficial Indigenous-specific laws, because these are thought to limit the rights of others to be free from discrimination, what sorts of justifications are available in international human rights laws and jurisprudence? The main contenders are, as discussed below, 'legitimate differentiation', 'special measures', 'specific rights', and 'minority rights'.

4.2 Legitimate Differentiation

The ICERD Committee, the HRComm, the IACtHR, and Inter-American Commission all adhere to the view that there are forms of differentiation that are not discriminatory, either because they do not 'nullify or impair' human rights or because there is a 'reasonable and objective' basis for the distinction made.[95] One outstanding issue in international human rights law, and in the domestic law of some States, is whether 'legitimate differentiation' extends beyond 'special measures' to encompass acts that are by definition non-discriminatory, even though they are not directed towards the alleviation of disadvantage, in other words, whether 'special measures' are a sub-set of 'legitimate differentiation' or address an entirely different set of actions. While the HRComm and the IACtHR have tended to read the two methods together, the CERD appears to regard them as logically distinct. The HRComm has advised that if a group's 'general conditions' impair their enjoyment of human rights, the State should take 'specific action to correct those conditions', adding that:

... such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.[96]

In contrast, in its 1994 General Recommendation 14 on the Definition of Racial Discrimination, the CERD observed that:

... a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate *or* fall within the scope of [the special measures provision] of the Convention.[97]

[94] Joint Statement by Australia, New Zealand, and the United States of America, 'On the Chair's Text on the Declaration on the Rights of Indigenous Peoples' (Human Rights Council, 27 June 2006) in Docip (n 20) 2 (on file with author). Note that this reading of Arts 19 and 20 was rejected by the International Law Association, Committee on the Rights of Indigenous Peoples: International Law Association, 'Final Report of Sofia Conference—Rights of Indigenous Peoples' (Sofia, ILA 2012) 4.

[95] CERD, General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination, UN Doc CERD/C/GC/32 (24 September 2009) para 8.

[96] HRComm, General Comment 18: Non-Discrimination (Thirty-Seventh Session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRC/GEN/1/Rev.1 (10 November 1989) 26.

[97] CERD, General Recommendation 14: Definition of Racial Discrimination, UN Doc A/48/18 (19 January 1994) 114, para 2 (emphasis added).

The distinction is an important one in the context of the UNDRIP, because protections for permanent Indigenous historic rights to land and self-governance do not easily qualify as a special measure if they are not directed to the correction of contemporary Indigenous disadvantage. The logic of 'legitimate differentiation' suggests that such measures might yet be justified because they do not impair the human rights of others, or because they otherwise serve the 'reasonable and objective' aims of a settler or Indigenous government.

The concept of legitimate differentiation as it has been developed by the HRC and the CERD is broadly based on the idea that the like treatment of differently situated persons may compromise substantive equality. In its general jurisprudence, the CERD has made it clear that non-discrimination need not entail uniform treatment where 'there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment',[98] or 'if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'.[99] Similarly, in interpreting the ICCPR, the HRComm has observed that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant',[100] and has included special measures and 'affirmative action' within its broader conception of legitimate differentiation.[101] Could this approach offer a way to support some or all of the group rights set out in the UNDRIP, in the event that it is suggested that these unreasonably limit the rights of others to be free from discrimination? Unless the concept of 'legitimate differentiation' is expanded beyond the few contentious cases in which it has been deployed to date in international law, the answer is likely to be no.

There are very few examples of legitimate differentiation in the HRComm's Optional Protocol jurisprudence. Cases where potentially discriminatory measures were found to be forms of legitimate differentiation include: differentiation between private and public schools in the allocation of State funding;[102] differentiation between persons aged over 60 years and younger persons in fees for public transport, library services, museum entries, and social and cultural activities;[103] and differentiation between natural and foster children in respect of child welfare payments.[104] These seem removed from the distinctions between Indigenous and non-Indigenous persons that underpin Indigenous rights to property, self-governance, and 'free, prior, and informed consent' in the UNDRIP—the distinctions that proved most controversial during its negotiation. Importantly, none of the HRComm decisions on legitimate differentiation turn on distinctions made on the basis of race.

[98] ibid. Similar language has been used by the ECHR to define discrimination as the differential treatment of similarly placed persons for which there is no 'objective and reasonable justification', meaning that the measure has a legitimate aim and there is 'a reasonable relationship of proportionality between the means employed and the aim sought to be realized': *Belgian Linguistics case (No 2)* (App No 1474/62) (1968) 1 EHRR 252, para 10.

[99] CERD, General Recommendation 14 (n 98) 114, para 2. See also *Sefic v Denmark*, CERD UN Doc CERD/C/66/D/32/2003 (7 March 2005) para 7.2 (requirement to speak Danish to receive car insurance not discriminatory in terms of the ICERD).

[100] HRComm, General Comment 18 (n 33) para 13. [101] ibid para 10.

[102] *Lindgren v Sweden*, Comm 298/1988 and 299/1988, UN Doc A/46/40, 253 (HRComm 1990) para 10.4.

[103] *Schmitz-de-Jong v The Netherlands*, Comm 855/1999, UN Doc A/56/40 (HRComm 2001) vol II, 165, para 7.2.

[104] *Oulajin and Kaiss v the Netherlands*, Comms 406/1990 and 426/1990, UN Docs CCPR/C/D/406/1990 and 426/1990 (HRComm 1990) paras 3.2, 7.4.

For the purposes of this chapter, however, it is important to note that the HRComm has used the concept of legitimate differentiation in one relevant context, to justify the legislative criteria used to allocate rights to vote in New Caledonia's self-determination referenda. Here, however, although it was argued that the criteria differentiated on the basis of race and ethnicity, the HRComm found that the criteria were in fact premised on residence, so that no prohibited ground was implicated, and so that they need not enter into an assessment of the corresponding harm caused by the distinction. In *Gillot v France*,[105] the authors, who were 'residents of New Caledonia from metropolitan France', claimed that the voting law discriminated against them on the basis of ethnic origin and nationality, because they were denied the right to vote, while voting rights were ascribed to persons who were Kanaks (members of the 'Melanesian community present in New Caledonia for approximately 4,000 years')[106] and Caldoches ('persons of European descent present in New Caledonia since colonization in 1853').[107] The Committee was satisfied that the criteria 'establishe[d] a differentiation between residents as regards their relationship to the territory, on the basis of the length of "residence" requirement ... whatever their ethnic origin or national extraction'[108] and concluded that:

> Without expressing a view on the definition of the concept of 'peoples' as referred to in article 1 [of the ICCPR], the Committee considers that, in the present case, it would not be unreasonable to limit participation in local referendums to persons 'concerned' by the future of New Caledonia who have proven, sufficiently strong ties to that territory.

This precedent points to a methodology that could potentially support some of the rights contained in the UNDRIP. If an Indigenous right could be framed as a distinction between Indigenous and non-Indigenous peoples that is not premised on the prohibited grounds of race or ethnicity, then it may escape a discrimination-based analysis. The strong correlation of Indigeneity and race in international and domestic law may make this prospect remote, but the possibility remains that some rights may be claimed by Indigenous groups that can be defended as measures allocated on the basis of residency, political affiliation, or cultural connection and therefore not interchangeable with measures implicating the prohibited grounds of descent, ethnicity, or nationality. As discussed below, the jurisprudence of the US Supreme Court on the status of the members of federally recognized tribes seems to follow a logic of this kind.[109] In the small body of jurisprudence on this point, courts in Australia, Canada, and New Zealand have, however, characterized distinctions between Indigenous and non-Indigenous persons[110] or between tribal members and non-members as distinctions based on race.[111]

Legitimate differentiation was also accepted by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 20, in which it observed that '[d]ifferential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective.'[112] Similar principles

[105] *Gillot v France*, UN Doc CCPR/C/75/D/932/2000 (15 July 2002).

[106] ibid para 3.5, note 5. [107] ibid para 3.5, note 6.

[108] ibid para 13.10. The HRComm further noted that 'the right to vote is not an absolute right and that restrictions may be imposed on it provided they are not discriminatory or unreasonable' (para 12.2).

[109] *Morton v Mancari*, 417 US 535, 553.

[110] *Carr v Boree Aboriginal Corp* [2003] FMCA 408, para 9 (Aus); *Amaltal Fishing Co Ltd v Nelson Polytechnic Complaints Review Tribunal* (1996) 2 HRNZ 225 (NZ).

[111] *Gerhardy v Brown* (n 75); *R v Kapp* (n 28).

[112] CESCR, General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2), UN Doc E/C.12/GC/20 (10 June 2009) para 13.

can be found in the jurisprudence of the ECHR,[113] and the IACtHR has occasionally deployed the logic of legitimate differentiation in its consideration of Indigenous and tribal claims under Articles 2 and 21 of the American Convention, often as part of a discussion about special measures. The Court's statement in *Saramaka v Suriname* is illustrative:

> ... the State's argument that it would be discriminatory to pass legislation that recognizes communal forms of land ownership is also without merit. It is a well-established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination. Legislation that recognizes said differences is therefore not necessarily discriminatory. In the context of members of indigenous and tribal peoples, this Court has already stated that special measures are necessary in order to ensure their survival in accordance with their traditions and customs.[114]

Finally, the African Commission on Human and Peoples' Rights has borrowed from the jurisprudence of the IACtHR and the Inter-American Commission to find that Kenya owed an obligation under the ACHPR to recognize the Indigenous status and property rights of the Endorois peoples:

> The African Commission is of the view that the Respondent State cannot abstain from complying with its international obligations under the African Charter merely because it might be perceived to be discriminatory to do so. It is of the view that in certain cases, positive discrimination or affirmative action helps to redress imbalance ... Besides, it is a well established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination.[115]

Legitimate differentiation has found less purchase in domestic law implicating Indigenous interests. In recent jurisprudence on racial discrimination claims involving Indigenous peoples, for example, the High Court of Australia has declined to develop a category of 'legitimate differentiation', although one had been deployed by lower courts.[116] In the 2013 case of *Maloney v The Queen*, discussing section 10 of the RDA (which, broadly, provides that if persons of one race enjoy a right to a more limited extent than persons of another race, the section operates to remove the limitation), one judge explained the Court's interpretative stance as follows:

> One understanding of 'discrimination' is that differential treatment does not amount to discrimination if that treatment is justifiable. Transplanting this understanding to s 10 would cut down the section's operation. Section 10 does not say that persons of a particular race may enjoy a right

[113] *Belgian Linguistics (No 2)* (n 99), 24, 27, 31, 82–83, 85–86, 103.

[114] *Saramaka People v Suriname* (n 58) para 103. See also the views of the Inter-American Commission in *Mary and Carrie Dann v United States* (n 63) para 143: the Convention, 'while not prohibiting all distinctions in treatment in the enjoyment of protected rights and freedoms, requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought'. See also *Maya Indigenous Community v Belize* (n 58) para 166.

[115] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Comm 276/2003, African Commission on Human and Peoples' Rights (4 February 2010) para 196.

[116] In *Bropho v Western Australia* (2008) 169 FCR 59, para 83 and *Aurukun Shire Council v Chief Executive Officer, Office of Liquor, Gaming and Racing in the Department of Treasury* (2010) 265 ALR 536, 33, para 64 per McMurdo P, 81, para 215 per Keane JA, and 95, para 270 per Philippides J, where infringements of Indigenous property rights where held to further the legitimate public interest of protecting other members of the community from alcohol-related violence.

to a more limited extent than persons of another race by reason of a Commonwealth, State or Territory law if that difference is justifiable or proportionate to a legitimate end. If the law is not a special measure within the meaning of s 8(1), the conclusion that persons of a particular race enjoy a right to a more limited extent than persons of another race is necessary and sufficient to engage s 10.[117]

However, as discussed below, in some settler States, laws directed to Indigenous peoples as groups have been exempted or shielded from human rights and non-discrimination law in order to preserve the special constitutional responsibilities of settler executives and legislatures in Indigenous affairs. These laws and the accompanying jurisprudence sometimes appear to share the logic animating the international law concept of legitimate differentiation, at least as far as they implicitly rely on the reasonableness and legitimacy of differential beneficial measures for Indigenous peoples. In some cases, Indigenous law and policy is insulated from non-discrimination norms by express legislative or constitutional provisions and, in others, by judicial decisions that designate Indigenous communities as political entities, so that the distinction in question is not one based on race.

The latter approach was adopted by the US Supreme Court in the seminal case of *Morton v Mancari* (1978). In this case, the Bureau of Indian Affairs' hiring preference for Indians was found to be 'granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities', a distinction that 'turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status'.[118] In explaining the consequences of applying strict scrutiny to federal Indian laws, like the one in question, the Court observed that:

If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code ... would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.[119]

Elsewhere, however, even where the Indigenous group in question is identified as a particular tribe or historic community, courts have found that the distinction between members and non-members is one based on race. To summarize the (small) body of comparative law on the correlation between these categories, in Australia distinctions in law between Aboriginal and non-Aboriginal persons,[120] traditional land owners and persons who are not traditional land owners,[121] and holders of native title and holders of freehold title[122] have been understood as distinctions made on the basis of race. In Canada, a distinction made between members of named First Nations and non-members was found to differentiate on the grounds of race (although it was nonetheless saved as a 'special measure' designed to ameliorate disadvantage).[123] Finally in New Zealand, applicants who were not eligible for funded tertiary education placements reserved for persons of 'Māori or Pacific Island descent' successfully claimed that they had been 'refused by reason of, or because of, [their] race'.[124]

[117] *Maloney v The Queen* (n 80) p 202, 68 (Hayne J). [118] *Morton v Mancari* (n 110) 551–52.
[119] ibid 552.
[120] *Carr v Boree Aboriginal Corp* [2003] FMCA 408, para 9: 'I am satisfied that the first respondent through its various servants and agents did discriminate against the applicant in her employment and did dismiss her for reasons which were to do with her race or non-Aboriginality.'
[121] *Gerhardy v Brown* (n 75). [122] *Mabo v Queensland* (n 75). [123] *R v Kapp* (n 28).
[124] *Amaltal Fishing v Nelson Polytechnic* (n 111) 35.

In Canada, 'aboriginal and treaty rights' are protected by section 35 of the Canadian Constitution, which shields those rights from anti-discrimination challenges brought under the Charter of Human Rights and Freedoms. Section 25 specifies that Charter rights 'shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada'.[125] Current debates turn on the degree to which section 25 'shields' section 35 rights from Charter provisions,[126] and raise the possibility that section 25 may render aboriginal and treaty rights 'non-discriminatory' by preventing the application of the Charter's section 15 non-discrimination provision where s 35 rights are at stake.[127] In the 2008 Supreme Court case of *R v Kapp*, the majority queried whether, in a relevant case, section 25 'would constitute an absolute bar' to a Charter-based claim 'as distinguished from an interpretive provision informing the construction of potentially conflicting Charter rights'.[128] Another example of a partial exemption from anti-discrimination law for Indigenous rights is the federal Canadian Bill of Rights Act 1976. Until 2011, any matter falling within the remit of the federal Indian Act was expressly exempt from the scope of the Bill of Rights Act, including the powers devolved to First Nations under the Indian Act. After extensive debate, the exemption was finally removed, but in applying the amended Bill of Rights Act to First Nations, courts are required to give 'due regard to First Nations' legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests'.[129]

These precedents show that while the language of 'legitimate differentiation' has not yet found much purchase in domestic law, comparable 'exceptions' have been developed by legislatures and courts to support Indigenous rights that might otherwise constitute prohibited racial discrimination, either by referring to express constitutional protections or by holding that protections for Indigenous rights do not amount to distinctions based on race. The language of section 2 of the UNDRIP does not identify legitimate differentiation as a preferred methodology for the interpretation of the Declaration as a whole, but throughout the UNDRIP, the identification of Indigenous peoples as peoples suggests they should be understood as political communities or polities, or nations, rather than as racial groups. It is conceivable, therefore, that legitimate differentiation may find a place in domestic and international law as a means by which to deflect racial discrimination claims by reference to the political attributes of Indigenous peoples as bodies politic, and by reference to their unique historic relationships with settler governments. This much seems to be the thrust of the 'specific rights' concepts deployed by the CERD in its General Recommendation 32 (discussed below). It is an approach that sits well with the relational, political, and agreement-based qualities of State–Indigenous engagement in the CANZUS States. Much depends on whether international and regional treaty bodies are prepared to extend the legitimate differentiation doctrine beyond the few scenarios in which it has been applied to date, and whether the principle will merge, conceptually, with the idea of permanent 'specific rights' advanced by the ICERD Committee.

[125] *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203, para 52.

[126] *R v Agawa* (1988) 28 OAC 201, para 11; *Campbell v British Columbia (Attorney General)* [2000] 79 BCLR (3d) 122, para 156. Also *R v Kapp* (n 28) para 64.

[127] Section 15(1): 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

[128] *R v Kapp* (n 28). [129] *Morton v Mancari* (n 110) 553.

4.3 'Special Measures' and 'Specific Rights'

Some of the rights contained in the UNDRIP could plausibly be defended as special measures, designed to secure the 'adequate advancement' of Indigenous peoples. The concept is mentioned only once in the UNDRIP, in Article 21(2), referencing the obligation of States to improve the special and economic conditions of Indigenous peoples. Nonetheless, given its prominence in international law on Indigenous rights, it seems likely to be drawn on as a way to justify distinctive laws and policies for Indigenous peoples, including those giving effect to rights protected by the UNDRIP.

The principle of substantive equality that structures international human rights law is expressed in the texts of treaties and in the jurisprudence of treaty fora as the concept of 'special measures'. The concept requires (or in the case of the ECHR, allows) States to take positive action to address the inequality experienced by disadvantaged groups. The principle of special measures is most closely associated with Articles 1(4) and 2(2) of the ICERD which oblige State Parties to take 'temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms'.[130] Special measures provisions also appear in Article 4 of the CEDAW, Article 5 of the ECHR, and Article 20(1) of ILO Convention 169 ('to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to [indigenous and tribal] peoples'). The CERD has addressed special measures in its general jurisprudence, and has sometimes urged States to take special measures in respect of Indigenous peoples[131] (or has welcomed existing special measures for such peoples[132]) as part of its Concluding Observations on State Party reports. The HRComm has also developed a concept of special measures as part of its recommendations on 'legitimate differentiation', and from time to time has urged States to adopt special measures for the benefit of Indigenous peoples.[133]

Special measures are controversial because they can appear to compromise formal equality and are by definition addressed to the rights and interests of groups rather than individuals. The CERD has emphasized that '... special measures are not an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality'.[134] As such, according to the Committee, while special measures may amount to the preferential treatment of one racial group over another, they are to be distinguished from 'unjustifiable preferences', because they are designed to promote substantive equality.[135] Further, according to the CERD, special measures are limited

[130] CERD, General Recommendation 32 (n 96) para 11.

[131] For recent examples, see CERD, Consideration of Reports Submitted by State Parties under Article 9 of the Convention, Concluding Observations: Namibia, UN Doc CERD/C/NAM/CO/13-15 (13 May 2016) para 22; Guatemala, UN Doc CERD/C/GTM/CO/14-15 (12 June 2015) paras 16, 20; the Niger, UN Doc CERD/C/NER/CO/15-21 (25 September 2015) paras 16–17; Suriname, UN Doc CERD/C/SUR/CO/13-15 (25 September 2015) paras 22, 32, 35.

[132] See, eg, Concluding Observations—Colombia, UN Doc CERD/C/COL/CO/14 (28 August 2009) para 10.

[133] See HRComm, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations: Costa Rica, UN Doc CCPR/C/CRI/CO/6 (21 April 2016) para 16; Colombia, UN Doc CCPR/C/COL/CO/6 (4 August 2010) para 25; El Salvador, UN Doc CCPR/C/SLV/CO/6 (18 November 2010) para 18.

[134] CERD, General Recommendation 32 (n 96) para 20. See also *R v Kapp* (n 28) para 16, cf *Maloney v The Queen* (n 80).

[135] ibid para 7.

by proportionality tests. They must 'be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be *temporary*' (emphasis added).[136] For this reason, the measures must be brought to an end when substantive equality has been achieved, and 'should not lead to the maintenance of separate rights for different racial groups'.[137]

Accordingly, special measures seem to provide a partial justification for certain provisions of the UNDRIP, by permitting (and in fact requiring) preferential treatment to overcome the effects of historic and continuing discrimination against Indigenous peoples. Some State participants in the UNDRIP Working Group argued that a general provision should be included in the text to endorse the use of special measures for Indigenous peoples, in order to supplement the non-discrimination principle expressed in Article 2. For example, in its 1996 intervention on draft Article 2, Canada observed that:

> With a view to addressing historic or systemic discrimination, states may need to institute special measures for the purpose of improving the situation of indigenous individuals or people. If this were done, we might include a statement that such special measures would not be considered discriminatory, in line with the similar provisions included in the [ICERD] and the Declaration on the Rights of Minorities.[138]

While the final text of Article 2 does not contain a reference to special measures, a second clause was added to Article 21(2) in 2006, specifying that '[s]tates shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions.'[139] This is the only express reference to special measures in the text of the Declaration. Whether it extends the possibility of special measures to areas not connected to Indigenous socio-economic well-being—for instance, to measures addressing cultural disadvantage, historic injustice, or past discrimination—is an open question. In the context of the ICERD, much depends on the scope of the 'human rights and fundamental freedoms' set out in section 5's non-exhaustive list, since it is the unequal enjoyment of those rights and freedoms which triggers States' obligations to take special measures. In the case of Indigenous-specific rights, such as those to historic property and self-governance, an element of circularity is evident. Are the UNDRIP provisions on human rights and fundamental freedoms to be regarded as falling within the ambit of section 5, so that their non-enjoyment is to be remedied by special measures? For the time being at least, special measures are correlated in domestic law with contemporary disadvantage relative to others in comparable circumstances,[140] rather than historic dispossession, although Indigenous disadvantage sometimes operates as a presumption at a State-wide level (rather than by reference to the circumstances of a particular group or individual).[141] The boundary between special measures and permanent rights was

[136] ibid para 16. [137] ibid para 26 (referring to ICERD Art 1, para 4).

[138] Canada, 'Articles 1, 2 & 43' (25 October 1996), Doc 228a (1996) in Docip (n 20) (on file with author).

[139] UNDRIP (n 2) Art 21(2).

[140] See, eg, *Bruch v Commonwealth* [2002] FMCA 29, para 50 (Australian Federal Magistrates Court), providing that rental assistance offered to Indigenous tertiary students was a special measure in the terms of RDA s 8 'to ensure that the rates of participation of indigenous Australians in education is raised to the same level as that for non indigenous Australians and is designed to promote equity and educational opportunity and improve educational outcomes for indigenous Australians'.

[141] eg *R v Kapp* (n 28) para 59.

addressed by the CERD in its recommendations on 'specific rights' for minorities and Indigenous peoples, discussed below.

As noted, special measures provide justification for Indigenous rights where these can be connected to Indigenous disadvantage in the enjoyment of human rights. The requirement of temporality, however, is a challenging one for Indigenous peoples claiming permanent rights to governance and property lost as a result of historic injustice. Historic Indigenous rights are not claims to a share of primary goods on terms equal to those of other individuals, but to particular property and powers that were held by the predecessors of Indigenous communities and have been or should have been inherited by their descendants. The justificatory basis of such rights does not evaporate when Indigenous peoples enjoy equality in other respects with non-Indigenous members of a settler society. Instead, the rights find their basis in measures of continuity that connect contemporary communities with their historic Indigenous antecedents: communities possessing the attributes (sovereignty, self-determination, territory) that are now claimed by Indigenous groups, in perpetuity, as their successors. Since these rights may be difficult to defend as temporary special measures designed to '[secure] adequate advancement of certain racial or ethnic groups or individuals', they raise again the possibility that protections for Indigenous property and self-governance could conflict with norms of non-discrimination in international and domestic law.

This problem has been addressed in part by the ICERD Committee in its 2009 General Recommendation 32 on special measures, passed two years after the adoption of the UNDRIP, in which it draws a distinction between 'special measures', and what it calls 'specific rights' vested in particular groups, including Indigenous peoples. Specific rights, according to the Committee, include:

> ... the rights of persons belonging to minorities to enjoy their own culture, profess and practice their own religion and use their own language, the rights of indigenous peoples, including rights to lands traditionally occupied by them, and rights of women to non-identical treatment with men, such as the provision of maternity leave, on account of biological differences from men.[142]

These rights, the Committee observes, 'are permanent rights, recognized as such in human rights instruments, including those adopted in the context of the United Nations and its specialized agencies'.[143] The purpose of such rights is not (on its face at least) to ensure substantive equality, but rather is 'to secure the existence and identity of groups such as minorities, Indigenous peoples and other categories of person whose rights are similarly accepted and recognized within the framework of universal human rights'.[144] This is a significant adaptation of non-discrimination principles that points in part to the impact of the UNDRIP on the development of mainstream international human rights law. The 'specific rights' category identified by the ICERD Committee could encompass and support two further justifications for the permanent collective Indigenous rights set out in the UNDRIP—the logic of minority rights and of 'historic Indigenous rights'.

4.4 The Rights of Minorities and Their Members

Minority rights methodologies can also support some (but not all) of the distinctive rights set out in the Declaration, so giving some content to the equality and non-discrimination norms articulated in Article 2 (and evidenced in Articles 6 and 7(1)). Minority rights,

[142] CERD, General Recommendation 32 (n 96) para 15. [143] ibid. [144] ibid para 26.

typified by Article 27 of the ICCPR and elaborated in the Declaration on Minorities, are collectively exercised individual rights. As part of their right 'to enjoy their own culture' in community with other minority members, persons belonging to ethnic, religious, or linguistic minorities have rights to form and maintain communities without undue interference from the State, and to enjoy positive measures designed to protect their capacity to do so. The HRComm has advised that minority rights further public as well as special interests, noting that '[t]he protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole.'[145] Significantly, protections for members of minorities can amount to protections for the group as a whole, approximating group rights in ways that could support some of the Indigenous rights contained in the UNDRIP. In the case of Indigenous peoples, for example, the HRComm has interpreted the concept of 'culture' used in Article 27 as including practices 'closely associated with territory and use of its resources'.[146] On one reading, minority rights of this kind are not 'group rights' properly so-called, because they are reducible to the rights of individual members of the minority, in the same way that freedoms of association and religion support the formation and maintenance of groups. However, the distinction is not clear-cut, because protections for minority members may require protections for minorities qua groups, and as the CERD has advised, these protections may be permanent.[147]

In the early sessions of the Working Group, where the conceptual framing of the Declaration was most comprehensively debated, some States argued that the UNDRIP text as a whole should be reformulated to match the concept of 'minority rights' used in mainstream international law, and so avoid some of the conceptual problems associated with 'group rights' in the Declaration. The United States, for example, suggested that the UNDRIP should adopt the 'approach taken by the Declaration on the rights of persons belonging to National or Ethnic Religious and Linguistic minorities, which refers throughout to "persons belonging to minorities" rather than "minorities"'.[148] States also suggested that provisions of the Declaration on Minority Rights should provide a model for the redrafting of certain contentious Articles referencing collective rights, including draft Articles 2, 19, and 20 (discussed above).[149] Proponents of Indigenous rights have strenuously rejected the conflation of Indigenous and minority rights, on the basis that Indigenous peoples have a political and legal status as historic 'peoples' that distinguishes their claims and rights from those of 'simple minorities'.[150]

[145] *Angela Poma Poma v Peru*, Comm No 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (HRComm 2009) para 7.2.

[146] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (ICCPR) Art 27; HRComm, General Comment 23: Article 27: Rights of Minorities, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) para 3.2.

[147] CERD, General Recommendation 32 (n 96) para 15. See also CESCR, General Comment 20 (n 113) para 9: 'Some such measures to achieve non-discrimination may, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and persons with sensory impairments in healthcare facilities.'

[148] United States on Art 1, 'USDEL Comments on Section 1 of the Draft Declaration', Doc 027a (1995) in Docip (n 20) (on file with author).

[149] United States, 'USA Preliminary Comments' (27 November 1995), Doc 029a (1995) in Docip (n 20) (on file with author); Canada on Art 2, 'Articles 1, 2 & 43' (25 October 1996), Doc 228a (1996) in Docip (n 20) (on file with author), including Canada's suggestion that the 'special measures' provision of the Declaration on Minority Rights could be used to augment draft Art 2.

[150] A Willemsen-Diaz, 'How Indigenous Peoples' Rights Reached the UN' in Charters and Stavenhagen (n 13) 30; see also 22.

However, the jurisprudence of the HRComm suggests that minority rights-based justifications can accommodate at least some permanent protections for Indigenous rights. The HRComm has specifically noted the need to differentiate between members of minorities and other persons in its General Comment 23 on Article 27, observing that 'the obligations placed upon States parties under Article 27 have sometimes been confused with their duty under Article 2(1) to ensure the enjoyment of the rights guaranteed under the Covenant without discrimination and also with equality before the law and equal protection of the law under Article 26',[151] and noting that '[s]ome States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.'[152] However, the Committee has also noted that 'Article 27 must be construed and applied in the light of ... the provisions against discrimination, such as articles 2, 3 and 26, as the case may be'.[153] Thus, a tension remains in HRComm jurisprudence between permanent protections for minorities as groups, and the need to construe Article 27 in light of the ICCPR's non-discrimination provisions.

The situation is no clearer where the relationship between the ICCPR's non-discrimination provisions and its jurisprudence on special measures for minorities is in question. As noted above, the HRComm accepts that the protection of members of minorities sometimes requires 'positive measures' to be taken to 'protect the identity of a minority' itself.[154] Unlike the ICERD, however, the ICCPR does not contain a 'special measures' provision. The HRComm has not elaborated a concept of substantive equality on which to base a special measures 'exception' to the ICCPR's non-discrimination provisions, but has confined itself instead to noting that 'positive measures' must 'respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population'.[155] Such measures may, however, constitute a legitimate differentiation under the ICCPR if they 'are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27' and 'are based on reasonable and objective criteria'.[156] Thus, the HRComm's guidance leaves open the question of whether protections for minorities and their members are forms of legitimate differentiation, or whether these are only legitimate if they are designed to correct a disparity in the enjoyment of fundamental human rights and freedoms (including Article 27). If the latter, the HRComm seems to come close to equating legitimate differentiation for minorities with temporary special measures of the kind required by the ICERD. In summary, minority rights approaches developed by the HRComm supply an inchoate equality-based framework for the assertion and defence of those rights, akin to both the 'special measures' and 'specific rights' approaches advanced by the CERD. Thus, the most that can be said at this stage is that the HRComm's emerging jurisprudence and advice on minority rights may assist in the interpretation and augmentation of the equality and non-discrimination principles set out in Article 2 of the UNDRIP, and so support at least some of the collective rights contained in the UNDRIP even where these are not addressed to Indigenous material disadvantage, albeit with the caveat that this justification would likely entail that those rights be qualified by overarching non-discrimination and equality norms.

[151] HRComm, General Comment 23 (n 147) para 2. [152] ibid para 4.

[153] *Lovelace v Canada* (n 56) para 16. See also *Kitok v Sweden*, Comm No 197/1985, UN Doc CCPR/C/33/D/197/1985 (HRComm 1988) para 9.8; *Mahuika v New Zealand* (n 56) para 9.6.

[154] HRComm, General Comment 23 (n 147) para 6.2. [155] ibid. [156] ibid.

The Inter-American Commission's jurisprudence on Indigenous rights also reveals an interpretation of special measures that appears less reliant on indicia of 'disadvantage' than that offered by the ICERD Committee. The Commission has placed a strong emphasis on the need for 'special measures' on the part of States to protect the distinctive cultural attributes of Indigenous and tribal communities, and to secure their property rights. In *Mary and Carrie Dann v United States*, the Commission observed the emergence of a body of human rights norms and principles applicable to Indigenous peoples, and noted that:

> Central to these norms and principles is a recognition that ensuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience. In most instances, this has included identification of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.[157]

Similarly, in *Saramaka v Suriname*, the IACtHR used the phrase 'special measures' to give content to the equality guarantee contained in Article 1(1) of the Convention, noting that 'members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival.'[158]

In domestic legal systems, some constitutional and legislative bills of rights contain express reference to special measures as an exception to the general prohibition of discrimination, or as an *ex ante* defence or justification for laws that differentiate on the basis of race.[159] Special measures, however, are a precarious basis on which to assert Indigenous rights, because while they can save protections for Indigenous interests from challenge, they also require that those protections expire when equality has been achieved. In Australia, the federal Native Title Act 1993, which provides a statutory framework for the recognition and protection of permanent native title rights derived from Indigenous traditional laws and customs (albeit while also placing a high burden of proof on Indigenous claimants), is described in its Preamble as a 'special measure', which is to be read and interpreted subject to the provisions of the ICERD via its incorporating statute—the Racial Discrimination Act.[160]

The 2013 Australian High Court case of *Maloney v The Queen* demonstrates a particularly controversial use of the 'special measures' provisions of the ICERD (incorporated by the RDA). In this case, measures criminalizing the possession of alcohol were imposed by the Queensland government on the Indigenous Bwgcolman community of Palm Island. Finding that the restrictions limited the enjoyment by members of the community of their fundamental human rights and so were racially discriminatory on their face, the Court went on to conclude that they were saved as 'special measures', because they were 'taken

[157] *Mary and Carrie Dann v United States* (n 63) para 125. Almost identical wording was used in *Maya Indigenous Community v Belize* (n 58) para 95.

[158] *Saramaka People v Suriname* (n 58) para 85. See also para 91.

[159] See, eg, Constitution of Malaysia Art 8(5)(c), 'which sanctions positive discrimination in favour of the aborigines': *Selangor v Sagong Tasi* (n 66) para 44.

[160] Native Title Act 1993 (Cth) (Australia) s 7(1). See *Western Australia v Commonwealth* (n 75) 483–84 (Mason CJ and Brennan, Deane, Toohey, Gaudron, and McHugh JJ): '... if there were any discrepancy in the operation of the two Acts, the *Native Title Act* can be regarded either as a special measure under s 8 of the *Racial Discrimination Act* ... or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the [*RDA*] or the [*ICERD*]'.

for the sole purpose of securing the adequate advancement of the Indigenous people of Palm Island'. In interpreting the RDA, which cross-references to the ICERD provisions on special measures, the High Court declined to consider the jurisprudence of the ICERD Committee, especially in its General Recommendation 23 on Indigenous Peoples and its General Recommendation 32 on Special Measures. Contrary to the Committee's view, the High Court decided that special measures need not be accompanied by consultation with the beneficiary community:

> The text of Art 1(4) of the ICERD, as imported by the RDA, did not bring with it consultation as a definitional element of a 'special measure'. Nor can such a requirement be imported into a text which will not bear it by the subsequent opinions of expert bodies, however distinguished.[161]

The High Court also declined to apply the relevant provisions of the UNDRIP, including, most relevantly, Article 19, requiring States to consult with Indigenous peoples in order to obtain their free, prior, and informed consent 'before adopting and implementing legislative or administrative measures that may affect them'. Accordingly, in *Maloney v The Queen*, the 'special measures' provisions of the ICERD, incorporated into the RDA, were used to defend discriminatory restrictions imposed on an Indigenous community. Significantly, the person challenging the measure was a *member* of the beneficiary community. This approach differs qualitatively from the use of special measures to defend 'preferential treatment' from challenges brought by persons who are denied the benefit in question. This latter, more orthodox use of special measures was deployed by the Australian High Court in its 1985 decision *Gerhardy v Brown*. In this case, the statutory rights of the Ngaanatjara, Pitjantjatjara, and Yungkutatjara peoples to exclude others from their traditional lands were defended as special measures against a challenge by an (Indigenous) non-member of the community who had been denied entry. The Court in *Maloney v The Queen* declined to embrace obiter pronouncements made in *Gerhardy v Brown* on the desirability of consultation, where Brennan J expressed the view that:

> [T]he wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.[162]

The logic of 'special measures' and substantive equality was also at stake in a Canadian Supreme Court case, *R v Kapp* (2008), based on section 15(2) of the Canadian Charter of Human Rights and Freedoms. Members of specified First Nations had been issued with communal one-day fishing licences. A group of predominantly non-Indigenous fishers argued that the issuance of the licences discriminated against them on the grounds of race, and so violated the Charter's equality provisions. The Court found that while the applicants had 'established that they were treated differently based on an enumerated ground, race', in terms of section 15(1),[163] the measure was nonetheless protected by section 15(2) as a 'law, program or activity that has as its object the amelioration of conditions of disadvantaged

[161] *Maloney v The Queen* (n 80) 86, para 24, per French CJ. Several judges thought that a lack of consultation might, in some circumstances, be a factor relevant to the question of whether a measure could reasonably be deemed a 'special measure', but did not think this limitation was applicable on the facts.

[162] *Gerhardy v Brown* (n 75) 135, per Brennan J.

[163] *R v Kapp* (n 28) para 29.

individuals or groups'.[164] The Court emphasized in its reasoning that 'sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole',[165] and that '[i]n essence, s. 15(2) ... seeks to protect efforts by the State to develop and adopt remedial schemes designed to assist disadvantaged groups',[166] in this case, by addressing the social and economic disadvantage of the First Nations in question. Crucially, according to the Court, '[n]ot all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination',[167] and, while the named First Nations were 'in fact disadvantaged in terms of income, education and a host of other measures',[168] in any case, 'the disadvantage of aboriginal people is indisputable'.[169]

According to the Court, if section 15(2) is satisfied, the need for a section 15(1) analysis (to decide whether the differentiation is in other respects discriminatory) is obviated altogether.[170] Rather than operating as an exception to discrimination (as per the Australian High Court's treatment of 'special measures' in *Maloney v The Queen*), in *R v Kapp* the section 15(2) substantive equality provision functioned as a threshold test in its own right, limiting the types of differentiation that will be assessed for discriminatory impact. Thus, the Canadian Supreme Court has embraced, without reference to the ICERD, a concept of 'special measures' that is comparable to the approach taken by the CERD, embracing a broad view of substantive equality in the application of anti-discrimination law.[171]

In contrast, in New Zealand, the 'special measures' provisions of the NZBORA 1990[172] and the HRA 1993[173] have not provided a vehicle for the assertion or defence of distinctive rights for Māori, likely because most collective claims-making is channeled through the political processes of the Treaty of Waitangi claims settlement process, and through consultation required by the Treaty. In fact, in its 2007 observations on New Zealand's State Party report, the ICERD Committee discouraged New Zealand from framing its laws and policies on Māori rights under the Treaty of Waitangi as 'special measures', foreshadowing its elaboration of 'permanent specific rights' in its 2009 General Recommendation 32:

> The Committee is concerned that, in the report of the State party, historical treaty settlements have been categorized as special measures for the adequate development and protection of Māori. ... [and] draws the attention of the State party to the distinction to be drawn between special and temporary measures for the advancement of ethnic groups on the one hand, and permanent rights of indigenous peoples, on the other.[174]

In *Amaltal Fishing Co Ltd v Nelson Polytechnic (No 2)*,[175] the 'special measures' provision of the HRA was considered by the New Zealand Human Rights Complaints Review Tribunal. In this case, applicants who were ineligible for funded tertiary education placements reserved by a polytechnic for persons of 'Māori or Pacific Island descent'

[164] Compare this approach with Australian jurisprudence, especially *Maloney v The Queen* (n 80). *R v Kapp* (n 28) establishes that differentiation satisfying s 15(2) need not be scrutinized to determine if it is discriminatory (para 40).

[165] *R v Kapp* (n 28) para 16. [166] ibid para 33. [167] ibid para 55. [168] ibid para 59.

[169] Ibid. [170] *R v Kapp* (n 28) para 37.

[171] See CERD, General Recommendation 32 (n 96) para 20.

[172] New Zealand Bill of Rights Act 1990 (NZ) s 19(2).

[173] Human Rights Act 1993 (NZ) s 73.

[174] CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: New Zealand, UN Doc CERD/C/NZL/CO/17 (15 August 2007) para 15.

[175] *Amaltal Fishing v Nelson Polytechnic* (n 111).

successfully claimed that they had been 'refused by reason of, or because of, [their] race'.[176] The Human Rights Complaints Review Tribunal found that the polytechnic was in *prima facie* breach of the HRA, and had failed to make out a defence to the challenge, because they had declined to bring evidence to show that 'Māori or Pacific Islanders need, or may reasonably be supposed to need, assistance or advancement in order to achieve an equal place with other members of the community'.[177] Without such evidence, the tribunal could not satisfy itself that 'appropriately qualified young Māori or Pacific Island men or women', at whom the course was targeted, needed assistance or advancement to achieve an equal place with other young persons with 'similar aspirations'.[178]

5. Conclusion

The UNDRIP's protections for collective historical Indigenous rights to property, self-governance, consultation, and 'free, prior, and informed consent', alongside individual rights to equality and non-discrimination, are perhaps its most novel and important contribution to international human rights law. Much of the debate in the drafting of the Declaration concerned the possibilities and challenges of reconciling these rights in application to particular claims and disputes. The UNDRIP does not provide a blueprint of a way forward on these difficult issues, but it undeniably represents the view of the international community that such reconciliation is possible and desirable. The UNDRIP's Articles 6 and 7(1) record rights to a nationality, and to security and integrity of the person, that are well established in mainstream international rights human law, and confirms that these protections are also owed to Indigenous individuals. Article 2 has a dual aspect. It prohibits discrimination against Indigenous individuals and peoples and provides that they are equal to all other individuals and peoples.[179] The broadly framed protections contained in the Article encode some of the major controversies associated with Indigenous rights and the need to reconcile these with the principle of non-discrimination that is a central pillar of international and domestic human rights law. The prohibition against discrimination accords with well-established prohibitions of discrimination against individuals and groups on the basis of race. Rights to property, self-governance, and consultation pose questions about the extent to which these might discriminate against non-Indigenous peoples or persons who are not members of the group that holds these rights. There are strands of reasoning within human rights jurisprudence that serve to support these distinctive rights, including the concepts of: 'legitimate differentiation' (including where Indigenous rights can be framed as the rights of political communities that do not implicate prohibited grounds of discrimination); 'special measures' (which support UNDRIP rights that address Indigenous disadvantage and can reasonably be described as temporary); 'specific rights' (which are a nascent category that may not require reference to formal or substantive equality and so could provide support for many of the rights recorded in the UNDRIP); and 'minority rights' (which protect the rights of individual members, but may also support the rights of Indigenous peoples where these do not discriminate against non-members). Finally, some Indigenous rights are

[176] ibid para 35.
[177] ibid para 246. cf *Bruch v Commonwealth* (n 141) para 50 (Australian Federal Magistrates Court).
[178] ibid. [179] UNDRIP Art 2.

supported domestically by Indigenous-specific laws that are not subjected to non-discrimination methodologies. These include: special rights provisions (such as section 35 of the Canadian Constitution); common law doctrines of trust and fiduciary duty (such as those associated with the 'honour of the Crown' principle in Canada and New Zealand); and treaties, land claim settlements, and other jurisdictional arrangements concluded between States and Indigenous peoples. In addition, non-discrimination principles have also served as a catalyst for agreement-making, claims settlement processes, and the recognition of Indigenous property rights. Taken together, these various methodologies show the efforts of international treaty bodies and domestic courts to bridge the gap between the particularity of Indigenous peoples' experiences and in efforts to interpret and implement the UNDRIP.

Chapter 8. Indigenous Belonging

Membership and Identity in the UNDRIP: Articles 9, 33, 35, and 36

*Shin Imai and Kathryn Gunn**

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

1. Introduction: The Lack of Definition and the Interplay of Legal Regimes

The recognition of Indigenous peoples' right to determine their own membership is crucial for their ability to meaningfully exercise their right to self-determination.[1] The Declaration addresses rights of membership directly in Articles 9 (right to belong), 33 (right to determine membership), 35 (right to determine responsibilities of members), and 36 (right to maintain relations across borders). Together, these provisions reinforce

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[1] S Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous People* (Theytus Books 1998) 116–99.

the right of Indigenous peoples to define themselves, both in terms of membership and geographic scope.

The lack of definition of *who* Indigenous people are has already been mentioned in previous chapters. During the drafting of the Declaration, representatives of Indigenous peoples stressed the importance of self-identification. However, some States argued that the lack of a fixed definition would create a circularity whereby people who claimed to be Indigenous would define Indigeneity based on the criterion that they themselves defined.

A similar problem arises when discussing *membership* in an Indigenous group or community. Article 9 recognizes that 'Indigenous peoples and individuals have the right to belong to an Indigenous community or nation', suggesting that if a group or individual *claims* Indigeneity, they have a right to belong to the group. But Article 9 also stipulates that this right is to be exercised 'in accordance with the traditions and customs of the community or nation concerned', which suggests that the community or nation determines who belongs and who does not. Like the question of Indigeneity itself, the question of belonging becomes circular in that one segment of those who claim to be members of an Indigenous community would self-identify as members, perhaps denying recognition to others who also claim to be members of that community.

The only way out of the circularity of Indigeneity and membership is to accept that there are pre-existing groups that can act as reference points for acceptance. This pre-existing group will decide which 'customs and traditions' will determine who are members and who are not. As a practical matter, it makes sense to begin with what is already there. Of course, the very identification of the 'pre-existing' group is difficult, but we will give concrete examples below of how this issue is being addressed.

State laws come into play because Indigeneity and membership in an Indigenous community may provide access to special protections and benefits from the State. Because this access is dependent on State recognition of Indigeneity and Indigenous peoples, tensions can arise when Indigenous peoples feel that the State's definitions are too narrow, thereby restricting access to benefits, or States are too generous in their definitions, thereby diluting the benefits available.

Finally, the international human rights norms can affect both decisions of States and decisions of Indigenous peoples. Below, we discuss decisions of the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights that have expanded State understandings of Indigeneity. International standards relating to human rights may also apply to the actions of Indigenous governments themselves. We discuss the problems that arise with American tribes that are 'disenrolling' long-time members for reasons that may have to do more with the distribution of cash from casinos than with cultural integrity. Are American Indian tribes subject to the gender equality and international human rights norms set out in Articles 44 and 46 of the Declaration? If so, should States legislate compliance with Articles 44 and 46?

This chapter will attempt to weave together the interaction of the laws of Indigenous peoples themselves with the laws of the State and international human rights norms. We use existing State practice to inform an interpretation of the provisions that is consistent with the spirit and intent of the Declaration, while recognizing the challenges faced in practical implementation. We feel that a somewhat detailed discussion of State practice is important because an abstract discussion will not help resolve the difficult rights and interests that are in play. By evaluating current State practice in relation to the standards

set out in the Declaration, we hope to encourage the generation of the concrete ideas needed to make the aspirations of the Declaration a reality.[2]

2. Drafting History: Right to Belong, Right to Determine Membership, Right to Determine Responsibilities of Members, and Right to Maintain Relations across Borders

The lengthy discussions leading to the drafting of the Declaration focused largely on whether and how to define 'Indigenous people' and what would characterize a group or people as 'Indigenous'. By contrast, relatively little attention was paid to the wording of the Articles that are the focus of this chapter. However, these Articles play an important role in reinforcing the rights of Indigenous peoples to define themselves, particularly given that the final version of the Declaration contains no definition of the term 'Indigenous'.

The extent to which the concerns of States and Indigenous observers were incorporated into or are absent from the final draft of the Declaration provides important insight into the often deeply divergent view of States and Indigenous groups on whether and how Indigenous peoples can define themselves, their membership, and their responsibilities.

2.1 Article 9

During discussions in early Working Groups, a number of States raised concerns about Article 9's proposed reference to the right to belong to Indigenous 'nations' on the basis that possible confusion could arise between use of the term 'nations' in the Draft and the more frequently used concept of 'nation-States'.[3]

At the 10 December 1996 Working Group, some States advised that they considered the term 'nation' in the context of Article 9 to mean 'communities'. The representative of Brazil suggested that the reference to 'nation' in Article 9 be removed and that the text instead state that: 'Indigenous people have the right to belong to an indigenous community.' Similarly, the representative of Australia stated that further discussion was needed on Article 9 and the meaning of the word 'nation', and that Australia could not support the term if the meaning went beyond the concept of 'first nations'.

By contrast, however, Indigenous organizations took the position that the term 'nation' was an accurate depiction of their political and legal status.[4] In particular, observers for the International Organization of Indigenous Resource Development, the Sami Council, and the Aboriginal and Torres Strait Islander Commission all expressed strong support for Article 9.

[2] After this chapter was written, the General Assembly of the Organization of American States approved the American Declaration on the Rights of Indigenous Peoples. We have not been able to fully analyse the OAS document, but we have added references to it in the footnotes when relevant. It contains many provisions similar to the UN Declaration: Organization of American States, American Declaration on the Rights of Indigenous Peoples, AG/doc.5537/16 (8 June 2016), <www.narf.org/wordpress/wp-content/.../2016oas-declaration-indigenous-people.pdf> accessed 26 January 2018. For a critique of some of the OAS provisions, see N Yañez, 'Regressive Elements in the American Declaration' (28 June 2016), <https://www.iwgia.org/en/focus/global-governance/2422-oas-regressive-elements-in-the-american-declaration> accessed 1 November 2017.

[3] Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32 of 3 March 1995, Chairperson-Rapporteur: Mr José Urrutia, UN Doc E/CN.4/1996/84 (4 January 1996) para 68.

[4] ibid.

Some participants also raised concerns with the use of the term 'discrimination' and proposed that the term be clarified by substituting alternative words such as 'disadvantage' or 'adverse discrimination'. Although all States agreed that members of Indigenous collectivities should not be subject to discrimination as a result of such a membership, many States still believed it was necessary to strike a balance between their national human rights obligations and non-interference.[5] Some States suggested including the expression 'where those traditions and customs are consistent with international human rights standards', but after deliberation agreed that inclusion of such an expression was unnecessary.

Many Indigenous representatives stressed that Article 9 in the Sub-Commission text was significant because their peoples did not have recognition as nations or communities and as such were deprived of human rights and fundamental freedoms enshrined in international instruments.[6]

2.2 Withdrawn Article 8

An original draft of the Declaration included an Article 8 that provided as follows:

> Indigenous peoples have the 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.[7]

This Article would have clarified that, once an Indigenous people had identified itself as Indigenous, the State would have the obligation to recognize them as such. This Article was supported by Indigenous groups, but States raised a number of questions, including the relation between collective and individual rights, adherence to international human rights norms and the financial responsibility placed on States if the only criterion were self-identification.[8] The United States suggested a list of characteristics that could be considered for State recognition:

> Indigenous peoples have the right to be recognized as such by the State through a transparent and reasonable process. When recognizing indigenous peoples States should include a variety of factors, including, but not limited to:
>
> - Whether the group self-identifies as indigenous;
> - Whether the group is comprised of descendants of persons who inhabited a geographic area prior to the sovereignty of the State;
> - Whether the group historically had been sovereign;
> - Whether the group maintains a distinct community and aspects of governmental structure;
> - Whether the group has a cultural affinity with a particular area of land or territories;
> - Whether the group has distinct objective characteristics such as language, religion, culture; and
> - Whether the group has been historically regarded and treated as Indigenous by the State.

[5] Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, Chairperson-Rapporteur: Mr Luis-Enrique Chávez, UN Doc E/CN.4/2002/98 (6 March 2002) para 67.

[6] ibid para 69.

[7] Commission on Human Rights, Report of the Working Group on Indigenous Populations in Its Eleventh Session, Chairperson-Rapporteur: Ms Erica-Irene A Daes, UN Doc E/CN.4/Sub.2/1993/Annex I (23 August 1993) 53.

[8] See, eg, Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, Chairperson-Rapporteur: Mr Luis-Enrique Chávez, UN Doc E/CN.4/2003/92 (6 January 2003) paras 62–71.

The Article was deleted in the Chairman's proposal in 2006. There is nothing in the report indicating the reason for the deletion.[9] The loss of this Article may have left open the question of what happens when a group self-identifies as Indigenous, but the State refuses to recognize the group as Indigenous.

2.3 Article 33

Article 33, which addresses Indigenous peoples' right to determine their own membership or identity, was subject to relatively little debate during the drafting of the Declaration. It is clearly related to Article 9 and the withdrawn Article 8, and most of the discussion was on those Articles. The discussions that did occur in relation to the rights in Article 33 focused on the concerns of some States that allowing a separate form of Indigenous citizenship would conflict with their own national legislation. For example, at an Inter-Sessional Working Group in 1995, Ukraine said that the provision pertaining to the collective right of Indigenous peoples to determine their own citizenship was at variance with the Constitution and Law on Citizenship of Ukraine.[10]

However, many Indigenous organizations said that the right to determine their citizenship in accordance with their own customs and traditions was an essential part of the exercise of the inherent right to self-determination,[11] and the text that was ultimately adopted in the Declaration reflects this position.

2.4 Article 35

An early version of Article 35 appears in the First Revised Text of the Declaration in 1989, which stated that Indigenous peoples have 'the right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms'.[12] In subsequent versions of this Article, the reference to the requirement that the right be exercised in a manner consistent with recognized human rights and fundamental freedoms is absent.[13]

A number of States pointed to the potential tension between this Article and the fulfillment of international human rights norms, and several States proposed revised versions of the Article which explicitly provided that this right would accord with international human rights standards, as in the initial draft.[14] Notwithstanding these concerns, however, the final version of this Article is silent on this requirement.

[9] Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, Chairperson-Rapporteur: Mr Luis-Enrique Chávez, UN Doc E/CN.4/2005/WG.14/CRP.1 (22 March 2006) Annex I.

[10] Commission on Human Rights Open-Ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, Information Received from Governments, UN Doc E/CN.4/1995/WG.15/2 (10 October 1995) 12, para 7.

[11] Working Group (January 1996) (n 3) para 91.

[12] Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, First Revised Text of the Draft Universal Declaration on Rights of Indigenous Peoples Prepared by the Chairman-Rapporteur of the Working Group on Indigenous Populations, Mrs Erica-Irene Daes, pursuant to Sub-Commission Res 1988/18, UN Doc E/CN.4/Sub.2/1989/33 (15 June 1989) para 25.

[13] Working Group (August 1993) (n 7).

[14] See, eg, Commission on Human Rights Working Group Established in Accordance with Commission on Human Rights Res 1995/32, Information Provided by States, Draft Declaration on the Rights of Indigenous

2.5 Article 36

An early draft of what became Article 36 can be found in the Declaration of Principles adopted by the Indigenous Peoples in 1987, which stated that: 'Indigenous nations and peoples have the right freely to travel, and to maintain economic, social, cultural and religious relations with each other across State borders.'[15] Parallels can also be seen between Article 36 and ILO Convention 169, which states that: 'Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and cooperation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.'[16] In support of this provision, one Indigenous observer noted that 'where a boundary imposed by nation States divides or cuts through aboriginal lands, guarantees should be provided so as not to make immigrants out of Indigenous peoples who have occupied that territory since time immemorial.'[17]

By 1993, the Draft Declaration as agreed upon by the members of the Working Group at its Eleventh Session included wording for Article 36 very similar to the final text, including the requirement that States 'take effective measures to ensure the exercise and implementation' of the right.[18] States expressed two major concerns.

First, the inclusion of this positive obligation on States raised objections. For example, in 1996, the representative of Canada suggested that the States only be required to 'facilitate' contacts[19] and in 2004, Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland suggested that the word 'promote' be substituted for 'ensure'.[20]

Second, States were concerned about impacts on the right to control entry through State custom and immigration requirements.[21] Canada suggested that this should be subject to 'reasonable and universal border control measures'.[22] In an effort to address these concerns, in 2004 the Chairman presented a summary of proposals with regard to what became Article 36 (then Article 35), which included reference to States taking effective measures to ensure the implementation of the right 'in accordance with border control laws'.[23]

Peoples: Amended Text, Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland, UN Doc E/CN.4/2004/WG.15/CRP.1 (6 September 2004) 12; and explanation in Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Res 1995/32, Information Provided by States, Draft Declaration on the Rights of Indigenous Peoples: Explanatory Comments to Amended Text, Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland, UN Doc E/CN.4/2004/WG.15/CRP.2 (6 September 2004) 8.

[15] Declaration of Principles adopted by the Indigenous Peoples Preparatory Meeting, held at Geneva 27–31 July 1987 in Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, Reporting of the Working Group on Indigenous Populations on Its Fifth Session, UN Doc E/CN.4/Sub.2/1987/22 (24 August 1987) Annex V para 19.

[16] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, Note by the Secretariat, UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994).

[17] Working Group (August 1987) (n 15) para 59.

[18] Working Group (August 1993) (n 7) 58. Note that Art 35 mentioned here became Art 36.

[19] Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, Chairperson-Rapporteur: Mr Jose Urrutia, UN Doc E/CN.4/1997/102 (10 December 1996) para 303.

[20] Working Group (September 2004) (n 14).

[21] Working Group (January 1996) (n 3) para 93.

[22] Working Group (December 1996) (n 19) para 303.

[23] Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Res 1995/32 of 3 March 1995, Chairman's Summary of Proposals (Mr Luis-Enrique Chávez), UN Doc E/CN.4/2004/WG.15/CRP.4 (14 October 2004) 40.

Notwithstanding this proposal, the final version of the text is silent on the issue of border control, but explicitly requires that States take effective measures to facilitate the exercise and ensure the implementation of cross-border rights. The final text of Article 36 is thus largely consistent with the views expressed by Indigenous participants in the course of the drafting process.

3. Analysis of Article 9: The Right to Belong

This Article sets out obligations of the *State* to recognize the 'right to belong to an indigenous community or nation'. In the next section of this chapter, we will discuss Article 33, which addresses the right of *Indigenous peoples* to decide on identity or membership in accordance with their customs and traditions.

A textual analysis of Article 9 raises the following questions:

(1) What is the obligation of the State to recognize peoples as Indigenous?
(2) What is the obligation of the State to recognize individuals as Indigenous?
(3) What is the State obligation to recognize the 'right to belong'?
(4) What is the 'discrimination' that the State is obligated to avoid?

3.1 What Is the Obligation of the State to Recognize Peoples as Indigenous?

The fact that the Declaration does not define 'Indigenous peoples' poses practical challenges in implementing and enforcing State obligations which require recognition of peoples as Indigenous. Articles 9 and 33 suggest that self-identification is the main criterion in determining Indigeneity,[24] but if this were the case, then any group could self-identify as Indigenous and compel the State to recognize them as such. For example, a group of white Afrikaners self-identify as 'Indigenous' and are making a land claim in South Africa.[25]

As drafted, the Articles in the Declaration are ambiguous on what body is entitled to determine whether a people are 'Indigenous'. As mentioned previously in this chapter, an early version of the Draft Declaration contained a version of Article 8 that would have provided Indigenous peoples with the right to 'identify themselves as Indigenous and to be recognized as such'.[26] This clause would have obligated States to recognize peoples that self-declared as Indigenous, but its deletion leaves unresolved the question of which entity has the authority to identify Indigeneity.

[24] The Inter-American Commission on Human Rights mentions Art 9 in a report related to debt bondage and forced labour of the Guaraní people in Bolivia. The Commission cites the Article to support its statement that 'under international law, self-identification is the main criterion for determining the status as Indigenous of the members of those peoples, both individually and collectively'. Inter-American Commission on Human Rights, Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco (2009), IACommHR, No 58/09, OEA/Ser.L/V/II, para 34. The American Declaration on the Rights of Indigenous Peoples provides that States are to respect the right to self-identify in Art I(2).

[25] Gloria Kendi Borona, 'Who Is and Who Isn't Indigenous in Africa?' (June 2016), <https://perma.cc/TT28-UF4J> accessed 16 October 2017; South Africa Today, 'Massive Pretoria Land Claim by Boer Afrikaner' (4 May 2015) <https://perma.cc/FQK6-TAQB> accessed 16 October 2017.

[26] Text at n 8. The American Declaration on the Rights of Indigenous Peoples provides that States are to respect the right to self-identity in Art I(2).

In practice, various domestic and international bodies are developing a list of characteristics that will help identify a group as 'Indigenous'. For example, the UN Permanent Forum on Indigenous Issues (Permanent Forum) set out the following criteria for a 'modern understanding' of Indigeneity:

- self-identification as Indigenous peoples at the individual level and accepted by the community as their member;
- historical continuity with pre-colonial and/or pre-settler societies;
- strong link to territories and surrounding natural resources;
- distinct social, economic, or political systems;
- distinct language, culture, and beliefs;
- form non-dominant groups of society; and
- resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.[27]

In the following paragraphs in this section, we describe how the issue of identity has been addressed in different regions of the world.

3.1.1 Indigenous Peoples in the Americas, Australia, and New Zealand

The criteria for the 'modern understanding' of Indigeneity were originally derived from the experiences of Indigenous peoples in the Americas, New Zealand, and Australia. For these groups, the concept of 'historical continuity with pre-colonial and/or pre-settler societies' was an accurate reflection of historical reality. The author of an early attempt to identify criteria, José Martínez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated in 1986 that the term 'Indigenous' should be restricted to situations where there was a European invasion, and should not be applied to the peoples of Africa and Asia.[28] However, as the concept of Indigeneity began to be explored globally, the 'pre-colonial' or 'pre-settler' criteria became increasingly difficult to apply.[29] As discussed below, international courts, human rights bodies, and governments are now modifying the 'pre-colonial' requirement by recognizing Indigenous peoples in Africa and Asia, as well as peoples in the Americas who came into being during the period of colonization.

3.1.2 Indigenous Peoples in Africa and Asia

In Africa and Asia, colonization imposed a European-dominated political and economic system on populations that were Indigenous to the territory. In this sense, all of the non-European people in those colonies were 'Indigenous' and subsequently marginalized through the process of colonization. This dynamic made it difficult for some African nations in the post-colonial context to see how one segment of their population could

[27] UN Permanent Forum on Indigenous Issues, 'Who Are Indigenous Peoples?' (no date), <http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> accessed 16 October 2017.

[28] J Martínez Cobo, Study on the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2 (7 July 1986) paras 379–82.

[29] See R Shrinkhal, 'Problems in Defining 'Indigenous Peoples' under International Law' (2013–2014) 7 Chotanagpur LJ 187–95.

be 'Indigenous' while another segment was not. Some considered the term 'Indigenous' itself to be derogatory.[30]

Nonetheless, newly independent African States were forced to confront the reality that, within each country, some groups had become economically and politically dominant over others. In 2005, the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights produced a pioneering report which highlighted the relevance of the concept of Indigeneity to Africa, including the issue of dominant groups within nation-States post-colonization:

> The Indigenous movement in Africa has grown as a response to the policies adopted by independent post-colonial African States. As argued by Mohamed Salih, post-colonial African States have in many respects continued the suppression, dispossession and discrimination that were initiated by the colonial regimes: 'post-independent African States were no less cruel towards their Indigenous populations than the colonialists.'[31]

While an exhaustive list of peoples in Africa who identify as Indigenous does not yet exist, the Indigenous Peoples of Africa Co-ordinating Committee describes the peoples in Africa that would be recognized by the Declaration as including 'those who have been living by hunting and gathering or by transhumant (migratory nomadic) pastoralism'.[32] The concept of Indigeneity in the African context was further articulated by the African Commission on Human and Peoples' Rights in 2009 in a decision dealing with a dispute between the government of Kenya and a group claiming Indigenous rights. The case was brought by the Centre for Minority Rights Development, a Kenyan NGO, on behalf of the Endorois, who are pastoralists that had, for hundreds of years, raised cattle on the fertile land around Lake Bogoria. The government of Kenya evicted the Endorois in order to create game preserves. Ultimately, the Commission found that the Endorois were Indigenous within the meaning of the Declaration, and went on to describe four key characteristics of Indigeneity:

> the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.[33]

It is noteworthy that this formulation does not include the 'pre-colonial' or 'pre-settler' requirement as part of Indigeneity in Africa.

[30] R Murray, 'The UN Declaration on the Rights of Indigenous Peoples in Africa: The Approach of the Regional Organisations to Indigenous Peoples' in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011) 496.

[31] ACommHPR and International Work Group for Indigenous Affairs, 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities': submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa' (African Commission on Human and Peoples' Rights; International Work Group for Indigenous Affairs; Distribution in North America Transaction Publishers 2005) 92.

[32] Indigenous Peoples of Africa Co-ordinating Committee, 'Who Is Indigenous in Africa?', <https://www.ipacc.org.za/en/africa%E2%80%99s-Indigenous-people.html> accessed 1 November 2017.

[33] African Commission on Human and Peoples' Rights, 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya' (4 February 2010). The Commission relied on a case from the Inter-American Court of Human Rights, *Saramaka People v Suriname*, IACtHR Series C No 172 (28 November 2007), which had found that descendants of escaped slaves in Suriname could claim rights under the Declaration.

In Asia, identifying certain groups as Indigenous is complicated by the difficulty of establishing chronological priority in many cases. Addressing this problem in the context of Nepal, S James Anaya explains:

> The country's population overall is the product of a long and complex history of original settlement and migration both into and within the territory of present-day Nepal, and of social and political processes that are strongly rooted in that territory and date back centuries.[34]

Nevertheless, while all citizens of Asian States are 'Indigenous' vis-à-vis European colonialists, as in Africa, there are clearly certain groups within these countries that are politically and economically marginalized relative to others.

State practice in Asia varies. Nepal recognizes a number of groups as Indigenous (*Adivasi Janajati*) and Taiwan has extensive legislation in relation to Indigenous peoples.[35] India, on the other hand, does not recognize the existence of Indigenous peoples within its borders even though its Constitution provides for over 600 Scheduled Tribes who generally identify as Indigenous and would meet the established criteria of Indigeneity.[36]

3.1.3 Indigenous Peoples Because of, But Not Before, Colonial Invasion

In the Americas, where there was a much clearer 'invasion' by the Europeans, defining the concept of Indigeneity has become complex and cannot be accurately captured by a simplistic delineation based on the date of arrival of the settlers.

In areas of Latin America, there exist communities of escaped slaves, sometimes referred to as Maroons or *afrodescidientes*, who have lived in their own communities within the jungles and in the countryside for hundreds of years. Of course, these groups did not *precede* the arrival of the Europeans, but they are clearly the *result* of colonization. They are socially, economically, and geographically marginalized and identify as Indigenous vis-à-vis the dominant groups in their country. The Inter-American Court of Human Rights recognized the Indigeneity of *afrodescidientes* in their 2007 ruling on a complaint against the Suriname government regarding resource extraction within the territory of the Saramaka, an *afrodescidiente* group. The Court found that the Saramaka were a 'tribal people' within the meaning of ILO Convention 169,[37] and drew heavily from the UN Declaration to articulate the rights of the Saramaka.[38] As a remedy, the Court ordered the Suriname government to demarcate Saramaka territory and to stop resource extraction until the free, prior, and informed consent of the Saramaka was obtained.[39] In

[34] Human Rights Council, Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, S James Anaya: Addendum: Report on the Situation of Indigenous Peoples in Nepal, UN Doc A/HRC/12/34/Add.3 (20 July 2009) para 11.

[35] For Nepal, see Anaya (n 34) paras 12–14 and for Taiwan, see text at n 60.

[36] P Parmar, 'Undoing Historical Wrongs: Law and Indigeneity in India' (2012) 49 Osgoode Hall LJ 491, 496–97. Indonesia recognizes in its constitution that there are groups, referred to as *masyarakat adat* or *masyarakat hukum adat*, but apparently believes that all Indonesians are Indigenous and so no special laws are needed. See IWGIA, 'Indigenous Peoples in Indonesia', <http://www.iwgia.org/en/Indonesia> accessed 1 November 2017.

[37] ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989), 1650 UNTS 28383 (ILO) Art 1.

[38] L Rodriguez-Piñero, 'The Inter-American System and the UNDRIP: Mutual Reinforcement' in Allen and Xanthaki (n 30).

[39] *Saramaka People v Suriname* (n 33).

Bolivia, the situation of the *afrodescidientes* is explicitly recognized in the Constitution, which provides that the *afrodescidientes* enjoy the same rights as Indigenous people.[40]

There are other groups in Latin America, often referred to as *campesinos*, who hold land communally. In Peru, the *campesino* communities originated in Indigenous populations, but over time became agricultural workers on large *haciendas*. With land reform in the 1960s and 1970s, the workers were given land which they largely worked collectively. These communities have their own legal mechanisms and see themselves as distinct from both the mainstream Peruvian population and from the Indigenous population. The current constitution distinguishes between *comunidades campesinas* and *comunidades nativas*,[41] although in the 1930s they were both referred to as *indígenas*.[42] For the purposes of international law, however, Peru recognizes both *comunidades campesinas* and *comunidades nativas* as Indigenous, and as such both qualify as groups that must be consulted in relation to resource development in their territories.[43]

In Canada, the Métis people came into being as the result of the union of French or English fur traders with Indigenous women, creating a distinct group that was neither European nor Indian. In one area of Canada, the Métis developed their own language and participated in two revolts in 1870 and 1885 in order to secure their own homeland within Canada.[44] The Canadian government has since acknowledged that the Métis are a distinct aboriginal people and in 1982 explicitly recognized them in the Constitution.[45]

3.1.4 Conclusion on State Obligations to Indigenous Peoples

One of the challenges inherent in attempting to achieve a 'modern' understanding of Indigeneity is the fact that the generally accepted criteria for determining who is Indigenous is a combination of chronological factors ('pre-colonial'), relational factors ('non-dominant'), subjective factors ('resolve to maintain ancestral environments'), and normative factors ('strong link to territories').[46] The discussion above shows that the term 'Indigenous' is not to be understood by a single factor, but rather a combination of factors which may or may not all be present. As the UN Special Rapporteur on Indigenous Issues, James Anaya, suggests, the term 'Indigenous' is better understood as a rubric that is defined by 'context rather than abstraction'.[47]

[40] Constitución Política del Estado Plurinacional de Bolivia 2009 (Bolivia) s 32:

> The African-Bolivian people enjoy, in all ways applicable, the economic, social, political and cultural rights recognized in the Constitution for the indigenous campesino nations and peoples. [author's translation]

See <https://www.constituteproject.org/constitution/Bolivia_2009.pdf> accessed 16 October 2017.

[41] Constitución Política de Perú (1993) s 89.

[42] C Kamphuis, 'Foreign Mining, Law and the Privatization of Property: A Case Study from Peru' (2012) 3 JHRE 217.

[43] Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (2011) s 7.

[44] Royal Commission on Aboriginal Peoples, 'The Forging of Métis Identity' (1996) vol 1.6, 138–45, <http://caid.ca/RepRoyCommAborigPple.html> accessed 26 January 2018.

[45] Constitution Act, 1982 s 35(2), being Sch B to the Canada Act 1982 (UK), 1982 c 1. 'In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.'

[46] Shrinkhal (n 29) 190.

[47] SJ Anaya, *International Human Rights and Indigenous Peoples* (Aspen 2009) 30. For a summary of the debate over the definition of 'Indigenous', see International Law Association (ILA), 'Rights of Indigenous Peoples Committee, Interim Report for the Hague Conference' (2010) 6–9, <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> accessed 16 October 2017.

3.2 What Is the Obligation of the State to Recognize Individuals as Indigenous?

The discussion above has provided an outline of the types of *peoples* that have been recognized as Indigenous either by State practice or views of international bodies. In this section, we will discuss the obligations imposed by Article 9 on States to recognize the right of Indigenous *individuals* to belong to an Indigenous community or nation. This obligation is particularly important to three types of individuals who may self-identify as Indigenous and have genealogical ties to an Indigenous people, but do not belong to a specific Indigenous community or nation.

The first group consists of those who have lost their connection to their community through the process of colonization. For example, many Māori in Aotearoa/New Zealand are not registered with an *iwi* (tribe) as a result of migration to urban centres and government policies hostile to tribal organizations.[48]

The second group consists of those who have been excluded by State legislation. In Canada, the federal government's Indian Act determines membership in 'Indian' bands and for nearly 100 years provided that Indian women who married non-Indian men lost their status as Indians. For Indian women who married non-Indian men, this led to the severing of legal ties to the Indian community and loss of rights to reside on reserves, both for the women and their children. The descendants of these women and children were often referred to as 'non-status' Indians.[49]

The third group consists of those who were once members of an Indigenous group, but were subsequently excluded by the rules of the Indigenous community itself. This group includes former members of American Indian tribes who have been 'disenrolled', as discussed below in relation to Article 33.[50]

We discuss each of these three groups in more detail below.

3.2.1 Indigenous Individuals Who Are Not Members of an Indigenous Group

Article 9 states that only *Indigenous* individuals have a right to belong. The first question, then, is what criteria are used to identify an individual as *Indigenous* who does not belong to an Indigenous community or nation as *Indigenous*?

This issue was discussed before the enactment of the Declaration by the Human Rights Committee in two cases related to Article 27 of the International Covenant on Civil and Political Rights. That Article provides:

> 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 practise their own religion, or to use their own language.

In the first case, from 1977, *Lovelace v Canada*,[51] a Maliseet woman from Canada had been removed from membership in her band after she married a non-Indian as a result

[48] See M Durie, *Te mana te kāwanatanga—The Politics of Māori Self-Determination* (Oxford University Press 1998).

[49] For Canada, see PD Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Purich 2011).

[50] For the United States, see M Fletcher, 'Tribal Membership and Indian Nationhood' (presented at the Sovereignty and Identity Symposium American Indian Law Review 1 March 2012), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129813> accessed 1 November 2017.

[51] Human Rights Committee, Sandra Lovelace v. Canada, Communication No 24/1977 (1) & (2) (29 December 1977), UN Doc CCPR/C/13/D/24/1977 (1981). The Committee found that the Canadian legislation violated Art 27.

of the operation of the Indian Act. After her marriage ended, she was not permitted to regain membership to the band and consequently lost many of the benefits associated with membership, such as the right to vote or the right to live on the reserve. When she applied for housing on the reserve, the Band Council stated that priority for housing on the reserve was to be given to those who were registered as 'Indians' under the Indian Act. The Human Rights Committee found that Canadian legislation harmed Sandra Lovelace by preventing her from registering as an Indian.

The second case, from 1989, *Kitok v Sweden*,[52] revisited the same issue, this time in the case of a Sami man who had lost his rights to herd reindeer under Sweden's Reindeer Husbandry Act when he left the practice for a number of years. The Act permitted the Sami village to decide whether to permit an individual who was ethnically Sami to return to farm reindeer. In this case, the village refused to reinstate full reindeer farming rights to Ivan Kitok, citing concerns with the number of people that could be supported in the practice. Kitok appealed to a Swedish tribunal, but the tribunal upheld the decision of the Sami village.

The *Lovelace* and *Kitok* cases are significant to our discussion here because in both cases the Committee had to first determine whether the individual was entitled to belong to the Indigenous group. In the case of Sandra Lovelace, the Committee observed:

> Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as 'belonging' to this minority ...[53]

In the case of Ivan Kitok, the Committee noted:

> Mr. Kitok has always retained some links with the Saami community, always living on Saami lands and seeking to return to full-time reindeer farming as soon as it became financially possible, in his particular circumstances, for him to do so.[54]

These two examples suggest that Indigeneity of individuals needs to be established in relation to a recognized Indigenous people through a combination of genealogy and continued ties to an existing Indigenous community or nation.

We can see a similar approach in Canada in cases involving the Métis. As we mentioned earlier, the Métis are descendants of French and English fur traders and Indigenous women. They are one of the three groups recognized as aboriginal in the Constitution of Canada. In 2003, the Supreme Court of Canada held that individuals who identified as Métis and were accepted by a contemporary existing Métis community could exercise aboriginal hunting rights.[55] After that decision, individuals in various regions of Canada self-identified as Métis and claimed to be exempt from provincial hunting regulations. Courts rejected cases where the claimants were unable to demonstrate their connection to a historical Métis community. For example, in one case, the judge found that the

[52] Human Rights Committee, Kitok v. Sweden, Communication No 197/1985 (2 December 1985) (1988) CCPR/C/33/D/197/1985. The Committee found that the restrictions on Kitok were reasonable because it provided a way to protect reindeer herding for the Sami as a whole.

[53] Lovelace (n 51) para 14. [54] Kitok (n 52) para 9.7.

[55] *R v Powley* (2003) SCJ 43 (Supreme Court of Canada). See also *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12, which held that Métis were under federal legislative authority, similar to Indians and Inuit.

individual claiming to be Métis was ten to twelve generations removed from a Chief who had signed a Treaty in 1693. The individual discovered his aboriginal lineage when he was 32 years old. The Court continued:

> he demonstrates no connection to any contemporary rights-bearing community, or for that matter, to any Indian band or other aboriginal community, rights-bearing or not ... Membership in self-styled organizations does not make one aboriginal for purposes of constitutional exemptions.[56]

The UN Committee for the Elimination of Racism also found that cultural factors were important for determining whether an individual was Indigenous. The issue was raised at the Committee after the Finland Supreme Administrative Court decided to allow voting for the Sami Parliament by any person with any ancestor registered as 'Lapp' dating back to as far as 1763.[57] The Sami Parliament had more stringent requirements for voting, including that at least one parent or grandparent spoke Sami as a first language.[58] The UN Committee recommended that the State give recognition to the narrower Saami Parliament requirements that included cultural ties to the Sami.

3.2.2 Conclusion on Obligation to Indigenous Individuals

While the Declaration does not contain any definition for an *Indigenous* individual, precedents from international bodies and some domestic courts indicate that a genealogical connection on its own, especially when it dates back many generations, will not be enough to require recognition by the State. The individual will have to show some ties and ongoing participation in the activities of an existing Indigenous community or nation in order to be considered Indigenous for the purpose of exercising the rights set out in the Declaration.

3.3 What Is the State Obligation to Recognize the 'Right to Belong'?

This part of our discussion of Article 9 will focus on State legislation that provides definitions for membership and the extension of State benefits and rights to Indigenous peoples and individuals who are recognized in State legislation.

3.3.1 Defining Membership

Some States have very detailed legislation on who is considered 'Indigenous'.[59] In Taiwan, for example, legislation sets out a list of groups that are recognized as 'Indigenous'[60] and sets out extensive rules on who is a member of an Indigenous community and who is not. Membership is based on permanent residency in specified regions, as well as on whether an individual or their immediate kin are registered in the census as being of Indigenous descent. The Status Act addresses what happens on marriage to a non-Indigenous person,

[56] *R v Hopper* (2008) NBCA 42 (New Brunswick Court of Appeal) para 18.

[57] SJ Anaya, Letter to the Government of Finland (24 May 2012), <https://spdb.ohchr.org/hrdb/21st/Public_-_AL_Finland_24.05.12_%281.2012%29.pdf> accessed 14 July 2014.

[58] Committee on the Elimination of Racial Discrimination, Finland, CERD/C/FIN/CO/20-22 (31 August 2013) para 12.

[59] For a general discussion on State membership codes, see R de Costa, 'Self-Determination and State Definitions of Indigenous Peoples' in *Restoring Indigenous Self-Determination: Theoretical and Practical Approaches* (E-International Relations 2014) 18–24, <http://www.e-ir.info/2014/05/14/self-determination-and-state-definitions-of-indigenous-peoples/> accessed 16 October 2017.

[60] The Indigenous Peoples Basic Law (2005), <http://law.moj.gov.tw/eng/LawClass/LawContent.aspx?pcode=D0130003> accessed 16 October 2017.

what happens to children who are born out of wedlock, and the effect of adoption on status.[61] In Canada, the Indian Act also has complex rules on defining 'Indians'.[62] State legislation that defines membership can be problematic if they are too exclusionary, as in the case of the 1971 Alaska Native Claims Settlement Act, which imposed the requirement that beneficiaries be of at least 'one quarter Native blood', leading to fears of a decrease in membership as young people have children with non-Indigenous partners.[63] Conversely, problems arise where legislation is over-inclusive, as in Australia, where the statute-imposed definition of 'aboriginal' has caused some controversy among aboriginal communities who criticize the definition for including individuals who discovered their aboriginal heritage later in life and otherwise had no connections to actual communities.[64]

3.3.2 State Obligation to Facilitate Belonging

The identification of specific Indigenous communities is becoming increasingly important both for agreements which address past wrongs perpetrated by States, and for new agreements relating to the use of traditional territories by States or corporations for resource extraction. These agreements play a key part in fulfilling many of the State's obligations under the Declaration in relation to land and self-determination.[65] However, these rights cannot be enjoyed unless Indigenous individuals belong to an Indigenous nation or community. When the State is or has been complicit in the creation of circumstances which create a group of Indigenous people without a recognized Indigenous nation or community, such as disenfranchisement through legislation, the State should be obliged to do more than passively recognize the right to belong. The State should facilitate the creation of a group to which the individual might belong in order to benefit from the rights in the Declaration. This obligation does not appear to have been addressed by any international bodies, but there have been law reform recommendations in New Zealand and Canada that have addressed this problem.

In the case of the urban Māori, the New Zealand Law Commission, in its report 'Waka Umanga: A Proposed Law for Māori Governance', recommended creating a special corporate vehicle called the *waka umanga* to provide a legal structure to Māori communities. The *waka umanga* would have some of the characteristics of a corporation, but most of the internal governance arrangements would be developed by the Māori collectivity. The Law Commission regarded the *hapu* (sub-tribe) as the basic community unit, and suggested that there should be at least fifty members for the group to be viable:

> A viable *hapu* being one that can respectably manage customary requirements in welcoming, feeding and bedding other tribal groups. That probably requires an active and local membership of at least 50, as nowadays all are not available for every event.[66]

[61] See Status Act for Indigenous People (2008) Arts 2–12, <http://law.moj.gov.tw/ENG/LawClass/LawContent.aspx?pcode=D0130001> accessed 16 October 2017.

[62] Indian Act, RSC 1985.

[63] DS Dorough, 'Reflections on the UN Declaration on the Rights of Indigenous Peoples: An Arctic Perspective' in Allen and Xanthaki (n 30) 518.

[64] J Clarke, 'Australia: The White House with Lovely Dot Paintings Whose Inhabitants Have "Moved on" from History?' in B Richardson, S Imai, and K McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart 2009) 86.

[65] See S Imai, 'Self-Determination and the State' in Richardson et al (n 64).

[66] New Zealand Law Commission, 'Waka Umanga: A Proposed Law for Māori Governance Entities', Report 92 (NZLC, May 2006) para 7.65.

The Law Commission recommended that fifteen people could propose or oppose the creation of a *waka umanga* and that disputes could be taken to the Māori Land Court, which has expertise on Māori issues. Initially, it would be those individuals that get together to make or oppose the *waka umanga* that would determine the membership of the group. Outside of the requirement for the minimum size of a *hapu*, there would be no imposed criteria. The Law Commission stated that 'it is the right of a tribe to determine its own membership and membership rules'.[67]

In Canada, the Royal Commission on Aboriginal Peoples also considered a process for creating Indigenous nations with their own land bases and self-governing jurisdiction. According to the Commission, Canada's 600 or so 'Indian bands' created under the Indian Act would need to be reconstituted as larger nations based on sixty to eighty traditional affiliations.[68] These larger nations would hold the inherent right to self-government. The Commission suggested that a charter group, such as a group of bands currently recognized under the Indian Act, could hold a referendum to determine whether to proceed towards self-government. This group would then develop a constitution and membership criteria that would be inclusive of those historically excluded by the membership criteria of the Indian Act. Membership would not depend on blood quantum. Rather, the Commission contemplated that there would be wide consultation with all potential members, and that prior to being recognized by the government, the constitution and membership criteria would be presented to a recognition panel composed of a majority of aboriginal people.[69]

While neither of these initiatives has been implemented, they stand as examples of the type of policies that would fulfil the State's obligations under Article 9.

3.3.3 Conclusion on the Right to Belong

Article 9 states that the right to belong is to be realized according to the 'traditions and customs' of Indigenous peoples. It follows that State legislation defining who is and who is not a member is valid only to the extent that the legislation is congruent with the customs and traditions of the Indigenous community or nation. This is not to say that legislation is not necessary. Since governments can only act through legislative mandates, there must be legislation. However, like Sweden's Reindeer Husbandry Act, which recognizes membership decisions made by the Sami village, State legislation need not set out complex rules on membership. As Kirsty Gover, one of the chapter authors of this book states:

> the goal is not to design and impose regulatory criteria defining indigeneity, but to operationalize in public law the cultural concept as it emerges from indigenous practices of recognition. In this way, the concept of public indigeneity can be created by the positive choices of Indigenous individuals and groups.[70]

In addition, where the State has been complicit in the creation of groups of Indigenous individuals who do not belong to an Indigenous community or nation, the State has a positive obligation to create mechanisms in consultation with the Indigenous individuals

[67] ibid para 4.50.

[68] Royal Commission on Aboriginal Peoples, 'Self-Determination and Self-Government: Overview' (1996) vol 2.2, 158, <http://caid.ca/RRCAP2.3.pdf> accessed 16 October 2017.

[69] Royal Commission on Aboriginal Peoples, 'Rebuilding and Recognizing Aboriginal Nations: Overview' (1996) vol 2.2, 299–304, <http://caid.ca/RRCAP2.3.pdf> accessed 16 October 2017.

[70] K Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford University Press 2010) 11.

in question to facilitate the creation of new groupings of Indigenous communities and nations to implement the right to belong.

3.4 What Is the 'Discrimination' that the State Is Obligated to Avoid?

Being recognized as Indigenous can bring benefits and rights to communities and individuals. In Taiwan, for example, Indigenous people are entitled to: preferential access to natural resources;[71] preferred placement and subsidies for schools;[72] preferential hiring for jobs;[73] and assistance in obtaining intellectual property rights over Indigenous intellectual creations.[74] Because of these rights and benefits, the government has an economic interest in being able to identify clearly who is eligible, and an interest in limiting the numbers of those eligible. As mentioned above, Taiwan addresses this issue by legislating detailed rules on membership. Inevitably, the existence of State legislation will result in situations where an individual claims to be Indigenous, and may even be accepted by an Indigenous community, but where the government refuses to extend rights and benefits because that individual does not qualify under the legislation.

In Canada, this discrepancy is even spelled out in the Indian Act. The Act sets out detailed criteria for determining who is registered as an 'Indian' for the purposes of the Act. For example, a child must generally have at least two grandparents who are registered as an Indian in order to be eligible for registration. However, the Act allows communities of Indians (called bands) to decide who will be members of the communities. Under this system, some bands will allow children to be members even if they have only one grandparent who is registered under the Indian Act. However, the Act states that the Canadian government will extend benefits, such as exemption from income tax, only to those individuals who qualify to be registered under the Indian Act so that band members who do not qualify to be registered do not receive benefits.[75]

In this context, what does the non-discrimination clause in Article 9 mean? Does it mean that the State cannot discriminate in its law and programmes between those citizens who are not Indigenous and those citizens who are members of Indigenous groups? Or does it mean that the State cannot discriminate among members *within* an Indigenous community or nation?

Given that Indigenous individuals are already protected against discrimination vis-à-vis non-Indigenous citizens by many other Articles in the Declaration (for example, Articles 2, 15, 16, 21, 22, 24, 29), we do not think that the first possibility—that the clause refers to the State's obligation not to discriminate between Indigenous and non-Indigenous citizens of the State—is correct.

A better explanation is that Article 9 was intended to ensure that, once an individual is recognized as Indigenous according to the customs and traditions of an Indigenous

[71] Regulations on Development and Management of Lands Reserved for Indigenous Peoples, <http://law.moj.gov.tw/eng/Law/LawSearchResult.aspx?p=Z&t=A1A2B1B2&k1=indigenous> accessed 16 October 2017.

[72] Education for Indigenous Peoples, <http://law.moj.gov.tw/eng/Law/LawSearchResult.aspx?p=Z&t=A1A2B1B2&k1=indigenous> accessed 16 October 2017.

[73] Indigenous Peoples Employment Rights Protection Act, <http://law.moj.gov.tw/eng/Law/LawSearchResult.aspx?p=Z&t=A1A2B1B2&k1=indigenous> accessed 16 October 2017.

[74] Protection Act for the Traditional Intellectual Creations of Indigenous Peoples, <http://law.moj.gov.tw/eng/Law/LawSearchResult.aspx?p=Z&t=A1A2B1B2&k1=indigenous> accessed 16 October 2017.

[75] See Olthuis, Kleer, Townshend, co-author S Imai, *Aboriginal Law Handbook* (3rd edn, Carswell 2008) ch 11.

community or nation, the State must treat that individual the same as all other members of that community or nation. For example, it may be that this clause will prohibit the discrimination in the Canadian legislation mentioned above, where some band members are recognized under the Indian Act for benefits, whereas other band members do not receive benefits.

4. Analysis of Article 33: Right to Determine Own Identity or Membership

This Article overlaps with Article 9, but has a slightly different focus. Article 9 provides Indigenous peoples and groups with the right to belong, a right that groups or individuals could claim against the State. Article 33 focuses on the right of Indigenous peoples to decide on membership and the obligations of Indigenous peoples to their own members.

The concept of self-identification found in Article 33 has been endorsed by the Inter-American Commission on Human Rights. In its 2009 report, 'Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources', the Commission refers to Article 33(1) in the context of a discussion supporting Indigenous self-identification.[76] Two cases at the Inter-American Court of Human Rights have also endorsed this Article. In the case of the *Kichwa Indigenous People of Sarayaku v Ecuador*,[77] the applicants brought a complaint against Ecuador for granting an oil concession and allowing an Argentinean company to undertake seismic exploration in Sarayaku territory without prior consultation or consent of the Sarayaku. The Court refers to the right to cultural identity and mentions a number of Articles from the Declaration, including Article 33.[78] In the case of the *Rio Negro Massacres v Guatemala*,[79] the Court mentions Article 33 together with other Articles from the Declaration in the context of discussing State–Indigenous relations and the connection of Río Negro inhabitants to their land.[80]

Article 33 raises the following issues:

(1) Are 'Indigenous people' the same as an 'Indigenous community or nation'?
(2) What does it mean to determine identity or membership?
(3) What limitations are there on 'customs and traditions'?
(4) What does it mean to have citizenship in the States in which they live?
(5) What are the rights with regard to structures and institutions of membership?

4.1 Is an 'Indigenous People' the Same as an 'Indigenous Community or Nation'?

Article 33 recognizes that 'Indigenous peoples' have the right to their own identity or membership, whereas Article 9 refers to membership in an Indigenous 'community or nation'. There is no explanation for this difference in the drafting record.

An interpretation that would make sense would see Article 9 address rights to belong to Indigenous communities or nations that have governance structures that could apply

[76] Inter-American Commission on Human Rights, 'Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources' (2009) OEA/Ser.L/V/II.Doc.56/09, para 30.
[77] *Kichwa Indigenous People of Sarayaku v Ecuador* (2012), IACtHR Series C No 245, para 217.
[78] ibid. [79] *Caso masacres de Río Negro v Guatemala* (2012), IACtHR Series C No 250.
[80] ibid para 52.

the 'customs and traditions' to membership decisions. These communities or nations may not be as large as an entire 'Indigenous people'. For example, as we explain in our discussion of Article 36 below, an 'Indigenous people' may be divided by State borders and there may not be a single governance structure on both sides of the border, even if they are a single 'Indigenous people'. Therefore, Article 33 may refer to the abstract right of an Indigenous people as a whole to control membership, whereas Article 9 may refer to the rights of individual Indigenous people to belong to an Indigenous group.

Having said this, we are not able to see any practical implications that arise from this difference in wording.

4.2 What Does It Mean to Determine Identity or Membership?

The right described in Article 33 encompasses two different concepts: identity and membership.

The right to determine identity makes it clear that Indigenous people decide what to call themselves and how they identify the constituent groupings that make up the people as a whole. The Inter-American Court reinforced this concept in interpreting the American Convention on Human Rights. In this case, the Court upheld the land rights of an Indigenous community that was 'multi-ethnic'[81] in the sense that the community was composed of peoples who had been historically distinct. The Court stated:

> it is not for the Court or the State to determine the Community's name or ethnic identity. As the State itself recognizes, it 'cannot ... unilaterally assign or deny names of [the] Indigenous communities, because this action corresponds to the Community concerned.' The identification of the Community, from its name to its membership, is a social and historical fact that is part of its autonomy.[82]

The concept of identity would also be applicable in the case of people who are separated by State boundaries, like the Inuit, the Sami, the Mohawk, or the Pygmies/Batwa. Those people have the right to identify themselves as one people notwithstanding their residence in different States. As we will see below, under Article 36, States have an obligation to take 'effective measures' to facilitate contact across international borders.

Membership refers to the right of the Indigenous people to decide which individuals belong to the community or nation. The UN Committee on the Elimination of Racial Discrimination (CERD) considered Article 33 in 2013 in a comment on the decision of the Finland Supreme Administrative Court to permit any individual who self-identified as a Sami to vote for the Sami Parliament. As noted above in Section 3.2 above, the Finnish court overruled the decision of the Sami Parliament to restrict voters to those who self-identified and met a language requirement. The CERD noted that the court decision gives 'insufficient weight' to the right of Sami to determine their membership under Article 33.[83]

This Article was also considered by the Permanent Forum on Indigenous Issues in 2010 in response to a complaint from Mohawks about problems crossing the US–Canada border. The Mohawk territory straddles the border, and to get from one part of

[81] *Xákmok Kásek Indigenous Community v Paraguay* (2010), IACtHR Series C No 214.

[82] ibid para 37.

[83] Committee on the Elimination of Racial Discrimination, Finland, CERD/C/FIN/CO/20-22 (31 August 2013) para 12.

the Canadian reserve to another, it is necessary to cross through the part of the reservation located in the United States. The Permanent Forum urged Canada and the United States 'to respect the right of Indigenous nations to determine their own membership, in accordance with article 33 of the United Nations Declaration on the Rights of Indigenous Peoples'.[84]

4.3 What Limitations Are There on 'Customs and Traditions'?

The 'customs and traditions' of Indigenous people are to be determined by Indigenous people themselves. But what happens if these 'customs and traditions' result in gender discrimination or are inconsistent with other international human rights standards? We discuss this issue in the context of an ongoing debate over tribal membership in the United States.

4.3.1 Is There a Limitation on the Right to Determine Tribal Membership in the United States?

In the United States, federally recognized tribes have their own inherent jurisdiction to determine membership through their tribal constitutions. This jurisdiction was upheld by the US Supreme Court in the case of *Santa Clara Pueblo v Martinez*,[85] in which the Court considered a Pueblo tribal law which provided that the children of a woman who married out of the tribe lost their tribal membership, but the children of a male tribal member who married out of the tribe did not lose their membership. Julia Martinez, a Pueblo woman, married a Navajo man and had a daughter. The family continued to live on the Santa Clara Pueblo reserve. The mother and a child challenged the tribal law as discriminatory. The US Supreme Court held that federal courts lacked jurisdiction to deal with claims because enforcement of tribal law was a tribal matter. The response to this decision was varied, with some hailing it as an affirmation of tribal sovereignty[86] and others viewing it as an example of toleration of sexism within tribal communities.[87]

In recent years, other examples of apparent discrimination have arisen in the US tribal system, particularly in relation to decisions by some tribes to 'disenroll' certain members. Perhaps the best-known case is that of the Cherokee Freedmen, who were descendants of African Americans who had lived with the Cherokee for generations as members of the tribe. In 2007, the Cherokee Nation amended its constitution to remove 2,800 Freedmen from membership, effectively stripping the Freedmen of all political and economic rights associated with being a member of the tribe. The tribe's decision was upheld by the Cherokee Nation Supreme Court in 2011.[88] The Nooksack tribe was also involved in a disenrollment initiative, in this case of tribe members who were descended from families who had married Filipinos.[89] Racial issues play into these decisions, but commentators

[84] Permanent Forum on Indigenous Issues, Report on the Ninth Session, ESC April 2010, UNESCOR, 2010, Supp No 23, UN Doc E/C.19/2010/15, para 97. Unfortunately, the report does not provide more context for this statement, although the instigating complaint referred to problems related to border-crossing.

[85] *Santa Clara Pueblo v Martinez* (1978) 98 S Ct 1670 (US Supreme Court).

[86] JR Wunder, *'Retained by the People': A History of American Indians and the Bill of Rights* (Oxford University Press 1994).

[87] DH Getches, *Cases and Materials on Federal Indian Law* (5th edn, Thomson/West 2005) 399–405.

[88] DO Freeman, 'Neo-Colonial Adaptation or Neo-Sovereignty: Oklahoma Cherokee/African Ancestry Freedmen Conflict' (2011), <http://ssrn.com/abstract=1941471> accessed 16 October 2017.

[89] GC Toensing, 'Nooksack Indian Tribe in Disenrollment Fight', *Indian Country Today* (New York, 11 April 2013).

also point to the distribution of casino profits as a reason for decreasing enrolled members. By reducing the number of members, the remaining members will receive a greater share of the casino profits.[90]

Native American commentators have further noted that there is a lack of recourse for Indigenous individuals in cases of apparent discrimination on the part of Indigenous groups. As academic and tribal court judge Wenona Singel observes:

> This gap in the human rights system exists because tribes do not have direct obligations under public international law, they are largely immune from external accountability under the domestic law of the United States, and they are frequently immune from judicial review within their own systems of tribal law.[91]

On the one hand, an argument can be made that tribes are acting within their rights under Article 33 in deciding membership 'in accordance with their customs and traditions'. However, it can also be argued that these tribal rights are limited by provisions in the Declaration that restrict the authority of Indigenous institutions. Article 44, for example, states that the rights in the Declaration will be 'equally guaranteed to male and female indigenous individuals', and Article 46 states that the exercise of the rights in the Declaration are to be interpreted 'in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith'.[92] The application of these standards to the membership provisions of the Declaration was contemplated during the drafting stage. Some States proposed to add the words 'where those traditions and customs are consistent with international human rights standards' to the Articles dealing with membership, but decided to withdraw the amendment, believing that Article 46 would apply.[93]

Given the intent of Articles 44 and 46 and discussion in the drafting history, it is clear that the Declaration does not contemplate an absolute right to determine membership. In the case of the Cherokee Freedmen or the Santa Clara Pueblo, it follows that the tribes' actions should be evaluated in the light of the gender equality and human rights provisions that are outlined in the Declaration itself.[94]

Having said this, Articles 44 and 46 should be applied sensitively so that they do not result in taking away the autonomy of the Indigenous people involved. The International Law Association (ILA), in its commentary on Articles 44 and 46, suggests that collective and individual rights 'must be properly balanced in order to ascertain how and to what extent both rights can be accommodated'.[95] What this means in the case of the Cherokee

[90] W Singel, 'Indian Tribes and Human Rights Accountability' (2012) 49 San Diego L Rev 567, 610–11.

[91] ibid 568.

[92] Similar provisions exist in the American Declaration on the Rights of Indigenous Peoples in Arts XXII (international norms) and XXXII (equality of men and women). A report of the ILA says that conforming to international human rights standards are an implicit requirement for all rights set out in the Declaration. See ILA, 'Rights of Indigenous Peoples Committee' (n 47) 18. For a view that the Declaration emphasizes individual human rights at the expense of collective rights, see K Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) EJIL 141.

[93] Working Group (2002) (n 5) para 67.

[94] In Canada, for example, the aboriginal and treaty rights protected under the Canadian Constitution are guaranteed equally to male and female persons: Constitution Act (n 45) s 35(4). In Ecuador, the Constitution provides that the exercise of rights by Indigenous peoples cannot breach the rights of 'women, children and adolescents': Constitución del Ecuador Art 57(10), <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> accessed 16 October 2017.

[95] ILA, 'Rights of Indigenous Peoples Committee' (n 47) 18.

Freedmen and the Santa Clara Pueblo is that the tribes' actions must be scrutinized, but the result of the scrutiny is not a foregone conclusion.

4.3.2 The Necessity of Genealogical Connection for Membership

Nuance is needed and an appropriate balance is especially important in evaluating the appropriate genealogical connection needed to become a member—often referred to as the 'blood quantum' rule. Kirsty Gover argues that a genealogical connection can play a legitimate role in the customs and traditions of an Indigenous people.[96] Canada's Royal Commission on Aboriginal Peoples came to a different position in its 1996 Report. The Commissioners, the majority of whom were Indigenous, clearly saw Indigenous nations as political units, not ethnic enclaves:

> The Commission concludes that under section 35 of the Constitution Act, 1982, an Aboriginal nation has the right to determine which individuals belong to the nation as members and citizens ... [However] it cannot specify a minimum blood quantum as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race as such.[97]

Similarly, for Michael Oeser, Associate Justice on the Southwest Intertribal Court of Appeals, the question of who is a tribal citizen should 'speak to a person's political identity, as opposed to ancestral or cultural identity'.[98] Oeser argues that American tribes should abandon exclusive reliance on minimum blood quantum or lineal descent in determining citizenship, and instead adopt two-part citizenship requirements based on lineal descent and non-genealogical criteria such as birth within the nation, birth to citizen parents, residency, cultural integration, historical knowledge, governmental knowledge, and civil service.[99]

Articles 44 and 46 do not provide an a priori answer to the debate on genealogical connection, and will have to be applied in the context of situations as they arise.

4.3.3 Application of the Declaration to Tribal Governments

If there is an irreconcilable conflict between international standards and the 'customs and traditions' of Indigenous peoples, the next challenge is to decide how those international standards should be implemented. The UN standards apply only to States, not tribes, and accordingly American tribes, to the extent that they are exercising inherent tribal jurisdiction, do not come under the purview of these standards. This has led lawyer Greg Rubio to suggest that the US government should be responsible for ensuring that international standards relating to discrimination apply to tribal governments.[100] In the case of the Cherokee Freedmen, tremendous federal government pressure, including threats to withhold funding, ultimately led to the Cherokees' reversal of their decision to disenroll

[96] For a discussion supporting the 'blood quantum' rules, see K Gover, 'Indigenous Membership and Human Rights: When Tribalism meets Liberalism' in C Lennox and D Short (eds), *Handbook of Indigenous Peoples' Rights* (Abingdon 2016).

[97] Royal Commission on Aboriginal Peoples (n 69) 227.

[98] MD Oeser, 'Avoiding Extinction, Preserving Culture: Sustainable, Sovereignty-Centered Tribal Citizenship Requirements' (2015) North Dakota L Rev 1, 4, <http://ssrn.com/abstract=2647111> accessed 16 October 2017.

[99] ibid 29.

[100] G Rubio, 'Reclaiming Indian Civil Rights: The Application of International Human Rights Law to Tribal Disenrollment Actions' (2009) 11 Oregon Rev Int'l L 1.

the Freedmen. While the actions of the US government clearly interfered with the sovereignty of the tribe, under Rubio's approach, the US government could be seen as fulfilling its obligations under international law.

The idea that only States have the power to ensure that Indigenous people comply with the standards set out in the Declaration seems counterintuitive, given that the thrust of the Declaration is to recognize greater autonomy for Indigenous peoples. It also seems odd that the Indigenous peoples who are recognized as having self-determination powers under the Declaration would not also be bound to comply with the Declaration itself. This is especially true for tribal governments that have endorsed the Declaration.[101] In general, those tribes have endorsed the Declaration as a means to enforce the individual and collective rights of their citizens against the State, including by asserting greater control over proposed resource development activities which threaten traditional lands and sacred sites.[102] However, it would seem very odd that a tribe would endorse the Declaration, but argue that the provisions of the Declaration did not apply to the operations of the tribal government.[103] We could not find international precedent that addresses this situation, but there is a possibility of an approach that will provide for the application of international human rights standards directly on Indigenous peoples.

We suggest that the Declaration contemplates the creation of Indigenous entities that are not fully nation-States, but that are sufficiently autonomous to be able to implement UN standards. By recognizing the right to determine community membership, as well as requiring that Indigenous peoples' institutions comply with international human rights standards, the Declaration implicitly necessitates the creation of Indigenous political entities with governance structures capable of ensuring that the customs, policies, and laws of the Indigenous people conform to international standards. In this model, Indigenous authorities would have the jurisdiction and obligation to impose international standards directly without requiring recourse to the nation-State. This would at least recognize that Indigenous peoples were bound by the provisions of the Declaration and that Indigenous decision-making bodies could be the subject of comment by international bodies, in the

[101] eg on 12 April 2010, the Pit River Tribe of Northern California became the most recent tribe after the Gila River Tribe of Arizona and the Seminole Nation of Oklahoma to officially affirm the Declaration. See <http://indiancountrytodaymedianetwork.com/2012/04/10/pit-river-tribe-endorses-undrip-107398> accessed 16 October 2017. Similarly, on 18 February 2011, the Cherokee Nation Tribal Council unanimously passed a resolution applauding the US government for endorsing the Declaration. See: <http://indiancountrytodaymedianetwork.com/2011/02/18/cherokee-nation-tribal-council-meeting-ends-approvals-18427> accessed 16 October 2017; A Resolution Applauding the United States Government for Endorsing the United Nations Declaration of the Rights of Indigenous Peoples, Council of the Cherokee Nation, No R-06-11 (3 December 2011), <https://cherokee.legistar.com/LegislationDetail.aspx?ID=826986&GUID=1DF5BB67-1E22-4301-81BE-7EFB0FE5F6D9&Options=ID|Text|&Search=R-06-11> accessed 1 November 2017.

[102] See, eg, the efforts of the Pit River Tribe to protect sacred sites at Medicine Lake from proposed geothermal development: <http://indiancountrytodaymedianetwork.com/2012/04/10/pit-river-tribe-endorses-undrip-107398> accessed 16 October 2017.

[103] We are not aware of any tribes that have expressly adopted (rather than endorsed) the Declaration to date. However, we note that the Navajo Nation Human Rights Commission, which relies primarily on Navajo law, has chosen to also draw on aspects of the Declaration in advocating for human rights members on behalf of Navajo Nation members. This has included calling for legislative reform within the Navajo Nation to bring the Navajo articulation of self-determination in its own legislative code in line with the more forceful language in the Declaration. See KA Carpenter and AR Riley, 'Indigenous Peoples and the Jurisgenerative Moment in Human Rights' (2014) 102 Cal L Rev 173, 223, <http://scholarship.law.berkeley.edu/californialawreview/vol102/iss1/8> accessed 16 October 2017.

same way that States can be the subject of such comment. Whether States also have a concomitant obligation to ensure that Indigenous peoples are complying with the terms of the Declaration is not answered by this approach. It may be that State obligations under the Declaration remain, but to the extent that Indigenous peoples themselves address the limitations imposed by Articles 44 and 46, States may show deference to the Indigenous approach. Or it may be that the State has no obligation to monitor compliance with the provisions of the Declaration once the Indigenous people act within their jurisdiction to determine membership. While a more complete exploration of this issue is not possible within the framework of this chapter, it is a question that will have increasing relevance as membership issues become prominent.[104]

4.4 What Does It Mean to Have Citizenship in the States in Which They Live?

The right to obtain citizenship is the right of Indigenous individuals and reinforces Article 6, which states that: 'Every Indigenous individual has a right to a nationality.'

This provision in Article 33 prevents the State from denying citizenship to a member of an Indigenous community. Ecuador implements this right in its Constitution as follows:

> Ecuadorian nationality is a political and legal bond between individuals and the State, without detriment to their belonging to any of the other Indigenous nations that coexist in plurinational Ecuador.[105]

The Constitution of Bolivia similarly provides for a clear expression of the coexistence of Indigenous membership and State citizenship by permitting individuals to register their cultural identity on documents issued by the State, such as passports and citizenship documents.[106]

But this Article does more than provide for a passive obligation to permit members of Indigenous communities to obtain citizenship in the State. Combined with the right to a nationality in Article 6, and the ameliorative purpose of the Declaration, this Article should be interpreted as requiring States to take positive steps to facilitate registration as citizens. While we have found no comments on this part of Article 33 in international or domestic law, a case under the American Convention on Human Rights addresses the issue of registration. The Inter-American Court of Human Rights held in *Sawhoyamaxa Indigenous Community v Paraguay* that Paraguay had the obligation to 'implement mechanisms enabling all persons to register their births and get any other identification documents',[107] especially in the case of vulnerable groups.[108] In *Sawhoyamaxa*, the Court held that Paraguay had violated several individuals' right to a legal personality,[109] as it failed to register eighteen out of the nineteen Sawhoyamaxa people (mostly children) who died due to preventable diseases while living along the roadside near a pending land claim area.[110]

[104] Singel (n 90) 611ff. Singel proposes the creation of an intertribal human rights system to provide external accountability for tribal decisions.

[105] Constitución del Ecuador (n 94) s 6.

[106] Constitución Política del Estado Plurinacional de Bolivia (n 40) Art 30(II)(3).

[107] *Sawhoyamaxa Indigenous Community v Paraguay*, IACtHR Series C No 146 (29 March 2006) para 193.

[108] ibid para 189. [109] ibid para 194. [110] ibid paras 178, 190.

4.5 What Are the Rights with Regard to Structures and Institutions of Membership?

The right in Article 33(2) to 'determine the structures and to select the membership of their institutions in accordance with their own procedures' is very similar to Article 34, which recognizes Indigenous peoples' right to 'promote, develop and maintain their institutional structures'.[111] There are three differences between the Articles. First, Article 33(2) refers to structures and institutions related to membership, while Article 34 refers to a right to develop institutional structures in general. Second, Article 33(2) specifically includes the right to select the membership of the institutions, whereas Article 34 is silent on this point. Third, Article 34 states that the institutions must conform to 'international human rights standards', whereas Article 33(2) is silent on this point.

There was no discussion of this difference during the drafting stages, and it is not necessary to make fine distinctions between these two Articles. The overall intent of these Articles, taken together, is clear: Indigenous peoples have the right to establish their own institutional structures, which necessarily includes the right to decide the composition of those institutions. International human rights standards apply to both Articles, either because it is directly mentioned (Article 34) or because of the application of Articles 44 (gender equality) and 46 (human rights and good governance).

5. Analysis of Article 35: Right to Determine Responsibility of Members

This Article provides that: 'Indigenous peoples have the right to determine the responsibilities of individuals to their communities.' The wording is curious, especially in light of Article 4, which provides for the 'right to autonomy or self-government'.

Article 35 raises the following issues:

(1) What is the difference between determining responsibilities under Article 35 and having a right to autonomy or self-government in Article 4?
(2) Are there limits on the types of responsibilities that can be assigned to individuals?

5.1 What Is the Difference between Determining Responsibilities in Article 35 and Having a Right to Autonomy or Self-Government in Article 4?

In a liberal democratic State, one would usually cast the relationship between individuals and the State government as one where citizens have the presumed right to live autonomously, subject to limitations established by the State in order to ensure the welfare of the citizenry as a whole. The corollary is that if there is no rule prohibiting or prescribing a specific action, there is no requirement to conform to any particular form of behaviour.

By contrast, Article 35 contemplates the possibility of a different type of relationship within Indigenous communities. It is not a relationship based on coercive laws imposed on individuals through the organs of the State, but rather a relationship based on individual members assuming responsibilities to the collective. The responsibilities can be articulated as a set of expected behaviours rather than a list of prescriptive rules

[111] The American Declaration has a similar provision in Art XXI.

enforced through rigid hierarchies found in the legislatures, police, and judiciaries of the nation-State. In an Indigenous society, power may be more diffuse and norms may be established through mechanisms such as feasts, ceremonies, and informal dispute resolution.[112] In this sense, then, Article 35 is complementary to Article 4. Whereas Article 4 can be seen as creating space for Indigenous agency through the recognition of self-determination, Article 35 articulates the relationship between individuals and the collective within that space.

In making this observation, we do not intend to essentialize Indigenous social structures, and we note that Article 35 could also take in a wide range of modalities that include the fairly structured governance structures found in American tribes. The Indian Law Resource Centre in the United States, for example, sees Article 35 as a basis for tribes 'to make their own laws about what conduct is unlawful, and to require that all persons—Indian or non-Indian—abide by such tribal laws'.[113]

5.2 Are There Limits on the Types of Responsibilities that Can Be Assigned to Individuals?

We have noted above that an early version of this Article contained a clause requiring the exercise of this right to conform to international human rights standards. The clause was removed, but in our view, Articles 44 (gender equality) and 46 (human rights and good governance) apply to Article 35 for the same reasons that these standards apply to Article 33.[114]

A more challenging limit will be the presence of State legislation which conflicts with the responsibilities assigned by Indigenous peoples.[115] Those issues are addressed in this book on discussions on self-determination in Chapters 5 and 6.

6. Analysis of Article 36: The Right to Maintain Relations across Borders

The territories of Indigenous peoples long predate the borders of the modern nation-State, and in most cases, national borders do not conform with the pre-existing territories of Indigenous peoples. As a result, Indigenous peoples' ability to maintain their culture and traditional practices may be significantly compromised where their territories and traditional lands are intersected by international borders. Article 36 of the Declaration attempts to address this issue by recognizing the right of Indigenous peoples to maintain and develop contacts, relations, and activities for spiritual, cultural, economic, and political activities across borders, and by placing a positive obligation on States to take 'effective measures' to ensure the implementation of the right.

[112] V Napoleon, 'Living Together: Gitksan Legal Reasoning as a Foundation for Consent' in J Webber and CM Macleod (eds), *Between Consenting Peoples: Political Community and the Meaning of Consent* (UBC Press 2010) 45–76; J Borrows, *Canada's Indigenous Constitution* (University of Toronto Press 2010) 23–106.

[113] Indian Law Resource Centre, 'Using the Declaration to End Violence against Native Women' (no date), <http://www.indianlaw.org/content/using-declaration-end-violence-against-native-women> accessed 16 October 2017.

[114] See ILA, 'Rights of Indigenous Peoples Committee' (n 47) 18: 'the duties that an indigenous community would require of its members must comply with international human rights standards.'

[115] See S Imai, 'Self-Determination and the State' in Richardson et al (n 64).

The text of Article 36 raises the following issues:

(1) What are the types of 'contacts, relations, and cooperation' that would constitute 'effective measures'?
(2) What 'effective measures' can be taken with regard to crossing international borders?

6.1 What Are the Types of 'Contacts, Relations, and Cooperation' that Would Constitute 'Effective Measures'?

One avenue by which Indigenous peoples have effectively exercised their rights under Article 36 is through international organizations which promote relations and political connections across national borders.

6.1.1 The Draft Nordic Sami Convention

The most ambitious initiative to address cross-border issues is the draft Nordic Sami Convention (Convention). If ratified, the Convention could meet or in some aspects exceed the standards for the facilitation of cross-border Indigenous rights established under Article 36.

The Sami are a nomadic people who follow the seasonal migration of reindeer herds across the international boundaries of Norway, Sweden, Finland, and the Kola Peninsula of the Russian Federation.[116] In 2005, Norway, Sweden, Finland, and the Sami people released a draft convention that would set out the framework by which the States would recognize the rights of the Sami across State borders.[117] The aim was to have the Convention finalized by 2015, but as of the date of writing, the process is ongoing.[118]

According to Timo Koivurova, the draft Convention would exceed the scope of rights under Article 36 by going beyond facilitating cooperation between groups, to exercising collective self-determination across international borders.[119] The Convention would create a 'gradual process whereby the Sami and the three Nordic nations may develop their relationship in such a manner that we might perceive four nations, coexisting in the same physical space, composed of the territories of three States'.[120] The draft Convention provides, among other things, for the right of the Sami to compensation and profit-sharing in relation to natural resource use, as well as for the right of the Sami to be engaged in the co-determination and environmental management of lands and resources in areas traditionally used by them.[121]

However, the reluctance of some States to finalize the draft in its current form emphasizes the contentious nature of State recognition of cross-border Indigenous rights.[122] For example, the draft Convention falls short of fully harmonizing States' practices and legislation with regard to how the Sami rights-holder is defined. As currently worded, the draft emphasizes the homogeneity of the Sami, but also provides different ways for the participating States to define who is Sami.[123]

[116] N Bankes and T Koivurova, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Hart 2013).
[117] ibid 1. [118] ibid.
[119] T Koivurova, 'Can Saami Exercise Their Self-Determination?' in Bankes and Koivorova (n 116) 123.
[120] ibid 124. [121] Bankes and Koivurova (n 116) 4–5. [122] ibid 5.
[123] T Joona, 'The Subjects of the Draft Nordic Saami Convention' in Bankes and Koivurova (n 116) 257.

Nevertheless, if adopted, the Convention will stand as an example of how the cross-border rights of an Indigenous people can be recognized and facilitated by a nation-State, and of how this recognition may both co-exist with and pose a challenge to preconceived notions of State sovereignty.

6.1.2 The Inuit Circumpolar Conference

The Inuit Circumpolar Council (ICC), an NGO created in 1977 to represent 55,000 Inuit of Alaska, Canada, Greenland, and Chukotka (Russia), is one group which is actively exercising the right to maintain and develop cultural, spiritual, social, and economic relations across international boundaries.[124] The ICC aims to 'strengthen unity among Inuit of the circumpolar region; promote Inuit rights and interests on an international level; develop and encourage long-term policies that safeguard the Arctic environment; and seek full and active partnerships in political, economic and social development in the circumpolar region'.[125] The ICC's objectives of strengthening both cultural and political relations across national borders falls squarely within the rights described in Article 36.

The ICC is active on an international level in relation to a variety of issues, including the promotion of the Inuit language, trade, environment, resource use, and human rights. To this end, the ICC maintains involvement in a number of international bodies such as the Arctic Council, the United Nations, the World Summit on Sustainable Development, the Convention on the Trade of Endangered Species, the World Intellectual Property Organization, the Organization of American States, and the International Whaling Commission.[126] Between 2002 and 2006, the ICC focused particularly on the Arctic Council, an eight-nation intergovernmental body where governments and Indigenous peoples' organizations work together on issues related to the environment and sustainable development in the Arctic.[127] In addition, the ICC holds consultative status II at the United Nations and was active within the United Nations and its subsidiary bodies, including the UN Human Rights Commission and its Working Group on Indigenous Populations. The ICC participated in the drafting of the Declaration, and cites the elimination of any specific reference to 'the principle of territorial integrity of States' as one of its key successes.[128]

The ICC's work in uniting and promoting Inuit interests exemplifies how Indigenous groups who are divided by State borders have successfully worked together to build connections across international boundaries for both cultural exchanges and political co-ordination. In this sense, the ICC's work is a positive example of Indigenous peoples exercising the right to maintain and develop cultural, social, political, and economic relations across national borders.

However, for many Indigenous groups the promotion of cross-border connections will have little practical utility unless States also fulfil their obligation under Article 36 to facilitate the movement of Indigenous peoples across national borders. As the subsequent section will suggest, significant challenges arise in respect of the implementation of Article 36 where perceived issues of border security and national autonomy are engaged.

[124] Inuit Circumpolar Council Home Page, <http://www.inuitcircumpolar.com/> accessed 15 April 2013.

[125] Inuit Circumpolar Council, <http://www.inuitcircumpolar.com/> accessed 28 July 2014.

[126] Inuit Circumpolar Council, <http://www.inuitcircumpolar.com/> accessed 16 October 2017.

[127] Inuit Circumpolar Council, <http://www.inuitcircumpolar.com/arctic-council.html> accessed 26 January 2018.

[128] Inuit Circumpolar Council, <http://www.inuitcircumpolar.com/un-declaration-on-the-rights-of-indigenous-peoples.html> accessed 16 October 2017.

6.2 What 'Effective Measures' Can Be Taken with regard to Crossing International Borders?

Globally, the extent to which States acknowledge and facilitate the cross-border rights of Indigenous peoples ranges from Ecuador's explicit constitutional guarantee of the right of Indigenous peoples to develop contacts with peoples divided by international borders,[129] to the United States' construction of a militarized fence on the US–Mexico border. The following examples provide an overview of the considerable disparity among States' approaches to ensuring that Indigenous peoples divided by international borders can exercise their rights under Article 36.

6.2.1 Africa's Recognition of the Rights of Nomadic Peoples

In Africa, there is widespread State discrimination towards Indigenous groups who carry on a nomadic way of life across international borders. For example, the African Commission on Human and Peoples' Rights describes the marginalization of nomadic groups such as the Pygmies/Batwa, who practise a forest-based culture and experience varying degrees of exclusion and discrimination in a number of different nations, including Rwanda, Burundi, Uganda, the Democratic Republic of the Congo, Cameroon, and Congo-Brazzaville.[130] Rather than facilitating the right of the Pygmies to maintain their nomadic way of life, which spans a number of international borders, steps taken by States to protect the Pygmies are made with the goal 'to assimilate the Pygmies into the dominant culture and not to promote multiculturalism'.[131] In some States, officials consider that the 'permanent settlement of the Pygmies is inevitable and irreversible, if they are to become true partners in the national economy'.[132]

Similarly, other African States use the notion of the sanctity of borders to deny the nomadic inhabitants the right to associate with their kin or to access resources in different countries. For example, nomadic inhabitants of the Kidal region of Mali have experienced harassment as they attempt to cross into Algeria. A report of the African Commission on Human and Peoples' Rights states that these nomadic peoples have been beaten, searched, or imprisoned when they try to cross borders to obtain basic necessities.[133]

As these examples suggest, where States refuse to take positive steps to facilitate border crossing, it is difficult for many nomadic peoples in Africa to realize the practical benefits of their rights under Article 36.

6.2.2 US—Canada Border

The United States and Canada recognize, to a limited extent, the rights of Indigenous peoples to maintain and develop their culture across the US–Canada border. However, although the United States and Canada differ in their approach to cross-border Indigenous issues, neither country has demonstrated complete adherence to the principles set out in Article 36.

Perhaps the most significant acknowledgement of the rights of Indigenous peoples whose territory crosses the US–Canada border is the United States' recognition of a right for Indigenous people who possess the requisite blood quantum requirement to pass freely from Canada to the United States. This right is recognized by the United States through

[129] Constitución del Ecuador (n 94) Art 57(18).
[130] African Commission on Human and Peoples' Rights (n 31). [131] ibid 36. [132] ibid.
[133] ibid 39.

the Jay Treaty, and has been subsequently acknowledged by American courts and codified in its immigration laws.[134] As a result, aboriginal people born in Canada who meet the blood quantum requirement prescribed by the State are entitled to enter the United States for purposes of employment, study, retirement, investing, and/or immigration.[135]

In granting the right to free passage for Canadian-born aboriginal people, the United States explicitly acknowledges the rights of Indigenous peoples to maintain their culture across international borders. However, this recognition is limited by the fact that applicants must provide documentation demonstrating that they possess 50 per cent 'American Indian blood'.[136] The fact that Canadian law does not define who is aboriginal by blood status creates further complications in an applicant's ability to establish his or her Indigenous identity when crossing the border. Additionally, the fact that both Canada and the United States maintain the right to define who is an Indigenous person for cross-border purposes places an inherent limit on the extent to which these countries actively facilitate the rights under Article 36.

Unlike the United States, Canada does not recognize that aboriginal people have an inherent right to cross the US–Canada border. Instead, Canadian courts have approached the right to free passage by considering the applicant's aboriginal relationship to Canada in a historic and contemporary context.[137] Canada recognizes the right to free passage only when an aboriginal person can establish that he or she is an Indian registered under the Indian Act.[138] While decisions of the Supreme Court of Canada have recognized the possibility of an aboriginal right protected under Canada's Constitution Act, 1982 to pass freely across the US–Canada border, the Court has thus far failed to expressly confirm the existence of such a right for specific Indigenous groups.[139]

For Indigenous groups whose territories are bisected by the international border, such as the Mohawks of Akwesasne, the problems associated with the United States and Canada's failure to fully recognize cross-border rights are a daily reality. As discussed above, the US–Canada border runs directly through the Akwesasne community. In Akwesasne in Canada, the Canadian government maintains that, because the Mohawks moved into the area after the Jay Treaty was signed, the Treaty does not apply (notwithstanding the fact that the lands are a traditional territory of the Mohawk).[140] On the US side, Akwesasne members can exercise their rights to free passage if they meet the US blood quantum requirements, but since 9/11 have to contend with significantly increased border security.[141]

Akwesasne has had some success in having its rights implicitly recognized by the Canadian government. This Indigenous nation has successfully negotiated a remission order with Canada, which provides that Canada will not collect taxes on goods acquired in

[134] S Diamant-Rink, 'The Dividing Line: Borders as an International Indigenous Human Rights Issue' (2009) 30 Im & Nat L Rev 911, 913. See also *McCandless v United States ex rel Diabo*, 25 F2d 71 (3rd Circuit Court of Appeal); Immigration and Nationality Act 1965 (US) s 289.

[135] Embassy of the United States, 'Entering the United States: First Nations and Native Americans', <https://ca.usembassy.gov/visas/first-nations-and-native-americans/> accessed 1 November 2017.

[136] ibid.

[137] NT Capton Marques, 'Divided We Stand: The Haudenosaunee, Their Passport and Legal Implications of Their Recognition in Canada and the United States' (2011–2012) 13 San Diego L Rev 385, 394–95.

[138] ibid 395.

[139] G Boos, G McLawsen, and H Fathali, 'Canadian Indians, Inuit, Metis and Metis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States' (2014) 4 Seattle J Env'l L 343, 355–59.

[140] Diamant-Rink (n 134) 919.

[141] ibid 920.

the United States by a resident of Akwesasne for personal or household use.[142] Akwesasne has also negotiated a political protocol with the Canadian government addressing issues over which Akwesasne can exercise its inherent jurisdiction, including initiatives that support the social and economic development of Akwesasne, divestiture of federal lands, border crossing, and tax exemption.[143] The international community has further implicitly acknowledged that the Haudenosaunee (of which the Mohawks of Akwesasne are a part) maintain one national identity, notwithstanding divisions imposed by the international border, through the recognition of the Haudenosaunee passport by a number of governments.[144]

In 2010, the Mohawks raised their border problems with the Permanent Forum on Indigenous Issues, which urged Canada and the United States to implement Article 36:

> The Permanent Forum recommends that the Governments of Canada and the United States address the border issues, such as those related to the Mohawk Nation and the Haudenosaunee Confederacy, by taking effective measures to implement article 36 of the United Nations Declaration on the Rights of Indigenous Peoples, which states that Indigenous peoples divided by international borders have the right to maintain and develop contacts, relations and cooperation with their own members as well as other peoples across borders.[145]

6.2.3 US—Mexico Border

Unlike their northern counterparts, Indigenous peoples on the US–Mexico border do not have the benefit of explicit recognition of the right to free passage in international treaties.[146] In recent decades, the rights of Indigenous peoples whose territories lie on the US–Mexico border have been further marginalized by the increased militarization of the US border. As Angelique EagleWoman notes, US policies implemented under the premise of ensuring national security run directly counter to Article 36 of the Declaration and could have the effect of criminalizing the cultural, social, and economic ties of Indigenous groups whose territories cross the border.[147]

The most visible example of the increased militarization is the ongoing construction of a 700-mile double-layered fence which will separate the United States from Mexico and, in so doing, disrupt the lives and culture of Indigenous groups whose territories cross the international border.[148] According to EagleWoman: 'Sacred sites are being desecrated by the Border Patrol, and access to such sites will be cut off if the double-layered fence is put into place.'[149]

[142] Akwesasne Residents Remission Order R.5.c.41 (3rd Supp) 3/7/91 *Canada Gazette*, Part II, vol 125, No 4.

[143] 'Political Protocol between Her Majesty the Queen and the Mohawks of Akwesasne' (30 May 2012), <http://www.akwesasne.ca/overview> accessed 1 November 2017.

[144] Capton Marques (n 137) 388–89. Sixteen countries have recognized the Haudenosaunee passport since 1923, although the recognition is often considered to be symbolic or a matter of diplomatic courtesy.

[145] Permanent Forum on Indigenous Issues (n 84) para 98.

[146] Diamant-Rink (n 134) 916. Diamant-Rink notes, however, that some argue that the Treaty of Guadalupe Hidalgo, which originated from the resolution of the Mexican War in 1848, 'recognized the right of indigenous peoples living along the border to maintain their land, culture, and religion regardless of the land transfer and new political border'.

[147] AT EagleWoman, 'Fencing off the Eagle and the Condor, Border Politics, and Indigenous Peoples' (11 September 2008), ABA Section of Environment, Energy and Resources: National Resources & Environment, vol 23, autumn 2008, 33–36, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266866> accessed 16 October 2017.

[148] ibid 34. [149] ibid 35.

For the Tohono O'odham, whose reservation is contiguous with the US–Mexico border, the United States' increasingly militarized approach is a significant impediment to maintaining social, cultural, spiritual, and economic ties with members on the opposite side of the border. Members who were once able to travel freely across the border are now forced to drive to checkpoints which may be hours from their homes; furthermore, there have been reports of harassment and of members being turned away at the border by border officials.[150] The increased militarization also presents difficult economic and cultural choices for the Tohono O'odham, such as whether to bear the cost of developing government ID cards to cross the border on their own lands, and whether to take on the expense of policing the border themselves or to allow the US or Mexican government law enforcement officers onto their lands.[151]

On the other hand, the Kickapoo in Texas have successfully advocated for the passage of legislation which allows tribe members to pass over the US–Mexico border for specific purposes, including to attend religious sites and to work as migrants in the United States.[152] According to Sapphire Diamant-Rink, the legislation 'recognizes the unique cultural needs of the Kickapoo, granting them passage and the services provided to other Indigenous groups living solely in the United States'.[153]

6.3 Conclusion on Cross-Border Rights

Ultimately, the meaningful exercise of Indigenous cross-border rights is in large part dependent on the willingness of States to move past perceived concerns about State autonomy or long-standing discrimination against nomadic peoples towards the active facilitation of Article 36. As the examples above illustrate, States have been inconsistent in ensuring the implementation of Article 36, and in some cases, appear to be taking measures directly contrary to the positive obligation imposed by the Article. Unless States are willing to actively fulfil their obligations pursuant to the Declaration, it will be impossible for Indigenous peoples to fully realize their rights to maintain and develop cultural, social, economic, and political connections across the international boundaries that have been imposed over their traditional lands.

7. Conclusion

In this chapter, we have examined Indigenous peoples' rights related to membership and identity as set out in the Declaration from the interaction of three perspectives: the customs and traditions of Indigenous communities; the laws of the State; and international law. These perspectives take different approaches to the subject matter of this chapter, but we can suggest broad convergence on each of the Articles.

Articles 9 and 33 raise issues related to Indigeneity. What has emerged from the study in this chapter is that the 'pre-invasion' paradigm, developed primarily for the Americas, Australia, and New Zealand, is a useful tool in conceptualizing who are Indigenous and who not. However, even within that paradigm, there are situations, such as the Métis in Canada or the Maroons in South America, who do not fit neatly into the 'pre-invasion'

[150] Diamant-Rink (n 134) 917. [151] ibid.
[152] ibid; Texas Band of Kickapoo Act, 25 United States, ss 1300b-13(d) (1983).
[153] Diamant-Rink (n 134) 917.

model. When we move to Africa and Asia, this paradigm becomes quite awkward to apply because of a number of factors, including a history of internal migrations and the dynamics of post-colonial development. This leaves us, we feel, with three contextual factors to consider in the recognition of Indigenous peoples under the Declaration. To be considered 'Indigenous' in the context of the Declaration, the group in question would:

(1) self-identify as culturally and linguistically distinct from other groups in the population;
(2) form a 'non-dominant' sector of society; and
(3) have a historical connection to a collective territory.[154]

Articles 9 and 33 also raise issues related to obligations of the State and the Indigenous nation or community to conform to international human rights standards. In our discussion on Article 33, we describe decisions made by American tribes on membership which may be contrary to established human rights norms. We argue that the control of membership is subject to the gender equality and international human rights norms set out in Articles 44 and 46 of the Declaration. Furthermore, we raise the possibility that Indigenous governments, not State governments, are responsible for ensuring conformity with these norms. States also have responsibilities to recognize membership decisions made by Indigenous peoples and to avoid discriminating among members of an Indigenous people. We also argue that the ameliorative nature of the Declaration places positive obligations on states to ensure that Indigenous peoples are able to access State citizenship and to reconstitute Indigenous groups where such groups have been fragmented or dispersed due to the effects of colonialism.

Article 35 addresses Indigenous peoples' responsibilities to their communities, and in some ways addresses the same issues as Article 4 (autonomy and self-government). In our view, the wording of Article 35 evokes different societal structures and creates a space for intra-community relationships that do not necessarily mimic the hierarchical structures of the nation-State. The responsibilities assigned to members, however, are bound by the human rights standards outlined in Articles 44 (gender equality) and 46 (human rights and good government).

The discussion of contacts across borders set out in Article 36 suggests that Indigenous peoples have a right to identify themselves irrespective of the existence of State boundaries. However, States' willingness to implement and facilitate the cross-border rights of Indigenous peoples is situation-specific and is often recognized in a limited manner, secondary to national security concerns. Arrangements which facilitate border-crossings and government funding for Indigenous organizations such as the ICC and the proposed Nordic–Sami Convention represent positive steps towards realizing the rights of Indigenous peoples across international borders. The construction of the US–Mexico fence and Canada's refusal to acknowledge the Akwesasnes' right to bring goods across the border, however, reflect instances of ongoing reluctance on the part of some States to fully recognize the cross-border rights of Indigenous groups.

[154] The 2005 guidelines from the World Bank do not mention a chronological 'pre-invasion' criterion in their description of Indigenous peoples. World Bank, 'Operational Manual, OP 4.10 Indigenous Peoples' (2005) ss 3–5, <https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f7384.pdf> accessed 26 January 2018.

The views expressed in this chapter are necessarily preliminary. We have attempted to illustrate examples of current State practices that may, or may not, be consistent with the provisions of the Declaration. The complex issues described above cannot be resolved in the abstract—rather, they must be addressed through the ongoing implementation of the Declaration. We look forward to observing developments in the years to come.

Chapter 9. Free, Prior, and Informed Consent in the UNDRIP

Articles 10, 19, 29(2), and 32(2)

Mauro Barelli

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 29(2)

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

Article 32(2)

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

1. Introduction

The rights to participation and consultation are crucial to guarantee the effective protection of the rights and interests of any ethno-cultural group,[1] and represent a fundamental aspect of modern democratic societies.[2] Accordingly, international and regional instruments such as the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[3] and the Framework Convention on the

[1] For an overview of participatory rights in the sphere of minority rights, see M Weller, 'Effective Participation of Minorities in Public Life' in M Weller (ed), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press 2007) 477–513.

[2] See, eg, Organization for Security and Co-operation in Europe, The Lund Recommendations on the Effective Participation of National Minorities in Public Life, High Commissioner on National Minorities (1 September 1999), General Principles, (1), <http://www.unhcr.org/refworld/docid/3dde55274.html> accessed 16 October 2017.

[3] Article 2(2) establishes the right of persons belonging to minorities to effective participation in cultural religious, social, economic, and public life, while Art 2(3) affirms the right of persons belonging to minorities to effective participation in decisions affecting their interests. UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res 47/135, Annex, 47 UN GAOR Supp (No 49) at 210, UN Doc A/47/49 (1993).

Protection of National Minorities[4] expressly affirm the right of members of minorities to participate effectively in decisions affecting their interests. Likewise, the Human Rights Committee (HRComm) has consistently interpreted Article 27 of the International Covenant on Civil and Political Rights (ICCPR) as requesting that States ensure the effective participation of members of minority groups in decisions that may affect them.[5] The rights to participation and consultation are also recognized in the only international treaty still open to ratification that deals specifically with Indigenous peoples' rights, namely the International Labour Organization Convention 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169).[6]

Against this background, the UN Declaration on the Rights of Indigenous Peoples (Declaration or UNDRIP) did not simply re-affirm the existence of participatory rights in relation to Indigenous peoples; instead, and more ambitiously, it envisaged a set of participatory rights which is remarkably more robust than the one formulated in the instruments mentioned above.[7] Article 3 of the Declaration, in particular, recognizes that Indigenous peoples have the right to self-determination, by virtue of which they freely determine their political status and freely pursue their economic, social, and cultural development. This provision should be read essentially as conferring on Indigenous peoples a right to internal self-determination, which would allow them to control their destiny as well as preserve their cultural identity.[8] In this sense, a fundamental component of Indigenous self-determination is the principle of free, prior, and informed consent (FPIC), which is expressly recognized in various Articles of the Declaration. FPIC reinforces significantly the provisions of the Declaration dealing with participatory rights, and specifically those concerning the right of Indigenous peoples to be consulted with regard to matters affecting them. At a minimum, FPIC requires that the relevant consultations should not be a mere formality, but, rather, should be conducted in good faith and with the objective of finding a common agreement; however, FPIC may also be understood in a more radical manner, namely one requesting that certain measures or projects should not be implemented in the absence of the consent of the Indigenous people concerned.

It is precisely the explicit affirmation of FPIC, combined with the recognition of the right of Indigenous peoples to self-determination, that makes the Declaration's approach to participatory rights especially innovative. Not surprisingly, the question of FPIC became a source of conflict during the negotiations on the Declaration. States are understandably reluctant to accept the idea that groups within their populations (be they Indigenous or non-Indigenous) may have the power to veto legislative measures or block projects considered of strategic importance for the development of the country. At the same time, if States could implement decisions which are not only objected to by Indigenous peoples but also likely to produce significant negative consequences on

[4] Article 15 reads as follows: 'The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.' Council of Europe, Framework Convention for the Protection of National Minorities (1 February 1995), ETS 157, entered into force on 2 January 1998.

[5] HRComm, ICCPR General Comment 23: Article 27: Rights of Minorities, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).

[6] See, in particular, Art 6.

[7] On the legal status of the Declaration in general, see M Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge 2016) 43–68.

[8] For a more detailed discussion of Art 3, see Chapter 5 in this volume.

their cultures and lives, the very purpose of the Indigenous rights regime would be seriously undermined. The provisions of the Declaration dealing with FPIC fully reflect this tension in an attempt to find a compromise solution that would satisfy both parties. The elusive language contained in some of these provisions has nevertheless been further elaborated and elucidated by the jurisprudence and practice of various judicial and quasi-judicial bodies.[9] As a result, a common and flexible approach to FPIC has gained increasing recognition at the international level. The legal contours of this approach are the focus of this chapter. After an overview of the main Articles of the Declaration dealing with FPIC,[10] Section 3 will clarify the meaning of the first three components of FPIC, namely 'free', 'prior', and 'informed'. Section 4 will then discuss the meaning of 'consent', examining the drafting history of the relevant provisions and placing them within the normative context of the Declaration. Section 5 will highlight the way in which other international instruments and bodies have addressed the question of FPIC, while Section 6 will consider some relevant domestic jurisprudence. Finally, Section 7 will draw some general conclusions on the current legal status of FPIC under international law.

2. Free, Prior, and Informed Consent in the UN Declaration on the Rights of Indigenous Peoples

The provisions of the Declaration dealing with FPIC may be divided into two categories. The first category contains those provisions that expressly prevent States from undertaking a specific action *in the absence* of the consent of Indigenous peoples. Thus, Article 10 establishes that 'no relocation [of indigenous peoples] shall take place without [their] free, prior and informed consent', while Article 29(2) affirms that 'no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.' The second category includes those provisions that request States to consult Indigenous peoples *in order to obtain* their consent before undertaking certain actions. More specifically, Article 19 affirms that States shall consult Indigenous peoples in order to obtain their consent with regard to legislative or administrative measures concerning them, while Article 32(2) establishes that States shall consult Indigenous peoples in order to obtain their consent with regard to any project affecting their ancestral lands. It was suggested that these two sets of provisions establish two different types of duty for States: in the first case, States would have a 'mandatory' duty to obtain the consent of Indigenous peoples while, in the second, that duty becomes 'contextualized'.[11] Although such a distinction seems coherent in light of the wording of the relevant provisions, it should not be implied that two different models of FPIC co-exist within the normative framework of the Declaration. As discussed in

[9] Not surprisingly, the topic of FPIC has also attracted increasing attention among academics. Recent works on the subject include C Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge 2015); D Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Purich 2014); A Xanthaki, 'Indigenous Rights under the Light of Energy Exploitation' (2014) 56 German Ybk Int'l L 315–50.

[10] This chapter will focus on Arts 10, 19, 29, and 32, while other provisions of the Declaration referring to FPIC, namely Arts 11 and 28, will be discussed in the context of other chapters comprised in this volume.

[11] See, eg, Follow-Up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries, Expert Mechanism on the Rights of Indigenous Peoples, UN Doc A/HRC/21/55 (16 August 2012) para 4.

the following sections, the principle of FPIC works in the same manner with regard to both sets of provisions by requesting that the consent of Indigenous peoples should be obtained in relation to matters connected with their fundamental human rights and capable of producing significant negative effects on their cultures and lives.

3. 'Free', 'Prior', and 'Informed'

Several bodies dealing with Indigenous peoples' rights have elaborated on the meaning of the various components of FPIC. As a result, and in the absence of a universal definition of FPIC, it is possible to identify the key elements of a common practical understanding of this important principle.[12] First, the term 'free' implies that the process of consultation should be conducted in the absence of any type of coercion and pressure. Consultations carried out in a climate of harassment, let alone violence, would therefore be incompatible with the principle of FPIC. Second, the term 'prior' implies that consultations should take place before undertaking an action or implementing a project that is likely to affect Indigenous peoples. With regard to the adoption of legislative measures, this means that Indigenous peoples should be consulted in advance during various stages of the relevant drafting process. With regard to development projects affecting Indigenous peoples' lands, consultations should be conducted sufficiently in advance of any authorization or commencement of activity, and more specifically during the exploratory or planning phase of the corresponding project. It is particularly important that activities related to development plans do not start until the completion of the process of consultation, as some may produce irreversible damage to the Indigenous peoples concerned. Crucially, States should not exercise undue time pressure on Indigenous peoples, who, instead, should have enough time to gather information through members of the community or third parties and subsequently discuss them. Third, the term 'informed' means that Indigenous peoples should receive satisfactory information in relation to the relevant measure or project. Thus, in the case of a development project, they should receive enough information with regard to the nature, size, pace, reversibility, and scope of the proposed project, the reasons for

[12] See, among others, IACtHR, *Case of the Saramaka People v Suriname*, Judgment of 28 November 2007 (Judgment on Preliminary Objections, Merits, Reparations, and Costs) paras 129–37; IACtHR, *Case of the Kichwa Indigenous Peoples of Sarayaku v Ecuador*, Judgment of 27 June 2012 (Merits and Reparations) paras 159–203; IACtHR, *Case of the Comunidad Garifuna Triunfo de la Cruz y Sus Miembros v Honduras*, Judgment of 8 October 2015 (Merits, Reparations, and Costs) paras 159–60; Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005), UN Doc E/C.19/2005/3; Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC.100/III/1A, International Labour Conference, 100th Session 2011, 783–88; Report of the Committee established to examine the claim alleging non-compliance by Colombia of the Convention on Indigenous and Tribal Peoples, 1989 (No 169), filed under Article 24 of the ILO Constitution by the Central Unitaria de Trabajadores (CUT), GB.276/17/1; GB.282/14/3 (1999) para 90; ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), Individual Opinion on Convention 169, Argentina, 2005, para 8; Report of the Committee responsible for examining the claim alleging non-compliance by Guatemala with the Convention on Indigenous and Tribal Peoples, 1989 (No 169), filed under Article 24 of the ILO Constitution by the Federation of Rural and Urban Workers (FTCC), GB.294/17/1; GB.299/6/1 (2005) para 53; Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, S James Anaya, UN Doc A/HRC/12/34/Add.6 (5 October 2009) App A, paras 18 and 19, and 'Addendum: The situation of Indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur', ibid; Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc 56/09 (30 December 2009) 103–21.

launching it, its duration, and a preliminary assessment of its economic, social, cultural, and environmental impact. This means, among others things, that they should be made aware of the potential risks of the proposed development. There also exist some specific requirements as to the nature of the relevant information, which should be accurate and in a form that is accessible to Indigenous peoples, meaning that they should fully understand the language used. Finally, and more generally, consultations should be undertaken using culturally appropriate procedures which respect the traditions and forms of organizations of the Indigenous peoples concerned.

In broad terms, the above description identifies the various phases and components of FPIC intended as a process of consultation and participation. More precisely, it indicates the manner in which States should conduct the relevant consultations in order for these to be lawful and meaningful.[13] What remains to be established is the actual meaning of the term 'consent', that is to say, whether consultations should necessarily lead to an agreement between States and Indigenous peoples, or whether the former could act even in the absence of such consent. According to its ordinary meaning, the term 'consent' indicates 'permission for something to happen'.[14] Thus, in the instant case it would seem that without the 'permission' of Indigenous peoples, States could not implement the measure or project at the centre of the consultation. In fact, the language used in some Articles of the Declaration concerning FPIC is less straightforward, and, as discussed in the following sections, a more cautious approach is required in order to appreciate the legal contours of this important principle. At this point, it should also be noted that clarifying the meaning of 'consent' also has important implications for the manner in which the broader process of consultation described above is conducted.[15] In particular, taking part in consultations knowing that one will hardly be able to oppose the outcome of the process is one thing; doing so with the awareness that the final decision might be successfully affected, or even rejected, is quite another. It follows that by virtue of a right 'to say no', Indigenous peoples could exercise more effective control over the various stages of the consultation process.

4. The Meaning of 'Consent': Articles 19 and 32

An examination of the content of Articles 19 and 32 is crucial to clarify the legal contours of FPIC as envisaged in the Declaration. This is so because of the particularly ambiguous language employed in these two provisions, which have a broad scope of application and potentially far-reaching implications. Article 19 affirms that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

[13] It should be noted that the models and procedures used to carry out specific consultations may vary depending on the 'national circumstances and those of Indigenous peoples, as well as the nature of the measures under consultation'. ILO, Report of the Committee set up to examine a claim alleging non-compliance by Brazil with the Indigenous and Tribal Peoples Convention, 1989 (No 169), presented on the grounds of Article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF), GB.295/17; GB.304/14/7 (2006) para 42. See also UN Doc A/HRC/12/34/Add.6 (n 12) para 28.

[14] See <http://oxforddictionaries.com/definition/english/consent?q=consent> accessed 16 October 2017.

[15] For a discussion, see L Laplante and S Spears, 'Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector' (2008) 11 Yale Human Rights & Development LJ 69–116. See also the Report of the Working Group on Indigenous Populations in its seventh session, UN Doc E/CN.4/Sub.2/1989/36, para 62.

Similarly, Article 32(2) states that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[16]

At the centre of the controversy lies the interpretation of the expression 'consult in order to obtain'. Does this obligation require States to obtain the consent of Indigenous peoples, or merely seek and, therefore, not necessarily obtain it? By analysing the drafting history of these two provisions, and positioning them within the normative context of the Declaration, the following discussion will highlight a constructive interpretation of FPIC which has received growing support in the practice of authoritative human rights bodies.

The starting point should be the text of the draft declaration adopted in 1994 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.[17] Crucially, this version of the Declaration constituted the basis for the negotiations that took place between 1995 and 2006 at the Working Group on the Draft Declaration (WGDD), that is, the body created by the Human Rights Commission to further elaborate on the draft text with a view to presenting a final version of the Declaration to the General Assembly for its adoption.[18] The original version of Article 32 included in the 1994 draft declaration established that:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States *obtain* their free and informed consent prior to the approval of any project affecting their lands, territories and other resources.[19]

In a similar vein, Article 19 affirmed that:

> Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall *obtain* the free and informed consent of the peoples concerned before adopting and implementing such measures.[20]

The radical language employed in the original version of these two Articles seemed to recognize a wide right to veto to Indigenous peoples. This was certainly the perception of several States' representatives, who, during the sessions of the WGDD, expressed their concern about the two provisions, proposing alternative versions thereof. The language used in those proposals is indicative of the more cautious approach to FPIC promoted by a number of States. In essence, the latter maintained that they should not 'obtain'

[16] Section 1, Art 32 affirms that 'indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources', while Section 3 adds that 'States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.'

[17] UN Doc E/CN.4/Sub.2/1994/2/Add.1 (1994).

[18] UN Commission on Human Rights, Res 1995/32.

[19] Original Art 30 of the Draft Declaration. Emphasis added.

[20] Original Art 20 of the Draft Declaration. Emphasis added.

but, rather, 'seek' the consent of Indigenous peoples.[21] Those objections were partially successful since, as noted above, the final text of the two provisions does not request States to obtain the FPIC of Indigenous peoples, but, rather, to consult them *in order to obtain* their consent.

The expression 'consult in order to obtain' found in the final version of Articles 19 and 32 should not be interpreted as imposing upon States an absolute obligation to obtain the consent of Indigenous peoples before implementing a measure or project affecting them. Had this been the case, the original version of the two Articles, which *de facto* recognized for Indigenous peoples a general right to veto, would have been preserved. That Articles 19 and 32 should be interpreted more restrictively is further supported by the statements of a number of States following the adoption of the Declaration by the General Assembly. For example, voting against the Declaration, Canada noted that 'the establishment of complete veto power over legislative action for a particular group would be fundamentally incompatible with Canada's parliamentary system', while Sweden, endorsing the Declaration, highlighted that the provisions on participation and consultation 'did not entail a collective right of veto'.[22]

Having said that, it would not be accurate to conclude that Articles 19 and 32 recognize a mere right to participation for Indigenous peoples. As discussed in the following section, the express recognition of FPIC in the Declaration, combined with strong provisions such as those on land rights and self-determination, reinforce significantly the right of Indigenous peoples to consultation, with important consequences on the scope of the relevant provisions.

4.1 FPIC and the Effective Protection of Indigenous Peoples' Rights

An overly restrictive interpretation of Articles 19 and 32 seems inaccurate for two main reasons. First, it was noted in the previous section that the final versions of Articles 19 and 32 were the result of a difficult compromise and should, therefore, be read in accordance with their nature. In this respect, it is telling that the expression supported by some States' representatives, that is, 'States shall (merely) seek the consent of indigenous peoples', was ultimately abandoned. This suggests that the expression 'consult in order to obtain' imposes a more stringent obligation on States. This is in line with the content of ILO Convention 169, which, as discussed further in Section 5.5 below, establishes that 'consultations must be undertaken with the objective of reaching agreement or consent to the proposed measures.'[23]

Second, FPIC should be read in conjunction with both the spirit and normative context of the Declaration. The latter recognizes and protects the special relationship that

[21] eg it was proposed that States should 'take account of the free and informed consent of indigenous peoples in the approval of any project affecting their lands and resources', or that States should 'seek the free and informed consent of the peoples concerned' before adopting and implementing measures affecting them. Other proposals requested that 'States shall use their best efforts to obtain', or that, 'where possible, States shall undertake effective consultations'. See, among others, UN Doc E/CN.4/2004/WG.15/CRP.7 (16 December 2004) para 5; Report of the Working Group on the Draft Declaration in its 2nd session, UN Doc E/CN.4/1997/102. para 280; and UN Doc E/CN.4/2004/WG.15/CRP.1 amended.

[22] Similar statements were made by New Zealand and Australia. See <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm> accessed 16 October 2017.

[23] Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 100th Session, 2011, ILC.100/III/1A, 784.

exists between Indigenous peoples and their lands, acknowledging that this is a fundamental aspect of any Indigenous culture.[24] Article 25, in particular, recognizes the right of Indigenous peoples 'to maintain and strengthen their distinctive spiritual relationship' with their lands, while Article 26 establishes that Indigenous peoples have the right to own and control their ancestral lands. More generally, the Declaration affirms that, by virtue of their right to self-determination, Indigenous peoples have the right to freely pursue their economic, social, and *cultural* development. In light of the above, allowing States to indiscriminately implement measures or projects which may have serious negative consequences on the lands, cultures, and, ultimately, lives of Indigenous peoples appears incompatible with both the spirit and normative framework of the Declaration. This would also seem to frustrate the very purpose of creating a special legal regime for Indigenous peoples' rights, as the latter are aimed at protecting not only the physical, but also cultural, integrity of these peoples.

The above considerations suggest that Articles 19 and 32 must be approached with a certain degree of flexibility. Thus, while FPIC should not be read as conferring an overreaching right to veto on Indigenous peoples, it should nevertheless be interpreted in such a way that guarantees the effective protection of Indigenous peoples' fundamental rights. As discussed in the second part of this chapter, this may mean that, on occasion, Indigenous peoples should be able to say 'no' to proposed measures or projects, or that, similarly, States will have to provide alternative solutions which would mitigate the negative effects of their proposed plans.

4.2 Articles 10 and 29

In light of the discussion conducted in the previous section, it becomes clearer why Articles 10 and 29 of the Declaration use a more straightforward language than that used by Articles 19 and 32. Article 10 establishes that:

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place *without the free, prior and informed consent* of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.[25]

Article 29(2), instead, affirms that:

> States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples *without their free, prior and informed consent.*[26]

[24] In the words of the IACtHR, the culture of Indigenous peoples 'directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity'. *Case of the Yakye Axa Indigenous Community v Paraguay*, Judgment of 17 June 2005 (Merits, Reparations, and Costs) para 135.

[25] Emphasis added.

[26] Emphasis added. Section 1, Art 29 states that 'indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.' Section 3 further specifies that: 'States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.'

These two provisions fully acknowledge the importance of the spiritual relationship that Indigenous peoples have with their lands. Crucially, they are premised on the assumption that relocating Indigenous peoples and disposing of toxic materials in their lands, respectively, could have serious negative consequences on their cultures and lives. In light of such potential negative implications, the two Articles request States to obtain, rather than 'consult in order to obtain', the free, prior, and informed consent of the Indigenous peoples concerned.

The potentially devastating effects of relocations for Indigenous peoples have been clearly highlighted by international and regional human rights bodies. For example, the Committee on Economic, Social and Cultural Rights warned that Indigenous peoples 'suffer disproportionately from the practice of forced eviction',[27] while the Inter-American Court of Human Rights reminded us that forced displacements may generate 'a clear risk of extinction and cultural or physical rootlessness of the indigenous groups [concerned]'.[28] For these reasons, a general prohibition of forcible relocations is also found in Article 16 of ILO Convention 169.[29] States were generally supportive of Article 10 of the UNDRIP, which was in fact adopted as originally formulated in the 1994 Draft Declaration.[30] As noted above, this is not surprising, for the prohibition of forcible removals of Indigenous peoples derives from the need to preserve their special relationship with their ancestral lands, which, in turn, is crucial to protect their rights and cultures. Some States, however, suggested that Article 10 should specify that relocations for reasons of public health, disaster, or other exceptional causes could take place even in the absence of consent.[31] A similar approach was taken by ILO Convention 107 on Indigenous and Tribal Populations of 1957,[32] which allowed relocations without consent for reasons relating to national security or in the interest of national economic development or of the health of the Indigenous peoples concerned. However, when ILO Convention 169 was produced to replace that convention, the express reference to such exceptional circumstances was omitted.[33] In following the example of ILO Convention 169, the Declaration sought to highlight the importance of the general prohibition and, thus, limit the scope of the permitted exceptions.

As to Article 29, it goes without saying that the presence of hazardous materials could cause serious, or even irreparable, damage to the environment while, at the same time, posing substantial, or potential, threats to the health of Indigenous peoples. In this respect, it should be noted that international law generally recognizes the importance of respecting and protecting the environment. For example, the UN General Assembly stated that 'all individuals are entitled to live in an environment adequate for their health and well-being',[34] while Principle 1 of the Rio Declaration establishes that 'human beings

[27] CESCR, General Comment 7: The Right to Adequate Housing (Article 11.1) Forced Evictions, UN Doc E/1998/22 (20 May 1997) Annex IV, para 10.

[28] *Case of Chitay Nech and Others v Guatemala*, Judgment (25 May 2010) (Preliminary Objections, Merits, Reparations, and Costs) para 147.

[29] For a discussion of this provision, see Section 5.5.

[30] The only difference consists in the addition of the term 'prior', which was absent in the original text.

[31] See, eg, Report of the Seventh Session of the WGDD, UN Doc E/CN.4/2002/98, paras 79–82.

[32] ILO Convention 107 Art 12, <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107> accessed 23 November 2017.

[33] On this point, see L Swepston, 'The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption' in C Cohen (ed), *Human Rights of Indigenous Peoples* (Transnational 1998) 26.

[34] UNGA Res 45/94 of 14 December 1990.

are entitled to a healthy and productive life in harmony with nature'.[35] With specific reference to Indigenous peoples, Chapter 26, Agenda 21 further highlights that the lands of Indigenous peoples should be protected from activities that are environmentally unsound.[36] The connection between the quality of the environment in which persons live and their human rights has also been regularly underlined by international and regional human rights bodies.[37] The content of Article 29 was, therefore, not particularly controversial and was generally supported by States. It should be noted that the original version of this Article included in the 1994 Draft Declaration did not contain an express reference to FPIC, but, instead, simply affirmed that: 'States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.'[38] While literally more permissive, the final version of the Article remains nevertheless informed by the full respect and recognition of the will of Indigenous peoples by virtue of the explicit references to FPIC.[39]

5. International Practice

Against the background described in the first part of this chapter, the practice of international and regional human rights bodies has shed further light on the legal contours of FPIC. Although a clear uniform practice has yet to emerge, it is possible to identify a growing consensus on a flexible interpretation of FPIC that is in line with the normative context of the Declaration discussed in the previous sections. This interpretation aims to provide adequate protection to the fundamental human rights of Indigenous peoples when these are significantly affected by legislative measures or development plans.

[35] Report of the UN Conference on Environment and Development (Rio de Janeiro, 3–14 June 1992) Annex I, Rio Declaration on Environment and Development (12 August 1992). See also The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, entered into force in February 2004, which establishes a mechanism for formally obtaining the decision of importing States as to whether they wish to receive shipments of certain hazardous chemicals. For more information, see <http://www.pic.int/TheConvention/Overview/tabid/1044/language/en-US/Default.aspx> accessed 16 October 2017.

[36] UN Conference on Environment and Development, Agenda 21.

[37] eg the Inter-American Commission of Human Rights highlighted that 'the realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated'. ACHR, 'Report on the Situation of Human Rights in Ecuador', Doc OEA/Ser.L/V/II.96, Doc 10 rev.1 (24 April 1997). Similarly, the Committee on Economic, Social and Cultural Rights recognized that 'the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as ... a healthy environment.' The right to the highest attainable standard of health, CESCR, General Comment adopted in 2000, UN Doc E/C.12/2000/4, para 4.

[38] Similarly, Art 19(3) of the recently adopted American Declaration on the Rights of Indigenous Peoples states that 'indigenous peoples are entitled to be protected against the introduction of, abandonment, dispersion, transit, indiscriminate use or deposit of any harmful substance that could negatively affect indigenous communities, lands, territories and resources.' OEA/Ser.PAG/doc.5537/16 (8 June 2016).

[39] Final Art 29(2) is, however, in line with an early version of the draft declaration, namely the one prepared by the Working Group on Indigenous Populations in 1993. Article 26(2) reads as follows: 'Military activities and the storage or disposal of hazardous materials shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.' See Revised working paper submitted by the Chairperson-Rapporteur, Ms Erica-Irene Daes, pursuant to Sub-Commission Resolution 1992/33 and Commission on Human Rights Resolution 1993/31, UN Doc E/CN.4/Sub.2/1993/26 of 8 June 1993.

5.1 The Inter-American Court of Human Rights

To date, the most detailed elaboration of the principle of FPIC has been developed by the Inter-American Court of Human Rights (IACtHR or Court), which represents one of the most authoritative human rights bodies in the sphere of Indigenous rights. The IACtHR's jurisprudence has dealt specifically with the issue of FPIC in relation to development or investment projects affecting the ancestral lands of Indigenous peoples. As articulated by the Court, Article 21 of the American Convention on Human Rights on the right to property[40] fully protects the right of the members of Indigenous communities to collectively own their ancestral lands.[41] Crucially, the Court added, this right extends to the natural resources which Indigenous peoples have traditionally used, and which are necessary for the very survival, development, and continuation of their way of life.[42] While this does not in itself prevent States from granting concessions for the exploration and extraction of sub-soil resources,[43] the IACtHR held that measures that would amount to a restriction of the rights of Indigenous peoples to their lands and natural resources must comply with a number of requirements in order to be lawful. In particular, they must be established by law, they must be necessary and proportional, and they must have the aim of achieving a legitimate objective in a democratic society. In addition, the Court identified a more specific set of safeguards intended to prevent that any such restriction could endanger the very (cultural) survival of the Indigenous community concerned. Thus, States are required to ensure the *effective participation* of the members of the community regarding any development or investment plan within their territory; they must perform or supervise prior environmental and social impact assessments; and, finally, they must ensure that Indigenous peoples will have a reasonable share of the benefits.[44] For the purposes of this chapter, special attention should be paid to the requirement of 'effective participation'. In this respect, the IACtHR held that States have a duty to consult with the Indigenous peoples concerned, and that, in doing so, they must act in good faith, provide sufficient information, and respect the Indigenous customs and traditions. Furthermore, the objective of the consultation process should be the reaching of an agreement among the parties.[45] Crucially, the Court also held that the duty of States to consult Indigenous peoples must now be regarded as a general principle of international law.[46]

While the observations on the duty to consult contributed to clarify the legal contours of FPIC, the distinguishing trait of the Court's jurisprudence has been its direct engagement with the thorny question of 'consent'. In this respect, the IACtHR introduced a crucial distinction between small-scale and large-scale development projects which has fundamental implications for the way in which FPIC is read and interpreted. More precisely,

[40] Organization of American States, American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 November 1969. Article 21 reads as follows: '(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society; (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law; (3) Usury and any other form of exploitation of man by man shall be prohibited by law.'

[41] See, eg, *Yakye Axa v Paraguay* (n 24) paras 124, 137; *Sawhoyamaxa Indigenous Community v Paraguay*, Judgment of 29 March 2006 (Merits, Reparations, and Costs) paras 118–21; *Saramaka v Suriname* (n 12) paras 87–96.

[42] *Saramaka v Suriname* (n 12) para 122. [43] ibid para 126. [44] ibid paras 127–29.

[45] ibid para 133. See also *Kichwa v Ecuador* (n 12) paras 180–211.

[46] *Kichwa v Ecuador* (n 12) para 164; *Comunidad Garifuna v Honduras* (n 12) para 158.

the Court held that in the case of large-scale development or investment projects that would have a major impact within Indigenous peoples' territories, States have a duty not only to consult with Indigenous peoples, but also to obtain their free, prior, and informed consent.[47] The same degree of protection needs to be guaranteed when the cumulative effects of a number of small-scale projects would resemble that of a large-scale project.[48] In other words, the Court endorsed the view that under certain circumstances, namely when a project is likely to cause profound social and economic changes in the territories and lives of the Indigenous peoples concerned, the latter should be entitled to a more rigorous protection. This can be described as a 'sliding scale approach' to the question of Indigenous participatory rights, notably one based on the assumption that the 'level of effective participation [of indigenous peoples] is essentially a function of the nature and content of the rights and activities in question'.[49] It is also important to note that, in the context of its legal analysis, the IACtHR made an express reference to Article 32 of the UNDRIP, thus aligning its interpretation of FPIC with the normative framework of the Declaration.[50] Crucially, the potential for such normative alignment was recently strengthened by the adoption of the American Declaration on the Rights of Indigenous Peoples, which uses, in Article 29, the same language of Article 32 of the UNDRIP.[51]

5.2 UN Human Rights Treaty Bodies

International human rights treaties lack any express reference to Indigenous peoples' rights. However, the bodies entrusted to monitor and promote their implementation have gradually developed extensive interpretations of their generic provisions in order to protect the rights of these peoples. In the context of this dynamic process, they have also addressed the question of FPIC, contributing to the formation of an international practice on the topic.

The HRComm was the first human rights treaty body to deal regularly and substantially with Indigenous issues, contributing to a considerable extent to the elaboration of new legal principles and standards related to Indigenous peoples. The HRComm did so by promoting a progressive interpretation of the right to culture included in Article 27 of the ICCPR so as to secure, among others, the right of Indigenous peoples to conduct traditional economic activities and to live in harmony with their lands and resources.[52] In a General Comment on Article 27, the HRComm highlighted that the enjoyment of cultural rights may require measures to ensure the *effective participation* of Indigenous peoples in decisions affecting them. Subsequently, a number of individual

[47] *Saramaka v Suriname* (n 12) para 134.

[48] *Saramaka v Suriname*, Judgment of 12 August 2008 (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs) para 41.

[49] G Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Martinus Nijhoff 2009) 116.

[50] *Saramaka v Suriname* (n 12) para 131.

[51] Article 29(4) establishes that: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources' (OEA/Ser. PAG/doc.5537/16 (8 June 2016)). Likewise, Art 23(2) of the American Declaration uses the same language of Art 19, affirming that 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them' (ibid).

[52] HRComm, General Comment 23 (n 5).

communications allowed the HRComm to elaborate on the meaning of 'effective participation', with important implications for the question of FPIC. Two cases are particularly instructive in this respect, namely *Länsman and Others v Finland* and *Ángela Poma Poma v Peru*.[53] The former case dealt with the decision of the Finnish Central Forestry Board to pass a contract with a private company to allow stone quarrying in a reindeer-herding area, home to a Saami community. The applicant claimed that this agreement violated the Saami right to enjoy their own culture, traditionally based on reindeer husbandry, as established by Article 27 of the ICCPR. The HRComm found that Finland had not violated this provision for two interrelated reasons: first, the authors of the communication were consulted and their interests were considered during the proceedings leading to the delivery of the relevant permit, and, second, quarrying, in the amount that had taken place at the time, had only a limited impact on the way of life of the concerned communities, and thus did not amount to a denial of their rights. This suggests that, in the eventuality of a more substantial impact on the way of life of the Indigenous communities concerned, the HRComm would have demanded more than mere consultation in order to decide in favour of the State.[54] This perception was later confirmed in *Poma Poma v Peru*. In that case, the diversion of groundwater from the land of an Indigenous community significantly affected their culture and life, as water was essential for their traditional activity of grazing and raising llamas and alpacas. The HRComm noted that the admissibility of measures which *substantially* compromise or interfere with the culture of Indigenous peoples depends on whether the latter have had the opportunity to participate in the relevant decision-making process. Crucially, the Committee added that, under those circumstances, participation must be effective, explaining that this would require not mere consultation, but, rather, the free, prior, and informed consent of the community affected.

Contrary to the case of individual communications, the HRComm's concluding observations on State reports do not provide a definitive indication of the Committee's approach to FPIC. For example, the HRComm has called upon State Parties to pay primary attention to the participation of Indigenous peoples in decisions that affect them,[55] and to consult Indigenous peoples before granting licences for the economic exploitation of their lands.[56] On a number of occasions, the Committee has sharpened its position, noting that States should ensure that consultations are effective, and that they should be conducted with a view to guaranteeing the free, prior, and informed consent of the Indigenous peoples concerned.[57] However, it has thus far refrained from addressing the specific circumstances which would trigger the necessity to obtain consent. That said, it should be noted that concluding observations do not represent ideal instruments when the need arises to either clarify the nebulous contours of critical legal questions such as that of FPIC or investigate factual matters such as the impact of a proposed measure on the culture and life of Indigenous peoples. For this reason, the HRComm's practice in individual communications can be taken to suggest that, in the Committee's view, States must obtain the FPIC of Indigenous peoples before taking actions that will substantially

[53] Respectively, UN Docs CCPR/C/52/D/511/1992 and CCPR/C/95/D/1457/2006.
[54] See also UN Doc CCPR/C/CAN/CO/5, para 9.
[55] UN Doc CCPR/C/79/Add.104, para 22. [56] UN Doc CCPR/C/NIC/CO/3, para 21(c).
[57] UN Doc CCPR/C/MEX/CO/5, para 22; UN Doc CCPR/C/COL/CO/6, para 25.

impact on their fundamental rights. The distinguishing factor, in line with the jurisprudence of the IACtHR, relates to the degree of interference that the measures concerned may have on the cultures and lives of Indigenous peoples.

As in the case of the HRComm, the concluding observations of the Committee on Economic, Social and Cultural Rights (CESCR) do not address directly the circumstances under which consent might need to be obtained or simply sought. Rather, the CESCR has noted on a number of occasions that States should consult and seek the consent of the Indigenous peoples concerned prior to the implementation of the relevant development projects.[58] However, the Committee may be in the process of developing a similar approach to the one employed by the HRComm. In the General Comment on the Right to Culture Included in Article 15 of the International Covenant on Economic, Social and Cultural Rights, the CESCR listed the obligations that State Parties have to respect in order to ensure the satisfaction of that provision.[59] Among other things, the Committee noted that States should 'allow and encourage the participation of ... indigenous peoples ... in the design and implementation of laws and policies that affect them.'[60] Significantly, the Committee also specified that 'States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are *at risk*.'[61] Without expressly elaborating on this point, the General Comment seems to introduce two different levels of protection in relation to measures affecting Indigenous peoples. Accordingly, laws and policies that threaten the preservation of the cultural distinctiveness of these peoples could only be adopted with their free, prior, and informed consent.

In a more radical way, the Committee on the Elimination of Racial Discrimination (CERD) stressed in a General Comment that no decisions directly relating to the rights and interests of Indigenous peoples should be taken without their informed consent.[62] This straightforward position has been confirmed in various concluding observations.[63] On some occasions, however, the CERD has taken a more nuanced approach to FPIC, indicating, for example, that States should 'endeavour to obtain' or 'seek' the consent of Indigenous peoples.[64]

The analysis conducted in this section suggests that a coherent uniform practice on FPIC among human rights treaty bodies has yet to emerge clearly. This may be partially due to the nature of the mechanisms used by the various committees to monitor compliance with their respective treaties. That said, there is evidence to suggest that the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have validated the importance of a sliding-scale approach to Indigenous peoples' participatory

[58] eg UN Doc E/C.12/1/Add.74, para 33; UN Doc E/C.12/1/Add.100, para 35; UN Doc E/C.12/MEX/CO/4, para 28.

[59] CESCR, General Comment 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1(a), of the ICESCR), UN Doc E/C.12/GC/21 (21 December 2009).

[60] ibid. [61] ibid. Emphasis added.

[62] CERD, General Recommendation 23: Rights of Indigenous Peoples, UN Doc A/52/18 (18 August 1997) para 5.

[63] eg UN Doc CERD/C/CHL/CO/15-18, para 22; UN Doc CERD/C/GTM/CO/12-13, para 11; UN Doc CERD/C/PER/CO/14-17, para 14.

[64] eg UN Doc CERD/C/GTM/CO/11, para 19; UN Doc CERD/C/GUY/CO/14, para 14; UN Doc CERD/C/COL/CO/14, para 20.

rights, linking the issue of FPIC with the nature of and effects that a proposed initiative will have on their fundamental human rights, in line with the more elaborated and detailed jurisprudence of the IACtHR.

5.3 The African Commission on Human and Peoples' Rights

In February 2010, the African Commission on Human and Peoples' Rights (ACommHPR, or the Commission) issued an important decision in the *Centre for Minority Rights Development (Kenya) v Kenya* case.[65] The claim was that the Kenyan government had removed the Endorois community from their ancestral lands without prior consultation and adequate compensation, thus violating, among other things, their right to property, natural resources, and development as recognized respectively by Articles 14, 21, and 22 of the African Charter on Human and Peoples' Rights (Charter). This case was especially important because it allowed the Commission to elaborate, for the first time, on the issue of Indigenous peoples' land rights in the context of the Charter. For the purposes of this chapter, special attention should be paid to a passage of the decision concerning the alleged violation of Article 22 of the Charter on the right to development. Notably, the Commission held that States have a duty not only to consult, but also to obtain the free, prior, and informed consent of Indigenous peoples in relation to development or investment projects that would have a major impact within their territory.[66] The reasoning of the Commission is, therefore, in line with the jurisprudence of the IACtHR, discussed in Section 5.1 above. That said, other passages of the decision dealing with FPIC are less illuminating. While considering possible restrictions to the right to property established by Article 14 of the Charter, the Commission noted, among other things, that States must consult the peoples concerned before encroaching their property rights, and subsequently went on to clarify the meaning and scope of this consultative process. In this respect, it affirmed that '[i]n terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded.'[67] In the subsequent passage, however, the Commission noted that 'failure to observe the obligations to consult and seek consent ultimately results in a violation of the right to property.'[68] As a result, it is not fully clear whether consent needs to be accorded or simply sought. Furthermore, the Commission made no reference to the impact that the relevant restrictions would have on Indigenous peoples, despite having specifically highlighted this important element in another part of the decision. While future engagement with the issue of FPIC will certainly contribute to shed light on the above questions, the rationale of the ACommHPR's pronouncement seems in line with the emerging flexible understanding of FPIC which is discussed in this chapter. In this sense, it is important to highlight that the Commission's findings draw almost entirely on the IACtHR's jurisprudence relating to Indigenous land rights, confirming a fundamental alignment between the reasoning and approach of the two bodies.[69]

[65] *Centre for Minority Rights Development (Kenya) v Kenya*, African Commission on Human and Peoples' Rights, 276/2003 (4 February 2010).

[66] ibid para 291. [67] ibid para 226. [68] ibid.

[69] G Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22(1) EJIL 165–202, 187.

5.4 UN Bodies Dealing Specifically with Indigenous Peoples' Rights

The UN Special Rapporteur on the Rights of Indigenous Peoples (Special Rapporteur) and the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) have each dedicated particular attention to the issue of FPIC, especially in relation to development projects affecting Indigenous peoples' lands.[70] The interpretation promoted by these two bodies is particularly important in order to clarify the meaning and scope of FPIC as understood in the Declaration, for their activities are carried out precisely in accordance with the normative framework of that instrument.

The Special Rapporteur has noted on several occasions that FPIC should be understood as an important principle aimed at protecting the fundamental human rights of Indigenous peoples.[71] In this sense, FPIC should not be read as conferring on Indigenous peoples a general right to veto. Instead, the provisions of the Declaration require that consultations must be undertaken in good faith and with the objective of reaching agreement. That said, in the Special Rapporteur's view, 'the strength or importance of the objective of achieving consent [should vary] according to the circumstances and the indigenous interests involved.'[72] This means that, under certain circumstances, ie in case of measures that will have a significant negative effect on Indigenous peoples' lives or territories, States should obtain the consent of the peoples affected prior to moving forward with the proposed initiative.[73] The Special Rapporteur conceded that, in accordance with an established principle of international human rights law, States may impose limitations on the exercise of certain human rights of Indigenous peoples. Yet, he noted that these limitations are only valid to the extent that they pursue a valid public purpose, which cannot consist of mere commercial interests, and comply with relevant standards of necessity and proportionality.[74] Importantly, the Special Rapporteur suggested that these stringent requirements would hardly be met in the case of extractive industries operating within the territories of Indigenous peoples without their consent.[75]

[70] According to the Special Rapporteur, the question of development projects affecting Indigenous peoples' lands 'has become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights'. 'Extractive Industries Operating within or Near Indigenous Territories', Report of the Special Rapporteur on the Rights of Indigenous Peoples, S James Anaya, UN Doc A/HRC/18/35 (11 July 2011) para 57. The Expert Mechanism on the Rights of Indigenous Peoples noted that special attention should be paid to the issue of FPIC in relation to 'projects or measures that have a substantial impact on indigenous communities, such as those resulting from large-scale natural resource extraction on their territories or the creation of natural parks, or forest and game reserves on their lands and territories'. Progress report on the study on Indigenous peoples and the right to participate in decision-making, Report of the Expert Mechanism on the Rights of Indigenous Peoples, UN Doc A/HRC/15/35 (23 August 2010) para 34.

[71] See, among others, Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc A/HRC/21/47 (6 July 2012) paras 47–53.

[72] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc A/HRC/12/34 (15 July 2009) para 47.

[73] According to Anaya, 'a direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples.' Furthermore, 'in certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent' (ibid).

[74] See also UNDRIP Art 46(2).

[75] Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries and Indigenous Peoples (1 July 2013) UN Doc A/HRC/24/41, paras 31–36. The Special Rapporteur further noted that 'in determining necessity and proportionality, due account must be taken of the significance to the survival of indigenous peoples of the range of rights potentially affected by the project. Account should also be taken of the fact that in many if not the vast majority of cases, indigenous peoples continue to claim rights to subsurface resources within their territories on the basis of their own laws or customs, despite State law to the

The EMRIP has taken a similar approach to that developed by the Special Rapporteur. In a recent study on the right of Indigenous peoples to participate in decision-making, it noted that States' duty to obtain the FPIC of Indigenous peoples implies that the latter may have the prerogative to 'withhold consent and to establish terms and conditions for their consent'.[76] In particular, the study highlighted that the Declaration requires that FPIC must be obtained in matters of fundamental importance for the rights, survival, dignity, and well-being of Indigenous peoples.[77] In assessing whether a matter is of such fundamental importance, the view of Indigenous peoples should be prioritized, while other decisive criteria would include the nature of the proposed plan or activity, and its impact on the peoples concerned.[78]

The above suggests that both the Special Rapporteur and the EMRIP promote a flexible approach to FPIC aimed at guaranteeing, on the one hand, the effective participation of Indigenous peoples in decisions affecting them and, on the other, the effective protection of their fundamental human rights. In this context, emphasis should be placed on Indigenous peoples' capacity to effectively influence the outcome of the relevant consultations—for example, by requesting States to modify their initial plans. At the same time, however, both bodies maintain that there may be situations where States should not implement their proposed measures in the absence of the FPIC of the Indigenous peoples concerned.

5.5 The International Labour Convention 169

ILO Convention 169 represented, until the establishment of the Declaration in 2007, the only instrument dealing specifically with Indigenous peoples' rights at the international level.[79] It contributed in a number of ways to the process of formation of the Declaration, and continues to play an important role in promoting and protecting the rights of Indigenous peoples globally. Since its adoption, however, the Declaration has become the most progressive and comprehensive instrument on Indigenous peoples' rights, having expanded the meaning and scope of provisions already established in ILO Convention 169 and recognized rights which are not included therein. As a result, the two texts address a number of questions in a different manner, including, to some extent, that of FPIC.

Participation and consultation represent the cornerstone of ILO Convention 169.[80] In this respect, Article 6 is of paramount importance as it affirms the general principle

contrary. These factors weigh heavily against a finding of proportionality of State-imposed rights limitations, reinforcing the general rule of indigenous consent to extractive activities within indigenous territories.'

[76] Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making, UN Doc A/HRC/18/42 (17 August 2011) Annex: Expert Mechanism Advice No 2 (2011): Peoples and the Right to Participate in Decision-Making, para 23.

[77] ibid para 22. [78] ibid.

[79] It should be noted that after the establishment, in 1989, of ILO Convention 169, ILO Convention 107 was declared closed for ratification. However, it remains valid for those States which, having previously ratified it, decided not to become parties to ILO Convention 169. Available at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107> accessed 16 October 2017.

[80] 'The spirit of consultation and participation constitutes the cornerstone of Convention ILO No. 169 on which all its provisions are based.' Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No 169), made under Art 24 of the ILO Constitution by the Confederacion Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), para 31.

whereby Indigenous peoples should be consulted in relation to legislative or administrative measures which may affect them, clarifying also that the relevant consultations shall be undertaken in good faith and with the objective of achieving agreement or consent to the proposed measures. In a similar vein, Article 15 establishes that when States retain the ownership of natural resources pertaining to the ancestral lands of Indigenous peoples, governments must consult Indigenous peoples 'with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources'. None of the above provisions can be read as promoting a sliding-scale approach to participatory rights of the kind that was discussed in the previous sections of this chapter. This is true despite the fact that Article 15, in particular, seems to introduce a link between the level of protection to be accorded to Indigenous peoples and the seriousness of the impact of a particular programme. As clearly stated by the ILO governing body, under no circumstances do Articles 6 and 15 imply a right to veto for Indigenous peoples or request that consultations necessarily lead to agreement or consent.[81]

This rigid interpretation tends to distance ILO Convention 169 from the growing international consensus on FPIC discussed in this chapter. That said, a number of factors partially alleviate the conceptual differences between the two approaches. First, although Articles 6 and 15 cannot be read in such a way that would request States to obtain the consent of Indigenous peoples under certain circumstances, it is important to stress that they are designed to guarantee that Indigenous peoples have 'a realistic chance of affecting the outcome' of the relevant process.[82] Second, a categorical rejection of the principle which links the degree of participation of Indigenous peoples in decision-making with the nature and implications of the measures concerned conflicts, to some extent, with a number of important provisions of the convention. This is especially true with regard to projects affecting the lands of Indigenous peoples. For example, Article 13 establishes that governments shall respect the special importance for the cultures and spiritual values of Indigenous peoples of their relationship with their lands. Related to this fundamental principle, Article 14 recognizes the rights of Indigenous peoples to own and possess the lands which they occupy. More generally, Article 7 affirms that Indigenous peoples have the right to decide their own priorities, and exercise control, to the extent possible, over their own economic, social, and cultural development. While it must be acknowledged that ILO supervisory bodies have taken a clear position with regard to Articles 6 and 15 of ILO Convention 169, the combined reading of the above provisions raises some legitimate concerns about the acceptability of overly restricted and rigid interpretations of FPIC.

The third, and most important, factor which contributes to narrow the gap between ILO Convention 169 and the Declaration in relation to FPIC refers to the question of relocation. Article 16 of the convention provides that where the relocation of Indigenous peoples is considered necessary as an exceptional measure, States must obtain their consent before removing them from their lands.[83] Crucially, this is the only provision in ILO

[81] Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 100th Session (2011), ILC.100/III/1A, 787.

[82] Contribution of the ILO to the Workshop on Free, Prior and Informed Consent organised by the UN Permanent Forum on Indigenous Issues, New York, 17–19 January 2005, <http://www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_ILO.doc> accessed 16 October 2017.

[83] '1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy. 2. Where the relocation of these peoples is considered necessary as an exceptional

Convention 169 where 'a very precise formulation of consent exists'.[84] This suggests that, in accordance with the Declaration, the Convention recognizes that on occasion the level of protection of Indigenous peoples' rights must indeed harden, acknowledging the importance of weighing the social, cultural, and economic implications of the proposed measures. In this sense, it may be said that the Convention does embrace a flexible approach to FPIC, but limits it, in scope, to the particularly serious case of relocation.

It is clear from the above considerations that, despite some degree of convergence, ILO Convention 169 privileges a more prudent version of FPIC than the one endorsed by the Declaration. This, however, does not preclude future alignment between the two instruments. Article 35 of ILO Convention 169 establishes that the provisions of the Convention should not prevent Indigenous peoples from enjoying more favourable rights pursuant to, inter alia, other international instruments, thus acknowledging that certain provisions of the Convention could fall behind existing international legal standards.[85] In this sense, the emergence of a clear, coherent, and uniform practice on FPIC could lead gradually to a more progressive interpretation of the relevant provisions of ILO Convention 169.

6. Domestic Jurisprudence

Several domestic courts have recognized the centrality of the right of Indigenous peoples to be consulted in relation to decisions affecting them. In doing so, they have generally upheld a model of consultation that, in accordance with the principle of FPIC discussed in this chapter, highlights the importance of carrying out meaningful consultations prior to the implementation of a legislative or administrative measure. For example, the Constitutional Court of Colombia affirmed that, in accordance with the right of Indigenous peoples to develop and preserve their culture, the State has an obligation to consult with Indigenous peoples before implementing measures that would affect them.[86] In a similar manner, the Constitutional Court of Guatemala held that the right of Indigenous peoples to prior consultation requires the State 'to establish procedures in good faith designed to obtain the free and informed opinion of these

measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.' Article 16(2) should be read in a particularly restrictive manner in order to preserve its compatibility with the general prohibition of relocation established under Art 16(1). It is telling that ILO Convention 107 Art 12(1) specified that Indigenous peoples could be removed exceptionally without their consent only on grounds of national security, national economic development, and health. The decision not to list any such grounds in ILO Convention 169 would seem to confirm the drafters' intention to limit the scope of the permitted exceptions. On this point, see Swepston (n 33).

[84] Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 100th Session (2011), ILC.100/III/1A, 785.

[85] Article 35 reads as follows: 'The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.'

[86] Constitutional Court of Colombia, Judgment C 169/01 of 14 February 2001, para 2.3. The Court further noted that the importance of the right of Indigenous peoples to prior consultation derives from the fact that meaningful consultations allow the parties to reconcile their positions and reach a middle ground for intercultural dialogue in a way that should guarantee the right of Indigenous peoples to autonomy. See para 5.1.

communities when government legislative or administrative measures are proposed that may affect them directly'.[87] This principle was also upheld by the Supreme Court of Chile when it halted the development of a gold and copper mine following the failure on the part of the government to consult the Indigenous communities affected by the project.[88]

While judicial decisions concerning FPIC have most typically revolved around the question of whether a process of consultation did take place, a few cases have also alluded to the more controversial question of consent, thus paving the way to potential judicial development in this important area. For example, the Constitutional Court of Bolivia noted that the consent of Indigenous communities should be obtained in three cases, namely those of relocation and disposal of hazardous materials on Indigenous lands, as affirmed by Article 16(2) of ILO Convention 169 and Articles 10 and 29 of the UNDRIP, respectively, and large-scale development projects which would have a major negative impact on the groups affected, as established by the IACtHR.[89] This view is generally shared by the Constitutional Court of Colombia, which, supporting the principle whereby the level of effective participation of Indigenous peoples in the relevant process of consultation depends on the nature and content of the rights and activities in question, noted that governmental plans to relocate Indigenous communities or launch large-scale development projects on Indigenous lands will normally trigger the State obligation to obtain consent.[90] As the principle of FPIC is aimed at protecting the fundamental human rights of Indigenous peoples, the court further emphasized that, in assessing the economic benefits and adverse effects of any project, the principal concern should be that of safeguarding the cultural and physical survival of the group concerned.[91] Express references to FPIC, including Article 32 of the UNDRIP, can also be found in a recent decision of the Supreme Court of Belize.[92] The case dealt with the permission granted by the government to a foreign company to construct a road and conduct commercial oil drilling within the boundaries of a national park. While some passages of the judgment refer to the government's obligation, deriving from international human rights law, to *seek* the FPIC of the affected communities, the court ultimately found that in failing to *obtain* the latter's consent prior to granting the relevant concessions and permissions the government of Belize had acted unlawfully. While this decision can be generally read as supporting a flexible understanding of FPIC, especially considering the references to both Article 32 of the Declaration and the pronouncements of the Special Rapporteur on the Rights of Indigenous Peoples, the Supreme Court of Belize did not elaborate extensively on the circumstances which would trigger the State obligation to obtain consent.

[87] Constitutional Court of Guatemala, Case 3878-2007 of 21 December 2009, Section V. Similar pronouncements have been made by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica (Case No 2011-1768 of 11 February 2011, Application for Amparo, considering para IV) and the Constitutional Court of Peru, which held that in cases of exploitation of natural resources, the government must necessarily consult the Indigenous communities that might be harmed by such activities. See Case No 0022-2009-PI/TC of 9 June 2010, para 23.

[88] Supreme Court of Chile, Case 11299/2014 (Civil), Resolución No 223992, de Sala Tercera (Constitucional), 7 October 2014.

[89] Constitutional Court of Bolivia, Case No 2003/2010-R of 25 October 2010, section III.5.

[90] Constitutional Court of Colombia, Case T-769/09 of 29 October 2009, section 5; Case T-129/11 of 3 March 2011, section 7.1; and Case T-376/12 of 18 May 2012.

[91] Constitutional Court of Colombia, Case T-129 of 3 March 2011, section 7.1.

[92] Supreme Court of Belize, Claim No 394 of 2013, Decision of 3 April 2014.

A court that has more directly engaged with this question, instead, is the Supreme Court of Canada, which over the years has developed an important jurisprudence on the Crown's duty to consult Indigenous peoples.[93] As established by the Court, the government has a duty to consult when it has real or constructive knowledge of an aboriginal rights or title claim that could be adversely affected by its contemplated action.[94] Crucially, the scope of this duty is proportionate to the strength of the case supporting the existence of the right or title and the seriousness of the potentially adverse impact that the contemplated governmental action would have on on them.[95] It follows that, in line with the flexible understanding of FPIC discussed in this chapter, the duty to consult presupposes the existence of a spectrum of duties for the government.[96] This means that, while consultations should always be meaningful and in good faith, under certain circumstances the government will also be required to accommodate the interests of the latter.[97] The recent *Tsilhqot'in Nation v British Columbia* case shed some light on the Court's understanding of the duty to accommodate, particularly in conjunction with the question of consent.[98] As a general principle the Court affirmed that, once aboriginal title is established, that is to say, once the right of an Indigenous community to control a portion of land has been recognized, no use of that land will be permitted without the consent of that community.[99] That said, the Court conceded that under certain circumstances the government may override the lack of consent. The requirements that the government must fulfil in order to do so, however, are particularly stringent. First, in addition to discharging its procedural duty to consult and accommodate, the government must demonstrate that its action is aimed at pursuing an objective which, considered from both the broader public's and the Indigenous community's perspective, appears compelling and substantial; second, the government's proposed action cannot substantially deprive future generations of an aboriginal group of the benefit of their land; and, third, the government must act in accordance with the principle of proportionality, which requires, among other things, that the benefits that may be expected to flow from its proposed action should not be outweighed by the adverse effects on the affected group.[100] All considered, it seems that, at least in certain situations, government incursions on the lands controlled by an Indigenous group without the consent of the latter would be particularly difficult to justify. In this regard, it is telling that one passage of the decision expressly encouraged the government, whether before or after a declaration of aboriginal title, to obtain the consent of the interested aboriginal groups before proceeding to use or exploit their lands.[101]

[93] For a detailed discussion, see Newman (n 9).

[94] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, para 35. See also *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] SCC 69, [2005] 3 SCR 388, para 34.

[95] *Haida Nation v British Columbia* (n 93) para 39. [96] ibid paras 43–45.

[97] ibid paras 41, 46–47.

[98] In the context of established claims, the Supreme Court of Canada had previously noted that the duty of consultation may in some cases 'even require the full consent of an aboriginal group, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.' *Delgamuukw v British Columbia* [1977] 3 SCR 1010, para 168.

[99] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, para 76.

[100] The principle of proportionality further requires that the incursion on Indigenous land is necessary to achieve the government's goal, and that 'the government go no further than necessary to achieve it.' Ibid, para 87.

[101] 'Governments and individuals proposing to use or exploit land, whether before or after a declaration of aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group' (ibid, para 97).

7. Conclusions

The UN Declaration on the Rights of Indigenous Peoples recognizes an extensive set of rights to Indigenous peoples aimed at guaranteeing their 'survival, dignity and well-being'.[102] Within this broad legal framework, participatory rights represent a valuable tool for Indigenous peoples to secure adequate protection of their fundamental human rights. Crucially, the principle of free, prior, and informed consent defines the nature and scope of these important rights. FPIC may have significantly different implications depending on the way in which it is read and understood. At a minimum, it requires that Sates should consult Indigenous peoples before implementing decisions affecting their interests; in a more radical manner, it could mean that States should obtain the consent of the Indigenous peoples concerned before moving forward with their proposed plan. The provisions of the Declaration concerning FPIC do not in themselves provide a definitive answer to the fundamental question of the meaning and scope of this significant principle. However, by placing those provisions within the normative framework of the Declaration and analysing the relevant practice of judicial and quasi-judicial bodies, it is possible to shed some light on the legal contours of FPIC. In particular, three main conclusions may be drawn from the discussions conducted in this chapter.

First, the right of Indigenous peoples to be consulted in relation to decisions affecting them is a well-established component of their human rights regime. This is recognized unambiguously in instruments such as the UNDRIP, ILO Convention 169, and the recently adopted American Declaration on the Rights of Indigenous Peoples, and is accepted without reservations by all international and regional bodies dealing, either directly or indirectly, with Indigenous peoples' rights. At the same time, the right of Indigenous peoples to consultation has been fully endorsed by several national courts. Such a universal and unqualified support has led the IACtHR to conclude that States' obligation to consult Indigenous peoples in relation to decisions affecting them should now be regarded as a general principle of international law.

Second, there is also widespread agreement on the fact that the principle of FPIC should set out the manner in which the relevant process of consultation between States and Indigenous peoples takes place. As suggested in Section 3 of this chapter, this process imposes complex and onerous obligations on States, which must engage in meaningful consultations with the affected groups. By contrast, States that fail to carry out genuine and appropriate consultations will be found in breach of their legal obligations towards Indigenous peoples.

The final, and most critical, point relates to the question of 'consent'. Both the drafting history of the Declaration and the relevant practice of judicial and quasi-judicial bodies suggest that FPIC does not confer on Indigenous peoples an overarching right to veto with regard to all decisions affecting them. That said, it would be difficult to reconcile the fact that governmental plans could be implemented without the consent of Indigenous peoples, and regardless of the consequences that those could have on their lands, cultures, and lives, with, generally, the normative framework of the Declaration and, specifically, Article 3 of that instrument, which establishes that, by virtue of their right of self-determination, Indigenous peoples have the right to freely pursue their economic, social, and cultural development. Against this background, a flexible approach to FPIC has gained

[102] UNDRIP Art 43.

increasing recognition at the international level. Bodies such as the IACtHR, the African Commission on Human and Peoples' Rights, the Human Rights Committee, and the Committee on Economic, Social and Cultural Rights have all upheld the principle whereby the degree of participation of Indigenous peoples in decision-making processes depends on the nature and implications of the proposed measures. A number of national courts have also adhered to this principle, contributing further to define its legal contours. This model implies that, after carrying out appropriate consultations, States may implement legislative measures or development projects without the consent of Indigenous peoples provided that doing so will not interfere substantially with the enjoyment of their fundamental human rights. Conversely, when a project is likely to produce a major (negative) impact on the lands, cultures, and, ultimately, lives of Indigenous peoples, the presumption is that States will have a duty not only to consult them, but, also, obtain their free, prior, and informed consent. At that point, the requirements that governments must fulfil in order to implement their plans without the consent of the affected group become especially rigorous.[103] This implies that, at least under certain circumstances, it will be particularly difficult for them to legally justify such a course of action.

One potential problem with this flexible model is that on occasion it may be difficult to determine the gravity of the consequences that a specific measure will have on the lives of Indigenous peoples. More generally, it is also clear that, notwithstanding the significant pronouncements of a number of international bodies and national courts, further judicial elaboration is needed to add clarity to the broader legal regime surrounding the principle of FPIC, which, it should be highlighted, does not only revolve around the issue of consent. That said, the emerging approach to FPIC discussed in this chapter promises to tackle the question of 'consent' in a constructive manner, focusing, in accordance with the spirit of the Declaration, on the need to protect adequately the fundamental human rights of Indigenous peoples. In doing so, it contributes to reverse a tradition of injustice and discrimination by seeking to prevent States' interests systematically and indiscriminately prevailing over those of Indigenous peoples.

[103] UNDRIP Art 46(2).

PART III

RIGHTS TO CULTURE

Chapter 10. Culture

Articles 11(1), 12, 13(1), 15, and 34

Alexandra Xanthaki

Article 11(1)

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with the indigenous peoples concerned.

Article 13(1)

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

1. Introduction

The freedom of Indigenous peoples to have their Indigenous identities and cultures respected has been the main incentive for their struggle and one of the main reasons for the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The recognition of Indigenous cultural rights is deeply rooted in the principles of respect of the diversity and richness of their identities, the end of historical injustices committed against them, and the principle of self-determination, all of which are incorporated in the Preamble of the Declaration. The gross disrespect of Indigenous cultures by States has been evident in their assimilationist policies, which have included the brutal removal

of Indigenous children from their families, unprecedented destruction of Indigenous cultures, and wide suppression of Indigenous languages and religions. Patterns of expropriation of Indigenous religious and cultural objects and neglect, even destruction of Indigenous cultural manifestations, unfortunately still continue.[1] Together with more awareness of the rights of vulnerable groups, recent decades unfortunately also witness the unruly development of projects by transnational corporations without the appropriate cultural sensitivity, especially in Indigenous areas previously considered remote and inaccessible. In addition, new waves of tourism beyond 'the beaten track' commodify important Indigenous historical and archaeological sites. It is therefore of no surprise that the protection of culture is so prominent in the whole text of the Declaration. The link between land rights and Indigenous cultural rights is of particular significance, but will be analysed in Chapter 14 on the provisions on land rights in this volume.

1.1 Analysis of the Related UNDRIP Provisions and Links with Other UNDRIP Rights

Aspects of Indigenous cultural rights can be found throughout the text of the Declaration; however, the Articles that focus on cultural rights are Articles 11 to 13, together with Articles 15 and 34. Articles 11 to 13 distinguish between Indigenous tangible heritage (Article 11); Indigenous traditions and customs (Article 11); the spiritual and religious aspects of Indigenous cultures (Article 12); and Indigenous intangible heritage (Article 13); whereas Article 25 focuses on inter-culturality in education and public information. The distinction is rather blurred and the language of the provisions errs towards the excessive. Indigenous representatives have insisted that the detailed language, with all its flaws, reflects to a large degree the experiences and problems Indigenous peoples face vis-à-vis their cultural rights.[2]

1.2 Existing Standards Relating to Cultural Rights

1.2.1 General Instruments

The above provisions of the Declaration regarding cultural rights must be put within the general context of current standards of international law.

1.2.1.1 UNESCO Instruments

Several UNESCO documents have maintained the importance of culture for the identity and development of the individual. The 1966 UNESCO Declaration of the Principles of International Cultural Co-operation[3] declared the respect that States should have to 'the distinctive character of each' culture. This is reflected in the statement of the Preamble of the UNDRIP that 'all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind'. The 1972 Convention concerning the Protection of the World Cultural and Natural Heritage is also reflected in the UNDRIP provisions on cultural rights in the recognition that cultural heritage has

[1] RJ Coombe, 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) Canadian JL & Jurisprudence 249, 272.

[2] United Nations, Report of the UN Working Group Established in Accordance with Commission on Human Rights Res 1995/32 of 3 March 1995, UN Doc E/CN.4/1997/102, para 74 (the Grand Council of Crees).

[3] UNESCO, Declaration of Principles of International Cultural Co-operation, Adopted by the UNESCO General Conference at Its Fourteenth Session, Paris, 4 November 1966, UNESCO's Standard-Setting Instruments, IV.C (1994).

to be protected.[4] The 2001 UNESCO Universal Declaration on Cultural Diversity[5] is also in accordance with the spirit of the UNDRIP as it declares 'that culture is at the heart of contemporary debates' on identity and social cohesion, affirms that respect for the diversity of cultures is necessary for international peace, and views the defence of cultural diversity as 'an ethical imperative, inseparable from respect for human dignity'. The text supports cultural pluralism. Similarly, but using a stronger language, the UNDRIP's Preamble proclaims that 'all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.' In addition, the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore[6] specifically protects the culture of sub-national groups, while the (2005) UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,[7] which has 129 State Parties, recommends 'the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples' (Article 2). Finally, also of relevance is the (2003) UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage,[8] which specifically recognizes that Indigenous communities play an important role in the production, safeguarding, maintenance, and recreation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity.

1.2.1.2 UN Human Rights Instruments

Turning to human rights instruments, the individual right to culture has been recognized in Article 27(1) of the Universal Declaration of Human Rights[9] and Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[10] The work that the Committee on Economic, Social and Cultural Rights (CESCR) has done on the definition of culture and the right to participate in the culture is particularly important for Indigenous peoples.[11] In actual truth, one may argue that in a similar manner to the UN Declaration on Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (UN Declaration on Minorities)[12] and Article 27 of the ICCPR, the UNDRIP provisions on cultural rights represent an interpretative tool of Article 15

[4] UNESCO, Convention concerning the Protection of the World Cultural and Natural Heritage, Adopted by the UNESCO General Conference at Its Seventeenth Session (23 November 1972).

[5] UNESCO, Universal Declaration on Cultural Diversity, adopted 2 November 2001, UNESCO Doc 31C/Res 25, Annex 1 (2001).

[6] UNESCO, Recommendation on the Safeguarding of Traditional Culture and Folklore, adopted on 15 November 1989.

[7] UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted on 15 October 2005, UN Doc CLT-2005/CONVENTION DIVERSITE-CULT REV, <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> accessed 16 October 2017.

[8] UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003), UN Doc MISC/2003/CLT/CH/14, <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> accessed 16 October 2017.

[9] Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 (1948) 71.

[10] United Nations, International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966) (entered into force 3 January 1976), 993 UNTS 3.

[11] CESCR, General Comment 21: Right of Everyone to Take Part in Cultural Life, UN Doc E/C.12/GC/21 (21 December 2009); also previously, General Discussion on the Right to Take Part in Cultural Life as Recognized in Article 15 of the Covenant, UN Commission on Economic, Social and Cultural Rights, UN Doc E/C.12/1992/SR.17 (11 October 1992) para 32.

[12] UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, GA Res 47/135, Annex, 47 UN GAOR Supp (No 49) at 210, UN Doc A/47/49 (1993).

of the ICESCR specifically on Indigenous cultural rights. In addition, the cross-fertilization among the UN human rights bodies regarding the interpretation of Indigenous cultural rights is obvious, as the Human Rights Committee (HRComm), the CESCR, the Committee on the Elimination of Racial Discrimination (CERD), and the Committee on the Elimination of All forms of Discrimination against Women (CEDAW Committee) all discuss Indigenous cultural rights in a way that adopts the content of the UNDRIP.

Of paramount importance has been the work of the HRComm especially *prior to* the adoption of the UNDRIP. The Committee has referred to the broad understanding of the term 'culture' and has talked about Indigenous linguistic rights,[13] cultural autonomy in terms of cultural institutions, consultation regarding traditional means of livelihood,[14] and protection of sites of religious or cultural significance.[15] The Committee's comments in its concluding observations followed discussions on Indigenous cultural rights in the case law, including *Apirana Mahuika and Others v New Zealand*,[16] *Lubicon Lake Band v Canada*,[17] *Lansman and Others v Finland* in 1994[18] and 1996,[19] *Francis Hopu and Tepoaitu Bessert v France*,[20] *Lovelace v Canada*,[21] and *Kitok v Sweden*.[22] These comments of the HRComm have been important in convincing the States of the validity of the UNDRIP related to cultural rights

The work of the CERD has also been particularly important in elaborating Indigenous cultural rights: Article 5(e)(vi) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[23] prohibits discrimination before the law in the exercise of cultural rights and recognizes in particular 'the right to equal participation in cultural activities'. The CEDAW Committee has increasingly been interested in discussing cultural frameworks that affect Indigenous women.[24] The Convention on the Rights of the Child[25] also recognizes in its Preamble 'the importance of the traditions and cultural values of each people for the protection and harmonious development of the child'. Article 30 of the Convention proclaims that the Indigenous child 'should not be denied the right' to enjoy his or her own culture. For example, General Comment 11 of

[13] See, eg, UN Doc CCPR/CO/71/UZB (2001) para 5, where the Committee welcomes Uzbekistan's language policy whereby education at all levels is offered in ten languages, including the languages of the minority groups.

[14] See, eg, UN Doc A/55/40, para 75, where the Committee notes positively the transfer of certain cultural institutions to the Saami in Norway, as well as the full consultation with the Saami in matters affecting their traditional means of livelihood.

[15] See, eg, UN Doc A/55/40, para 510 regarding Australia.

[16] A/56/40, vol I, Annex X, A, Comm No I 547/1993.

[17] CCPR/C/38/D/167/1984, Comm No 167/1984, UN Doc Supp No 40 (A/45/40) (26 March 1990).

[18] CCPR/C/52/D/511/1992, Case No 511/1992.

[19] CCPR/C/58/D/671/1995, Case No 671/1995.

[20] CCPR/C/60/D/549/1993/Rev.1, Comm No 549/1993.

[21] A/36/40, Annex 7(G) (1998).

[22] A/43/40, Annex 7(G) (1988).

[23] United Nations, International Convention on the Elimination of All Forms of Racial Discrimination adopted and opened for signature and ratification by General Assembly Res 2106 (XX) of 21 December 1965 (entered into force 4 January 1969), 660 UNTS 195.

[24] eg CEDAW Committee, Concluding Observations of the Committee on the Elimination of Discrimination of Women, Mexico, CEDAW/C/MEX/CO/7-8 (2012) paras 34–35; CEDAW Committee, Concluding Observations of the Committee on the Elimination of Discrimination of Women, Paraguay, CEDAW/C/PRY/CO/6 (2012) para 32.

[25] UN Convention on the Rights of the Child, GA Res 44/25, Annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989) (entered into force 2 September 1990).

the Committee has emphasized that positive measures are needed in order to fulfil the rights of the Indigenous child to his or her culture.[26]

1.2.1.3 Regional Instruments

In addition to the above, one should not forget the positive contribution that the adoption of regional instruments has had on paving the way to the adoption of cultural rights in the UNDRIP. In the 2000 ASEAN Declaration on Cultural Heritage,[27] Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam recognized the importance of cultural identity. Even though the text refers several times to the 'national cultures', it also mentions Indigenous cultures. It urges States to protect tangible and intangible heritage and intellectual property rights, and put a stop to the illicit transfer of cultural items. Similar is the spirit of the 2006 Charter for African Cultural Renaissance,[28] which protects tangible and intangible heritage, but also leans towards the preservation of 'national integrity' with no mention of tribal or Indigenous cultures. Still, the text emphasizes the need to end cultural domination. The 2011 Faro Council of Europe Framework Convention on the Value of Cultural Heritage for Society,[29] a binding document for State Parties, explicitly refers to 'heritage communities' and their rights to participate in and benefit from the cultural heritage.[30] The Convention has been ratified by seventeen European States so far, mainly from Eastern Europe.[31]

Regional bodies have been instrumental in helping the recognition of strong cultural rights in the UNDRIP. The Inter-American Court has commented on cultural rights in a way that complements and further interprets the content of the UNDRIP. Interesting has been the reference of the Court to the Indigenous 'right to cultural integrity'. In *Pueblo Indígena Kichwa de Sarayaku v Ecuador* decided in June 2012,[32] the Court held that among other rights, the granting of a concession for oil exploration and exploitation within the Sarayaku people's territory without their consent violated 'the right to cultural integrity'.[33] Gilbert has noted that the emergence and development of an Indigenous 'right to cultural integrity', which includes rights to subsistence, livelihood, cultural diversity, and heritage, is the outcome of a human-rights-based approach to culture.[34] Significantly, the Court's culturally driven approach to land rights has carved the way for growing international practice in this field. This will be discussed more with regard to the provisions on land rights in this volume.

The African system of human rights protection appears to follow the steps of the Inter-American system and its invaluable contribution to the evolution of Indigenous rights in the cultural domain. The African Charter on Human and Peoples' Rights requires States to take

[26] UN Committee on the Rights of the Child (CommRC), General Comment 11: Indigenous Children and Their Rights under the Convention, UN Doc CRC/C/GC/11 (12 February 2009) para 17.

[27] Bangkok, Thailand, 24–25 July 2000.

[28] Adopted by the Sixth Ordinary Session of the Assembly held in Khartoum, Sudan, 24 January 2006.

[29] Adopted in Faro, 25 October 2005.

[30] E Stamatopoulou, 'Monitoring Cultural Human Rights: The Claims of Culture on Human Rights and the Response of Cultural Rights' (2012) 34 Human Rights Quarterly 1170, 1178.

[31] Armenia, Bosnia and Herzegovina, Croatia, Georgia, Hungary, Latvia, Luxembourg, Moldova, Montenegro, Norway, Portugal, Serbia, Slovakia, Slovenia, and the former Yugoslav Republic of Macedonia.

[32] *Kichwa Indigenous People of Sarayaku v Ecuador*, Judgment of 27 June 2012, IACtHR Series C No 245.

[33] ibid, Merits and Reparations, para 302.

[34] J Gilbert, 'Custodians of the Land: Indigenous Peoples, Human Rights and Cultural Integrity' in M Langfield, W Logan, and NM Craith (eds), *Cultural Diversity, Heritage and Human Rights: Intersections in Theory and Practice* (Routledge 2010) 31–44.

specific measures for the promotion of cultural identity and the awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and Indigenous sectors of the population.[35] In 2010, the African Commission on Human and People's Rights ruled that the Endorois' eviction from their traditional land for tourism development violated the religious and cultural rights of the Endorois.[36] In 2017, the Court held in the *African Commission of Human and Peoples' Rights v Kenya* (the '*Ogiek case*') that the Ogiek violated the right to culture as recognized in the African Charter, interpreted in light of the UNDRIP.[37]

1.2.2 Instruments Specifically on Indigenous Rights

Although ILO Convention 107[38] aimed at the 'progressive integration' of Indigenous peoples into the lives of their respective countries (Article 2 of ILO Convention 107) and assimilationist practices were tolerated, still Indigenous cultural rights are protected by the Convention to some extent. For example, States are urged to take measures to promote Indigenous 'cultural development' (Article 2(2)(b)). One could sense that the cultural development promised was at the time of drafting the Convention considered part of a narrowly understood 'integration' project; however, an interpretation of this Article in line with the current multicultural spirit of international law can truly protect Indigenous cultures.

Contrary to ILO Convention 107, ILO Convention 169[39] is more forthcoming in its protection of Indigenous cultural rights. Article 2(1) ensures that States must take action to promote the full realization of Indigenous cultural rights 'with respect for their social and cultural identity, their customs and traditions and their institutions'. The Convention asks States to take special measures to 'safeguard' the cultures of Indigenous peoples (Article 4). The 'social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected' according to Article 5 of ILO Convention 169 and 'due account shall be taken of the nature of the problems which face them both as groups and as individuals'. Indigenous communities have been disappointed that the Convention does not view Indigenous cultural rights under the framework of self-determination; this, though, should not detract from the effectiveness of the instrument. The Committee of Experts has repeatedly commented on cultural rights of Indigenous peoples that are protected both by ILO No 169 and the UNDRIP, including health practices consistent with Indigenous cultures, respect for Indigenous customary laws, and respect for cultural heritage.[40] This application of the same standards undoubtedly strengthens the force of the cultural rights provisions of the UNDRIP.

[35] African Commission of Human Rights, 'General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Members Regarding the Meaning, Scope and Weight of "the Rights of Peoples" Recognized by Articles 17(2), 19 to 20 of the Charter' (1990) 417–18.

[36] African Commission on Human and Peoples' Rights, Comm No 276/03, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya (25 November 2009).

[37] African Court on Human and Peoples' Rights, App No 006/2012, African Commission on Human and Peoples' Rights v. Republic of Kenya (26 May 2017) para 181.

[38] International Labour Organization, Convention on Indigenous and Tribal Populations, 1957 (No 107), 328 UNTS 247 (1957).

[39] International Labour Organisation, Convention concerning Indigenous and Tribal Peoples in Independent Countries, entered into force in 1991 (ILO No 169), 72 ILO Official Bull 59, entered into force 5 September 1991.

[40] See the comments of the Committee of Experts in <http://www.ilo.org/dyn/normlex/en/f?p=1000:20010:::NO:::>.

UN instruments on the rights of members of minorities are also relevant to Indigenous cultural rights as they include provisions on the right to participate effectively in cultural life[41] and on the right to development.[42] In the European context, the 1990 CSCE Copenhagen Document recognizes the right of persons belonging to national minorities to freely express, preserve, and develop their ethnic, cultural, linguistic, or religious identity and to maintain and develop their culture in all its aspects, free of any attempts of assimilation against their will (paragraph 32). This recognition is also included in the 1995 Framework Convention for the Protection of National Minorities. Although the UNDRIP went much further than such instruments, the latter have been important ammunition in convincing States that the UNDRIP provisions on cultural rights were a step towards the evolution of existing standards rather than alien to international human rights law.

2. Drafting History of Relevant Provisions

2.1 The First Steps

Indigenous cultural rights have been at the heart of the text of the Declaration since its very inception. The Declaration of Principles adopted in 1984 by the Fourth General Assembly of the World Council of Indigenous Peoples in Panama was one of the first documents compiled by Indigenous representatives to express their claims.[43] The Declaration noted that 'the cultures of the indigenous peoples are part of the cultural heritage of mankind' (Principle 3) and 'the traditions and customs of indigenous people must be respected by the States, and recognized as a fundamental source of law' (Principle 4). Interestingly, even at that early stage Indigenous representatives put limits to their own rights: Principle 7 accepted that 'the institutions of indigenous peoples and their decisions, like those of States, must be in conformity with internationally accepted human rights both collective and individual.' Principle 13 reflected the needs that Indigenous peoples have vis-à-vis the protection and development of their cultural rights: 'the original rights to their material culture, including archaeological sites, artefacts, designs, technology and works of art, lie with the indigenous people.'

The 1985 Draft Principles, put forward by the newly established UN Working Group on Indigenous Populations of the then Sub-Commission (WGIP), had four of its seven paragraphs referring to Indigenous cultural rights. Among others, the draft Principles recognized to Indigenous peoples 'the right to manifest, teach, practice and observe their own religious, traditions and ceremonies, and to maintain, protect, and have access to sites for these purposes' (Article 4); the right to preserve their culture, identity, and traditions, and to pursue their own cultural development (Article 6); and the right to

[41] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art 2, paras 1 and 2. See also Council of Europe, Framework Convention for the Protection of National Minorities, ETS No 157, Art 15.

[42] Declaration on the Right to Development, adopted 4 December 1986, UNGA Res 41/128, UN GAOR, 41st Sess, 97th plen, Art 1. In its General Comment 4, para 9, the Committee considers that rights cannot be viewed in isolation from other human rights contained in the two international Covenants and other applicable international instruments.

[43] United Nations, Report of the Working Group on Indigenous Populations on Its Fourth Session, UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985) Annex III, 1–2.

promote intercultural information and education, recognizing the dignity and diversity of their cultures (Article 7).[44]

As the drafting of the new instrument intensified in the following years, more discussions within the working group led to more changes and additions; in this process, Indigenous peoples played an important role. Their suggestions, submitted in a document after a preparatory meeting of Indigenous representatives, were really detailed and had a very strong collective element throughout. For example, Article 11 read: 'Indigenous nations and peoples continue to own and control their material culture, including archaeological, historical and sacred sites, artifacts, designs, knowledge, and works of art. They have the right to regain items of major cultural significance and, in all cases, to the return of human remains of their ancestors for burial according with their traditions.' Article 13 prohibited *any* 'technical, scientific or social investigations, including archaeological excavations; without their prior authorization, and their continuing ownership', and 'indigenous nations and peoples shall always enjoy unrestricted access to, and enjoyment of sacred sites in accordance with their own laws and customs, including the right of privacy.'[45]

Even though cultural rights, mainly included at the time in Articles 12 to 14, were in principle viewed as non-controversial rights, the collective element of the provisions, their detailed language, and the clear obligations they included made States restless. Even at this early stage of the drafting, Finland noted the difference between the cultural rights as included in the draft instrument and 'the individual and negative nature of States obligations' under Article 27 of the ICCPR. Canada also noted the need to balance Indigenous rights with the public interest or non-Indigenous rights.[46]

In 1989, a provision on language rights was added recognizing the right of Indigenous peoples 'to develop and promote their own languages, including an own literary language, and to use them for administrative, juridical, cultural and other purposes'.[47] Interestingly, the Saami Parliament asked for the inclusion of the requirement that officials know the language of Indigenous peoples when dealing with them, but this was not adopted.[48]

2.2 The Sub-Commission

In 1993, the Chairperson of the Working Group on Indigenous Populations, Erica-Irene Daes, submitted a revised draft of the Declaration; by then, the provisions looked very similar to the ones finally adopted in 2007, almost fifteen years later. Consistent with the 1995 Daes 'Principles and Guidelines for the Protection of the Heritage of *Indigenous* People', Indigenous ownership over their culture is recognized to be collective, permanent, and inalienable, as prescribed by their customs and traditions. Daes insisted that no alienation of these elements of their culture should be allowed by international or national law, unless made in conformity with Indigenous peoples' own traditional laws and with the approval of their own local institutions.[49]

[44] UN Doc E/CN.4/Sub.2/1985/22, 14–19; Annex II, 1; Annex III and IV, 1, 2.

[45] Annex V, Declaration of Principles adopted by the Indigenous Peoples Preparatory Meeting held at Geneva, 27–31 July 1987, UN Doc E/CN.4/Sub.2/1987/22 (1987).

[46] Finland's report, UN Doc E/CN.4/Sub.2/AC.4/1988/2 (1988). Canada's report, UN Doc E/CN.4/Sub.2/AC.4/1988/2/Add.1 (1988).

[47] UN Doc E/CN.4/Sub.2/1989/33 (1989).

[48] UN Doc E/CN.4/Sub.2/AC.4/1992/1 (1992).

[49] ibid paras 171–75; see also 'Principles and Guidelines for the Protection of the Heritage of Indigenous People', Report of the Technical Meeting on the Protection of the Heritage of Indigenous People (Geneva, 6–7 March 1997), UN Doc E/CN.4/Sub.2/1997/15, Annex, para 3.

Four paragraphs recognized cultural rights: one was on tangible heritage; one on religious and spiritual traditions; one on more general intangible heritage, including languages; and one introducing a new right, the right of Indigenous peoples 'to retain and develop their customs, laws and legal systems, in a manner not incompatible with universally recognised human rights and fundamental freedoms'.[50] This last provision was to be strengthened even further: by August 1993, the draft provision recognized the right of Indigenous peoples 'to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards'.[51] The 1994 Technical Review of the Declaration brought up the issue of terminology: 'cultural heritage', as also mentioned by the Daes study on the protection of cultural and intellectual property, was more appropriate than 'cultural property'. The Review also emphasized the importance of an individual right to culture that would coincide with a collective one and noted the additional limitations that the right to manifest one's religion has under the ICCPR and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief. It finally asked the Working Group to consider placing cultural and intellectual property rights together; this was also UNESCO's suggestion.[52]

2.3 The Ad Hoc Working Group of the Commission

The attempts of the Indigenous representatives throughout the sessions of the Working Group of the Draft Declaration (WGDD) not to change the text adopted by the Sub-Commission for fear of diluting it were remarkable. Articles on cultural rights included in Part III of the then draft Declaration appeared to get consensus in principle, but States still tried to restrict their scope.[53] The main issue that States had with regard to these Articles continued to be their collective nature and debates were difficult and controversial. A few States, including France, Japan, and Sweden, argued repeatedly that international law did not recognize collective rights.[54] Other States recognized the existence of collective rights, but feared that their inclusion would lead to the weakening of the respective individual rights.[55] One 'solution' repeatedly suggested by the United States was the adoption of a language similar to the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, recognizing individual rights under collective capacity 'exercised individually or in community with others'.[56] Another suggestion was the inclusion of a paragraph protecting third parties, but again, this was rejected by Indigenous representatives.[57] Such language indeed would lower the standards of international law on Indigenous rights, as both ILO Conventions 107 and 169 had already recognized a wide range of Indigenous collective rights without such explicit restrictions. Also, adoption of a language that would emphasize individual rights would nullify the

[50] Operative para 31, UN Doc E/CN.4/Sub.2/1993/26 (1993).

[51] Article 33 in Annex I: Draft Declaration as Agreed upon by the Members of the Working Group at Its Eleventh Session, UN Doc E/CN.4/Sub.2/1993/29 (1993) Annex I.

[52] UNESCO comments in UN Doc E/CN.4/1995/WG.15/3 (1995) para 3.

[53] UN Doc E/CN.4/1996/84, paras 71–73.

[54] See France, Japan, and Sweden in UN Doc E/CN.4/1997/102, paras 108–13.

[55] See Report of the 1996 Session, UN Doc E/CN.4/1997/102, paras 108–13; see also Argentina's comments in UN Doc E/CN.4/1995/WG.15/2 (1995) para 11; also 2002 Session of the Working Group, UN Doc E/CN.4/2002/98 (2002) para 51.

[56] ibid paras 103–29; see also UN Doc E/CN.4/1999/82 (20 January 1999) para 49.

[57] United Nations, 2002 Session of the Working Group, UN Doc E/CN.4/2002/98 (2002) para 53.

raison d'être of the new instrument. The United States also suggested that the cultural rights be redrafted to avoid the endorsement of special measures.[58] Ironically, Argentina brought up the common heritage of mankind as an argument to restrict Indigenous cultural rights and asked for the omission of the word 'right' 'in cases where, as in the present instance, the concept corresponds more to a general objective or aspiration'.[59] During the discussions in the Working Group of the Commission, States also tried to delete the words 'archaeological and historical sites', disagreed on the inclusion of 'spiritual property'[60] and 'spirituality',[61] and questioned the provisions on education as promoting separate systems for Indigenous communities.[62]

The discussion in the Working Group of the Commission also saw several suggestions for changes in Article 34 (then Article 33). The original version, Article 33, read:

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

States were reluctant to accept the inclusion of this provision in the final text, as they perceived it as far-reaching. Several States asked for the inclusion of restrictions based on the national legal system.[63] The informal plenary at the Eleventh Session of the Working Group suggested the inclusion of the phrase 'where they exist' before juridical systems and customs, the implication being that not all Indigenous communities have such systems; of course, it would be up to the States in the first instance to decide on this matter. Also, some States asked for consistency of these customs and systems not only with the international human rights system, but also with national systems; otherwise, they claimed, this would allow Indigenous peoples 'to opt out of national legal systems'.[64] States also pushed for the inclusion of the term 'reasonable' before any measures they would have to agree on for the protection of Indigenous cultures.[65]

2.4 The Road to the Adoption

Despite all the disagreements of the States, the text formally remained unchanged for many years, a victory for Indigenous peoples. On 29 June 2006, the new Human Rights Council adopted the Draft Declaration on the Rights of Indigenous Peoples,[66] incorporating most of the proposals submitted by the Chair of the Working Group on the Draft Declaration in 2006; some changes in the numbering of the Articles also occurred. Article 34 became Article 33; the references of distinct Indigenous juridical systems had survived the test so far, despite fierce opposition of States. Article 12 became Article 11, but maintained its content. However, restitution was diluted into redress in

[58] See United States, UN Doc E/CN.4/1995/WG.15/2/Add.1.

[59] See Argentina's comments in UN Doc E/CN.4/1995/WG.15/2 (1995) para 11.

[60] United Nations, Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, UN Doc E/CN.4/1997/102 (1996) para 75.

[61] United Nations, Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32 of 3 March 1995 on Its Eleventh Session, UN Doc E/CN.4/2006/79, 21.

[62] United Nations, Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32 of 3 March 1995, UN Doc E/CN.4/1996/84, para 77.

[63] ibid paras 222ff. [64] ibid para 92.

[65] United Nations, Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32 of 3 March 1995 (2002), UN Doc E/CN.4/2002/98 (2002) Annex I.

[66] See Res 1/2 of 29 June 2006; UN Doc A/HRC/1/L.10 (30 June 2006) 58.

the 2006 text. The second paragraph of Article 12, the old Article 13, also changed. The Human Rights Council submitted its resolution with the Declaration to the Sixty-First Session of the General Assembly, but the Declaration[67] did not go through the Third Committee, as Namibia introduced amendments[68] which were adopted by a recorded vote of 82 to 67, with 25 abstentions.[69] Under the pressure by African States supported by Australia, Canada, New Zealand, and the United States,[70] on 30 November 2006, the Third Committee deferred consideration and action pending on UN consultations, but put the end of the Sixty-First Session by September 2007 as a deadline for the adoption of the Declaration.[71] Subsequent changes submitted by the African States focused on land rights,[72] but they also wanted the right of Indigenous peoples to their institutional structures and juridical systems to become subject to national laws. Still, the suggested change was rejected. Other States which jumped on the opportunity for further changes pushed for the inclusion of clauses protecting the rights of others. In August, Canada, Colombia, New Zealand, and the Russian Federation presented yet another non-paper on the Declaration to the President of the General Assembly, tabling a complete alternative Declaration text. The non-paper introduced amendments to thirteen of the Declaration's Articles, some of them clearly non-starters with Indigenous peoples and States alike. All these suggestions were not accepted.

Finally, the Declaration was adopted without any changes to the Human Rights Council's text on cultural rights. In the interpretative statements delivered after the adoption of the Declaration, several States, including Australia, Canada, and Japan, repeated their concerns regarding the recognition of collective rights and the effect that their recognition would have on third parties.[73]

3. Specific Issues with regard to Cultural Rights

3.1 Definition of Culture

The UNDRIP does not define 'culture'; however, all its provisions on Indigenous cultural rights follow a broad understanding of the concept, which includes language, literature, philosophy, religion, science, and technology, as well as 'ideological systems', such as knowledge, beliefs, values, customs, and habits. This is consistent with the approach of several UN bodies. In General Comment 23, the HRComm observed 'that culture manifests itself in many forms' and gave as examples 'traditional activities [such] as fishing or hunting and the right to live in reserves protected by law'.[74] In the *Kitok* and *Lubicon Lake Band* cases, the HRComm reaffirmed this wide understanding of culture. CERD General Recommendation XXIII on the Rights of Indigenous Peoples also gave a broad scope of the

[67] UN Doc A/C.3/61/L18/Rev.1. [68] UN Doc A/C.3/61/L57/Rev.1. [69] ibid.

[70] See UN Department of Public Information, Press Conference on Declaration of Indigenous Peoples' Rights (12 December 2006), <http://www.un.org/News/briefings/docs/2006/061212_Indigenous.doc.htm> accessed 16 October 2017.

[71] UN Doc A/61/448, 25.

[72] W van Genugten, 'The African Move towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: The Substantive Arguments behind the Procedures', paper prepared for the Committee on the Rights of Indigenous Peoples of the International Law Association (1 March 2008), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103862> accessed 14 March 2010.

[73] UN Doc A/61/PV.107, 20.

[74] HRComm, General Comment 23: Article 27: Rights of Minorities, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).

concept that includes 'distinct culture, history, language and way of life as an enrichment of the State's cultural identity'.[75] The UNDRIP views Indigenous peoples as the primary guardians and interpreters of their cultures, the true collective owners of their works, arts, and ideas. Consistent with the 1995 Daes 'Principles and Guidelines for the Protection of the Heritage of Indigenous People', Indigenous ownership over their culture is recognized to be collective, permanent, and inalienable, as prescribed by their customs and traditions. These principles have been followed in the Declaration.

3.2 The Scope of the Right to Culture

The broad understanding of culture has had an important effect on the understanding of 'the right to culture'. The actual scope of the right to culture has been a matter of concern for UN bodies.[76] Article 15 of the ICESCR recognizes several aspects of this right, including the right: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; (c) to benefit from one's own scientific work and creative activity; and (d) to freedom of scientific work and creative activity. The right to take part in one's cultural life seems most relevant to Indigenous peoples, yet at the same time quite generic and vague. Human rights instruments refer to 'cultural rights' or 'the right to culture', without being more specific than this. UN monitoring bodies have been making continuous attempts to open up the scope of the provisions on cultural participation in order to include other aspects of the right to culture.[77] For example, importantly for Indigenous peoples, the CESCR has confirmed that the right to 'participation in cultural life' also includes 'the right to benefit from cultural values created by the individual or the community'.[78] The opinion of the Committee is quite a step forward from the actual language of the provision. The General Comment of the Committee explicitly links Article 15 of the ICESCR to the UNDRIP and recognizes the collective dimension of the right to participate in culture, put as 'the right to take part in cultural life individually, or in association with others'.[79]

Contrary to other international instruments, the UNDRIP unfolds the generic 'right to culture' into several other rights included in several Articles, including the right of Indigenous peoples to their cultural traditions and customs; to manifestations of their cultures, spiritual, and religious traditions; to their histories, languages, and oral traditions; and so forth. Therefore, even though the understanding of culture is broad and so is the scope of the cultural rights included in the UNDRIP, the text clarifies such a scope. It is the first instrument that recognizes aspects of the 'right to culture' in such detail, treats such aspects as human rights (rather than State rights), and links them to sub-national groups (rather than to whole populations of States). In this respect, the Declaration pushes forward the existing standards of international law in cultural rights. UNESCO treaties, which have viewed cultural heritage as very much an issue of States, need to be re-interpreted in order to ensure consistency with the contents of the

[75] CERD, General Recommendation 23: Rights of Indigenous Peoples, UN Doc A/52/18 (18 August 1997).

[76] Y Donders, 'Study on the Legal Framework of the Right to Take Part in Cultural Life' in V Volodin and Y Donders (eds), *UNESCO Studies on Human Rights* (UNESCO 2007).

[77] E Stamatopoulou, 'Monitoring Cultural Human Rights: The Claims of Culture on Human Rights and the Response of Cultural Rights' (2012) 34 Human Rights Quarterly 1170.

[78] ICESCR, General Discussion on the Right to Take Part in Cultural Life as Recognized in Article 15 of the Covenant (1992), UN Doc E/C.12/1992/SR.17, para 32.

[79] ibid para 7.

Declaration. Interestingly, an Indigenous 'right to cultural heritage' is being currently discussed; its distinction from the Indigenous right to culture is not very clear.[80] The UN Independent Expert in the Field of Cultural Rights referred for the first time in 2011 to a right to cultural heritage. 'Considering access to and enjoyment of cultural heritage as a human right', she noted, 'is a necessary and complementary approach to the preservation/safeguard of cultural heritage.'[81] The Faro Convention (2011), for example, recognizes the right of everyone 'to benefit from cultural heritage'.

As mentioned earlier, of paramount importance for the UNDRIP provisions on cultural rights has been the work of the HRComm previous to the adoption of the UNDRIP as it has helped shaping the provisions of the UNDRIP. The Committee had talked about Indigenous linguistic rights,[82] cultural autonomy in terms of cultural institutions, as well as consultation regarding traditional means of livelihood[83] and protection of sites of religious or cultural significance.[84] The Committee's comments in its concluding observations followed discussions on Indigenous cultural rights in the case law, including *Apirana Mahuika and Others v New Zealand*,[85] *Lubicon Lake Band v Canada*,[86] *Lansman and Others v Finland* in 1994[87] and 1996,[88] *Francis Hopu and Tepoaitu Bessert v France*,[89] *Lovelace v Canada*,[90] and *Kitok v Sweden*.[91] These comments of the HRComm have been important in convincing the States of the validity of the UNDRIP related to cultural rights.

Since the adoption of the UNDRIP, the monitoring bodies have at times continued to refer to the generic right of Indigenous peoples to culture, such as the HRComm in the case of the Thule language and culture,[92] but have also used the UNDRIP as the basis to refer to specific elements of Indigenous cultures. For example, the HRComm used in the concluding observations for New Zealand language very similar to that of the UNDRIP: the Committee recognized the 'Māori's right to conserve, promote and develop their own culture, language and cultural heritage, traditional knowledge and traditional cultural expressions, and the manifestations of their sciences and cultures'.[93]

One element that may be missing from the UNDRIP is the recognition of the right of Indigenous peoples to join in the culture and cultural activities of the State; in other words, the recognition of the duality of Indigenous rights recognized to Indigenous peoples as

[80] A Xanthaki, S Valkonen, L Heinämäki, and P Nuorgam (eds), *Indigenous Peoples' Cultural Heritage, Rights, Debates and Challenges* (Brill forthcoming).

[81] Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed, UN Doc A/HRC/17/38 (21 March 2011) para 2.

[82] eg UN Doc CCPR/CO/71/UZB (2001) para 5, where the Committee welcomes Uzbekistan's language policy whereby education at all levels is offered in ten languages, including the languages of the minority groups.

[83] eg UN Doc A/55/40, para 75, where the Committee notes positively the transfer of certain cultural institutions to the Saami in Norway, as well as the full consultation with the Saami in matters affecting their traditional means of livelihood.

[84] eg UN Doc A/55/40, para 510 regarding Australia.

[85] A/56/40, vol I, Annex X, A, Comm No I 547/1993.

[86] See n 17 above.

[87] CCPR/C/52/D/511/1992, Case No 511/1992.

[88] CCPR/C/58/D/671/1995, Case No 671/1995.

[89] CCPR/C/60/D/549/1993/Rev.1, Comm No 549/1993.

[90] A/36/40, Annex 7(G) (1998).

[91] A/43/40, Annex 7(G) (1988).

[92] CESCR, Concluding Observations on the Fifth Periodic Report of Denmark, UN Doc E/C12/NOR/CO/5 (13 December 2013) para 21.

[93] ICESCR, Concluding Observations on the Fifth Periodic Report of New Zealand, UN Doc E/C12/NZL/CO/3 (2012) para 26.

members of the population of the State as well as separate culture bearers. One should recognize that first, such an aspect of the right to culture is included in the wide prohibition of discrimination in Article 2 of the UNDRIP, and, second, general human rights instruments have covered this aspect more than adequately: for instance, the CESCR has explained that the right to take part in cultural life in Article 15 includes a negative dimension, which the Committee defined as 'non-interference with the exercise of cultural practices and with access to cultural goods and services', and a positive aspect, defined as 'ensuring preconditions for participation, facilitation and promotion of cultural life, and access and preservation of cultural goods'.[94] Thus, it seems that the UNDRIP Articles referring to Indigenous cultural rights must also be interpreted as including a negative aspect and a positive aspect, even in the cases where both aspects are not explicitly in the text. The CERD has also focused on equality of Indigenous peoples in the exercise of their cultural rights using the prohibition in Article 5(e)(vi) of the ICERD on the prohibition of discrimination before the law in the exercise of economic, social, and cultural rights, and in particular 'the right to equal participation in cultural activities'.

Another aspect of cultural rights that is not included in the UNDRIP provisions on cultural rights relates to theories of inferiority of Indigenous cultures. One has to remember that Article 15 of the UNDRIP talks about interaction and awareness of Indigenous cultures; more specifically, the Preamble condemns theories of racial superiority, and Article 8(2) includes a prohibition against any form of propaganda designed to promote racial discrimination. Still, hate speech against Indigenous cultures is not included as such in the UNDRIP. Monitoring bodies such as the CERD have touched on this issue, for example with respect to the dissemination of ideas based on racial superiority against the Mestizo and Maya in Belize.[95]

3.3 Rights to Cultural Customs and Traditions (Article 11(1))

Article 11(1) of the UNDRIP recognizes the Indigenous 'right to practice and revitalize their cultural traditions and customs'. It reflects the (2005) UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which recognizes that cultural diversity can be protected only through human rights, including the right to choose cultural expressions, and recommends 'the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples' (Article 2). Article 11(1) is stronger than Article 4(b) of ILO Convention 107, the latter also requiring States to recognize 'the danger involved in disrupting the values and institutions' of Indigenous peoples, and further including a clause: 'unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept'. There is no suggestion in the Convention how the wishes of the group would be understood; maybe more suspiciously, one cannot easily think of benign 'appropriate substitutes' to the values and institutions of Indigenous groups that come from outside. Article 2(2)(b) of ILO 169 requires States to take measures 'promoting the full realisation of the ... cultural rights of [indigenous] peoples with respect for their social and cultural identity, their customs and traditions', while Article 5 promotes the 'social, cultural, religious and spiritual values and practices' of Indigenous peoples.

[94] CESCR, General Comment 21 (n 11) para 6.

[95] CERD, Concluding Observations on Belize, UN Doc CERD/C/BLZ/CO/1 (2012) para 9. See Chapter 5 of this volume.

Although the protection in Article 11(1) of the UNCDRIP is strong, one should not forget that the right to cultural practices and traditions is not absolute. States have repeatedly raised concerns about the possible conflicts between such cultural practices and rights of individuals. Such fears are indeed addressed by the UNDRIP. Articles 1 and 46 of the UNDRIP place the text of the Declaration within the general standards of international law, including its well-known principles of solving conflicts between human rights. It is necessary to ensure that Indigenous communities are informed and give their free, prior, and informed consent before any interference with their cultural practices; non-discrimination must always be taken into account; and recognition of Indigenous communities as the main interpreters of their traditions as owners must be ensured. At the same time, the Declaration does not stand on its own, but forms part of the wider human rights system and, thus, is susceptible to the checks, guarantees, and limits set by this system. This is clear in the language of preambular paragraph 16, which encourages States 'to comply with and effectively implement all international instruments', as well as the individual human rights guarantee included in Article 1 of the UNDRIP. According to this, nothing in the UNDRIP shall lower the existing standards on the rights of peoples as well as individuals. Even though the explicit reference to international human rights is not necessary, neither is it unjustified: the rights recognized are not absolute.

Who and how will decide whether the specific Indigenous cultural practice or tradition is in conflict with international human rights? The individual whose rights are put in question by the tradition or custom must be the first point of reference.[96] Of importance is also that the Indigenous group must be allowed to exercise its own rules of interpretive and decision-making processes (part, themselves, of their culture) in the application of universal human rights norms.[97] Overall, conflicts between international human rights and Indigenous rights will put in motion the *Lovelace* test of proportionality, necessity, equity, and balance of rights.[98]

3.4 Tangible Indigenous Heritage (Article 11(1) of the UNDRIP)

In addition to Indigenous cultural traditions and customs, Article 11(1) of the UNDRIP also protects the right of Indigenous peoples to their tangible heritage. The Article recognizes 'the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature'. The terms 'develop' and 'future manifestations' remind the international community that Indigenous cultures are not objects of the past;[99] the Declaration recognizes that cultures evolve and does not attempt to freeze cultural development—rather, to give Indigenous peoples control to determine their own cultural evolution.

Although the right of Indigenous peoples to their tangible heritage was one of the least controversial discussions in the elaboration of the UNDRIP, serious violations of this right can still be observed all around the world. Indeed, there has been renewed interest in guaranteeing Indigenous peoples rights to their tangible cultural heritage,

[96] SJ Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004) 133.
[97] ibid 26. [98] *Lovelace v Canada* (n 21).
[99] P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002).

usually initiated by Indigenous communities themselves. Of particular importance is the work of museums when they involve the exhibits of Indigenous communities. Common problems relate to the lack of specific references to Indigenous cultures and knowledge, the misreading of Indigenous artefacts and their meaning by non-Indigenous outsiders, and the lack of participation of Indigenous communities in the preparation, exhibition, and benefits that derive from such exhibitions.

International law has been to a degree a mere observer to the misappropriation of Indigenous artefacts, allowing States to treat Indigenous exhibits as 'national' treasures and to make the decisions regarding their transfer and exhibition.[100] The (1972) UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), for example, only protects objects of outstanding or monumental value and does not give Indigenous peoples any role in protecting their own heritage. The Convention does recognize States' 'duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage' (Article 4), but recognizes no right of any group to such heritage. In addition, if one sticks to the letter of the Convention, unauthorized filmings of Indigenous religious ceremonies and secret recordings of songs and rituals would be protected by the Convention as it protects photographs, films, and sound recordings that have a historical value; at the same time, Indigenous communities have no protection against such unauthorized filmings and recordings. Even though the right to culture as included in general and minority human rights instruments helps Indigenous peoples in their claims, the adoption of the UNDRIP clearly changes the rule of the 1972 Convention: now, Article 4 has to be interpreted in the light of Article 11(1) of the UNDRIP as well as the right of Indigenous peoples to free, prior, and informed consent on matters that directly affect them. In other words, States' duty to identify, protect, conserve, and present Indigenous tangible heritage found on their territory must coincide with the right of the relevant Indigenous community to control the protection, conservation, and presentation of such tangible Indigenous heritage The inscription of specific Indigenous sites in the UNESCO World Heritage List has uncovered several problems relating to the different understandings of the importance or the type of management of these sites between the Indigenous communities in question and the officials. Similarly, the (1970) UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property must be interpreted in a way consistent with the UNDRIP. The Convention protects:

> (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; (b) cultural property found within the national territory.

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, created to compliment the 1970 Convention, recognizes the heritage of tribal and Indigenous communities living in a Contracting State. Although the 1995 Convention puts the State where such heritage comes from in charge of such a claim against

[100] A Xanthaki, *Indigenous Rights and UN Standards: Self-Determination, Culture, Land* (Cambridge University Press 2010) 197–200.

another State and is of no use for heritage taken by the State without the consent of the Indigenous community, nevertheless it explicitly proclaims that the missing object 'will be returned' to the tribal or Indigenous community to which it belongs. One has to admit that recently there have been instruments that distance themselves from such restrictive understandings of culture. For example, at the European level, although the Fribourg Declaration of Cultural Rights falls short of recognizing a collective right to culture, it does recognize the right to culture for 'everyone, alone or in community with others'; and the Council of Europe Framework Convention on the Value of Cultural Heritage for Society recognizes the right 'alone or collectively'. Such instruments 'have opened new perspectives on social participation in heritage making.'[101]

Indeed, the duality that prevails in instruments that view cultural heritage as belonging either to the State or to an individual ends after the adoption of the UNDRIP, which explicitly recognizes the right of Indigenous peoples to their cultural heritage found within the State territory and Indigenous control over their cultural tangible heritage. The recognition that the UNDRIP now offers to Indigenous peoples is important in turning them from passive participants in processes of alienation from their objects[102] to actively deciding the fate of their cultural objects.[103]

Concerns have been raised with regard to the Indigenous control over their cultural heritage and rights of individuals and/or the common culture of mankind. The right of Indigenous peoples to their heritage, critics have suggested, may lead to unjustified restrictions in the access to the heritage of mankind. Total Indigenous control over their cultural heritage may deprive, critics argue, other writers and artists of being inspired by Indigenous artefacts, literatures, and philosophies. Article 15 of the ICESCR protects the right of everyone to enjoy the benefits of scientific progress and its applications and to benefit from the moral and material interests resulting from scientific production. In the 1950 Agreement on the Importance of Educational, Scientific and Cultural materials (the Florence Agreement), the Contracting States undertook that they will as far as possible 'contribute their common efforts to promote by every means the free circulation of educational, scientific and cultural material, and abolish or reduce any restrictions to that free circulation'.[104] In principle, one would see the need to protect the cultural rights of vulnerable groups such as Indigenous peoples overriding the need for free access of cultural objects, but of course such issues can only be resolved in an ad hoc case.

[101] G Dolff-Bonekamper, 'Cultural Heritage and Conflict: The View from Europe' (2010) 14 Museum International 245–46.

[102] J Clifford, 'Museums as Contact Zones' in J Clifford, *Travel and Translation in the Late Twentieth Century* (Harvard University Press 1997) 188.

[103] T Lanauze, S Forbes, and M Solomon, 'A Practical Approach to Traditional Knowledge and Indigenous Heritage Management: A Case-Study of Moriori Heritage Management Practice' in SM Subramanian and B Pisurati (eds), *Traditional Knowledge in Policy and Practice* (United Nations Press 2010) 330.

[104] A Vrdoljak, 'Self-Determination and Cultural Rights' in F Francioni and M Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff 2008) 41.

3.5 Rights to Spiritual and Religious Tradition (Article 12 of the UNDRIP)

Turning to spiritual and religious tradition, Article 12 recognizes the right of Indigenous peoples to 'manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains'. Again, the scope of the provision is wide, as it rightly adopts the understanding of religion endorsed by the HRComm in General Comment 22 on the Right to Thought, Conscience and Religion, which includes the right to hold 'theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.'

Article 12 is the first clear and explicit recognition of Indigenous spiritual and religious rights in international law. The recognition of Indigenous spiritual and religious beliefs relates to Article 18 of the ICCPR, which protects the right of everyone 'to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'. It is noteworthy that Article 18 protects equally religion or belief; in this respect, whether or not the State recognizes the Indigenous spiritual values as a religion is irrelevant. The CESCR has stated that 'States parties must also respect the rights of indigenous peoples ... to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life.'

The right to religion has so far been of limited use to Indigenous peoples, mainly because of its recognition as an individual right in international law; hence, current, national case law has been heavily reliant on the right to property or even intellectual property rights for the protection of manifestations of the Indigenous spiritual beliefs.[105] The UNDRIP is the first international instrument that recognizes explicitly a collective aspect of the right to religion. Newman has noted that although the right is individually framed in Article 18 of the ICCPR, 'the fact that individuals normally require like-minded communities to be able to exercise their religious rights effectively is sufficient justification for accepting that religious associations as juridical persons are also beneficiaries of subjective rights under Article 18.'[106] National courts have only recently started discussing the collective element in the right to religion.[107]

[105] ML Blakeney, 'Protecting the Spiritual Beliefs of Indigenous Peoples: Australian Case Studies' (2013) 22 Pacific Rim L & Pol'y J 391.

[106] D Newman, 'Recognition of Collective Religious Rights as a Means to Legal Protection of Sacred Natural Sites', paper given at the Conference on 'Protecting the Sacred: Recognition of Sacred Sites of Indigenous Peoples for Sustaining Nature and Culture in Northern and Arctic Regions', Northern Institute for Environmental and Minority Law (Rovaniemi, 11–13 September 2013); also see R Kuppe, 'Religious Freedom Law and the Protection of Sacred Sites' in TG Kirch and B Turner (eds), *Permutations of Order: Religion and Law as Contested Sovereignties* (Ashgate 2009).

[107] *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland* [2013] NZHRRT [36] (17 October 2013) para 3. As discussed by D Newman, E Ruozzi, and S Kirchner, 'Legal Protection of Sacred Natural Sites within Human Rights Jurisprudence: Sapmi and Beyond' in L Heinamaki and TM Herrmann (eds), *Experiencing and Protecting Sacred Natural Sites of Sami and other Indigenous Peoples* (Springer Polar Sciences 2017).

The recognition of a collective right to religion in the UNDRIP is an important step forward in international law standards and may have a considerably positive effect on Indigenous peoples' rights,[108] provided that States implement such a provision. One has to note that in conflicts between Indigenous religious rights and third parties' rights, Indigenous peoples' concerns should prevail as international law has accepted that the latter are more vulnerable and need further protection. More problematic may be situations when Indigenous religious rights conflict with religious rights of other Indigenous or minority groups.[109]

More generally, Article 12 reflects and codifies several judgments of the IACtHR, including the *Saramaka* case.[110] In the *Aloeboetoe* case, the Court took into account the customary marriage practices of the Saramacan people.[111] The Inter-American Court also ordered reparations to reinforce the cultural traditions and customary law of the Achí Mayan peoples when their culture was almost destroyed through human rights violations. The Court found in the *Massacre of Plan de Sánchez* case that the deaths of the women and elderly, who were traditionally the oral transmitters of the Mayan Achí culture, interrupted the passage of cultural knowledge to future generations, and the militarization and repression after the massacre resulted in the Indigenous peoples' loss of faith in their traditions.[112] The Court specifically discussed Indigenous burial sites and implied that prohibition of such sites violates their right to religion. Indeed, the prohibition of the Indigenous group to practise their traditional burial ceremonies because of their relocation was deemed a violation of their rights,[113] which Guatemala accepted as a violation of 'the freedom to manifest their religious, spiritual, and cultural beliefs'.[114] In the *Bamaca Velasquez* case, the Court also noted that the funeral ceremonies of the Mam ethnic group were 'something that is traditional in the indigenous culture'.[115] The *Case of Moiwana Community v Suriname*, where an Indigenous people were denied the right to honour their deceased according to their own traditions, is of huge importance for the protection of Indigenous culture. As the Indigenous peoples did not know what happened to the remains of their deceased, the Court ordered Suriname to take all measures 'to recover promptly the remains of the Moiwana community members killed' by the national army in 1886.[116] Therefore, in fulfilling Indigenous peoples' cultural rights, States are now under the obligation to act in positive and precise ways in order to recover the remains of Indigenous members.

3.6 Rights to Intangible Heritage (Article 13 of the UNDRIP)

Article 13(1) recognizes the right of Indigenous peoples 'to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies,

[108] S Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) EJIL 121–40.

[109] See, eg, Arizona District Court, *Hopi Tribe v Navajo Nation*, complaint filed in the US District Court of Arizona on 5 July 2013, terminated on 8 November 2013, <http://turtletalk.files.wordpress.com/2013/07/hopi-tribe-v-navajo-nation-complaint-07-05-13-copy.pdf> assessed 15 November 2017.

[110] *Aloeboetoe and Others v Suriname* (Reparations), IACtHR Series C No 15 (1993) paras 17 and 58.

[111] ibid; 1–2 IHRR 208 (1993).

[112] *Plan de Sánchez Massacre v Guatemala* (Reparations), IACtHR Series C No 116 (2004).

[113] *Plan de Sánchez Massacre v Guatemala* (Merits), IACtHR Series C No 105 (2004) para 42(30).

[114] ibid para 36(4).

[115] *Bámaca Velásquez v Guatemala* (Reparations), IACtHR Series C No 91 (2002) para 82.

[116] *Case of Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations, and Costs), Judgment of 15 June 2005, IACtHR Series C No 124 (2005) para 208.

writing systems and literatures, and to designate and retain their own names for communities, places and persons', while Article 13(2) urges States to take measures to this end, as well as measures to ensure that Indigenous peoples understand and are understood in 'political, legal and administrative proceedings'. Such measures have to be *effective*, so the mere establishment of measures without regular evaluation concerning their outcome does not fulfil the letter of the provision.

The confusion between the scope of Articles 11 and 13 of the UNDRIP reflects the confusion around the (2003) UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the (2005) UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions. Indeed, State reports revealed a lack of understanding in the distinction of the 'diversity of cultural expressions', which is the object of the 2005 Convention, and the 'manifestations of intangible cultural heritage', the object of the 2003 Convention.[117] The (2003) UNESCO Convention for Safeguarding of the Intangible Cultural Heritage defines intangible cultural heritage as the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts, and cultural spaces associated therewith—that communities, groups, and, in some cases, individuals recognize as part of their cultural heritage. Hence, one would say that although the 2005 UNESCO Convention applies to all UNDRIP provisions on cultural expressions, the 2003 Convention and intangible heritage correspond mainly to Articles 12 and 13 of the UNDRIP. Indigenous cultural heritage is transmitted from generation to generation, is constantly recreated by communities and groups, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage specifically recognizes that Indigenous communities play an important role in the production, safeguarding, maintenance, and recreation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity.

The protection of Indigenous names in Article 13(1) of the UNDRIP reflects the UN Declaration on Minorities, which also protects minority names; still, the UNDRIP goes much further because of the detailed recognition of various Indigenous cultural elements and its strong collective element. In essence, Indigenous communities are rightfully confirmed as the primary guardians and interpreters of their cultures and the true collective owners of their works, arts, and ideas.

At times, there is tension between the protection of the world's cultural heritage and allowing Indigenous peoples to be in charge of their own cultural heritage. For example, implementing the World Heritage site of Laponia in northern Sweden, which obtained its World Heritage status in 1996, became an arena for 'Sami ethno-political struggle for increased self-governance and autonomy',[118] where the Saami vision conflicted with the vision of the municipalities and the State.[119] These incidents are not uncommon.

[117] Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, Sixth Ordinary Session, Paris, UNESCO Headquarters, UN Doc CE/12/6.IGC/4 (10–14 December 2012) para 26.

[118] C Green, *Managing Laponia, A World Cultural Heritage Site as Arena for Sami Ethno-Politics in Sweden*, Uppsala Studies in Cultural Anthropology (Uppsala 2009).

[119] ibid 99.

Of particular importance is the protection of Indigenous languages. Included in Article 13 of the UNDRIP, the right to Indigenous languages carries with it the work of the HRComm on language rights. In addition to several European instruments on language rights,[120] the right of members of minorities to their language is also linked to the right to education in the 1960 Convention against Discrimination in Education. The Convention provides for separate schools under certain conditions (Article 2(b)) and recognizes the right of minorities to carry on their own educational activities and, in so doing, to use or teach in their own language (Article 5). Should such education be funded by the State? May believes that the effective protection of this right brings with it some reasonable expectation for some sort of State support.[121]

The CERD has implemented the provision on Indigenous language rights when discussing the New Zealand report. The Committee specifically encouraged New Zealand to develop a new Māori language strategy and a specific schedule to implement changes in the law regarding Indigenous intellectual and cultural rights.[122] The CERD has also expressed its concern regarding inadequate measures for ethnic language in Laos, 'in particular the non-written languages, which form part of the national cultural heritage'.[123] The Inter-American Court has emphasized the importance that language has for Indigenous populations as one characteristic that differentiates them from the rest of the population and as 'one of the most important elements of identity of any people, precisely because it guarantees the expression, diffusion, and transmission of their culture'.[124]

Notwithstanding the continuing challenges, one should mention that some Indigenous languages are currently experiencing some revitalization. The UNDRIP protection of the Indigenous languages will no doubt help Indigenous groups expose their children to their Indigenous languages.

3.7 Cultural Rights in Education (Article 15 of the UNDRIP)

Article 15 underlines the need that Indigenous 'cultures, traditions, histories and aspirations' be reflected in general education and public information and, once again, asks States to eliminate prejudice and discrimination and promote tolerance, understanding, and good relations among Indigenous peoples and other segments of the populations.

Article 15 of the UNDRIP encapsulates the multicultural vision, as reflected in several UNESCO documents, a vision of a society where cultures and traditions interact and people get to know about each other's identities in a two-way approach.[125] This is important in view of the general State practice to insist on the Indigenous communities learning about the non-Indigenous culture, language etc. without also insisting on the

[120] These instruments include the (1990) Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Art 32), Recommendation 1201 of the Parliamentary Assembly of the Council of Europe (Arts 7, 8(1)), and the European Charter for Regional or Minority Languages (1998).

[121] S May, 'Language Rights: The "Cinderella" Human Right' (2011) 10 J Human Rights 265–89.

[122] CERD, Concluding Observations on the Eighteenth to the Twentieth Periodic Report of New Zealand, UN Doc CERD/C/NZL/CO/18-20 (2013) paras 14, 17.

[123] CERD, Concluding Observations on the Eighteenth to the Twentieth Periodic Report of Laos, UN Doc CERD/C/LAO/CO/16-18 (2012) para 21.

[124] *López Álvarez v Honduras* (Merits, Reparations, and Costs), IACtHR Series C No 141 (2006) paras 169–71.

[125] A Xanthaki, 'Multiculturalism and International Law: Discussing Universal Standards' (2010) 32 Human Rights Quarterly 21–48.

need for the non-Indigenous population to be aware of and familiar with the Indigenous cultures, languages, and identities. It is interesting to note that the provision places obligations on the *States* for promoting tolerance, understanding, and good relations; Indigenous peoples themselves are under no obligation by the Declaration to interact with the non-Indigenous segments of the population. This is particularly important for Indigenous communities who wish to continue to live in voluntary isolation.[126] As the CESCR has confirmed particularly with regard to Indigenous peoples, 'the decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality.'[127]

Article 15 of the UNDRIP reflects the 2001 UNESCO Universal Declaration on Cultural Diversity,[128] which affirms the importance of culture for international peace, and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which urges States to create an environment that would encourage the protection and promotion of Indigenous cultures. The 2005 Convention has a pluralistic vision of State cultural policies. Polymenopoulou argues that this convention 'has been the first UN binding instrument giving teeth to both the concepts of *cultural diversity* and *intercultural dialogue*'.[129] The importance of cultural diversity and inter-cultural dialogue were further stressed in the 2007 World Summit Outcome document.[130]

Article 29 of the Convention of the Rights of the Child is also in the same spirit as Article 15 of the UNDRIP, as it stresses the importance of 'understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin'. The Committee has expressed concern that aboriginal children in the Canadian welfare system are not able to preserve their identity, keep their name, culture, and language, and receive an education in their own cultural background.[131]

3.8 Indigenous Juridical Customs and Systems (Article 34 of the UNDRIP)

Article 34 of the UNDRIP recognizes the right of Indigenous peoples 'to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards'. Article 34 embodies the right to self-determination as expressed in the Preamble and Articles 3, 4, and 5 of the Declaration. Here, the right to cultural autonomy is not separated from the right to self-determination as opposed, for example, to Articles 1 and 27 of the ICCPR, which separate self-determination and cultural autonomy respectively. On this point, the HRComm has emphasized the distinction that the Covenant draws between the right to

[126] IWGIA, *Indigenous Peoples in Voluntary Isolation and Initial Contact* (IWGIA- IPES 2013).

[127] CESCR, General Comment 21 (n 11) para 7.

[128] UNESCO, Universal Declaration on Cultural Diversity (n 5).

[129] See particularly this Convention's objectives, Art 1(c), (d), (e). E Polymenopoulou, 'Cultural Rights in the Case-Law of the International Court of Justice' (2014) 27(2) Leiden J Int'l L 447.

[130] UNGA Res 60/1 (2005), 60 UN GAOR Supp No 49, para 14.

[131] See also similar comment on Australia, CommRC, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia, UN Doc CRC/C/AUS/CO/4 (2012) para 37.

self-determination and the rights of minorities.[132] Conversely, Article 34 draws together self-determination and cultural rights.

Of course, it is interesting that Article 34 of the UNDRIP does not refer to Indigenous 'laws', but to 'customs'; also, the text includes the limiting clause 'in the cases where they exist'. Still, the recognition of the right of Indigenous peoples to promote, develop, and maintain their institutional structures and juridical systems is a major success, especially as several States had objections to the inclusion of this right. Australia, for example, argued in the General Assembly that:

> The Declaration places indigenous customary law in a superior position to national law. Australia will read the whole Declaration in accordance with domestic laws and international human rights standards.

Obviously, this statement does not follow current standards of international law: the International Court of Justice has confirmed that 'the fundamental principle of international law [is] that it prevails over domestic law'.[133] Making the rights recognized by the Declaration subject to national law would just not make sense.

It is obvious that the UNDRIP takes a substantial step further than existing instruments on minority rights. In accordance with Article 34 of the UNDRIP, States must allow Indigenous judicial customs and systems to run parallel to the national judicial systems. Indigenous customs and structures, including circle sentencing and Indigenous sentencing courts, community-based structures and bodies, especially community-based family violence programmes, mentoring and policing programmes, as well as community-based alternatives to prisons are included in such customs and structures.[134] Although theory as well as practice worldwide has accepted legal and judicial pluralism,[135] international law has not really followed. Even though human rights instruments recognize autonomy, especially instruments referring to minority rights, they include no references to juridical customs and institutions. ILO Conventions 107 and 169 are the only human rights instruments referring to customs, albeit in a prototype manner. ILO Convention 107 recognizes Indigenous customs and institutions, but its language and the several clauses act as a double sword: these populations will be 'allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of the integration programmes' (Article 7(2)). The requirement of compatibility of Indigenous customs and institutions with non-Indigenous ones does not stand well in today's vision of Indigenous rights. Similarly, Article 8 reads that 'to the extent consistent with the interests of the national community and the national legal system', '(...) the methods of social control and the Indigenous customs in regard to penal matters' are to be respected (Article 8). Although

[132] HRComm, General Comment 23 (n 74).

[133] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, [1988] ICJ 12 (Advisory Opinion of 26 April) para 57.

[134] See F Alison and C Cuneen, 'The Role of Indigenous Justice Agreements in Improving Social and Legal Outcomes for Indigenous People' (2010) 32 Sydney L Rev 645, 666.

[135] W Twining, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of Comparative and Legal Law* 473. K Tuori, 'Legal Pluralism and Modernisation: American Law Professors in Ethiopia and the Downfall of the Reinstatements of African Customary Law' (2010) 62 J Legal Pluralism 43; see also W Twining, 'The Restatement of African Customary Law: A Comment' (1963) 1 J Modern African L 221.

the Convention is now closed for ratification, it is still in force in eighteen States, some with significant Indigenous populations.

ILO Convention 169 is more forthcoming: it requires that the 'integrity of the values, practices and institutions' of Indigenous peoples 'shall be respected' (Article 5(b)). The ILO has specifically explained that any protection should not be 'restricted only to traditional institutions, but rather also apply to current practices of indigenous peoples' economic, cultural and social development'.[136] Article 8 of ILO Convention 169 requires States to give due regard to the customs or customary laws of Indigenous peoples, when applying national laws and regulations. The ILO has explained that the criteria of Article 8(1) are cumulative; in other words, Indigenous customs can be restricted only when incompatible *both* with the national legislation and the international human rights standards.[137] This double condition is rather limiting. In contrast, Article 34 of the UNDRIP goes further: apart from being more detailed about the rights of Indigenous peoples, it does not require compatibility with the national legal system, but only compatibility with international human rights standards. Finally, Article 9 of ILO Convention 169 asks for respect of the Indigenous methods that deal with offences and customs with regard to penal matters. In 2012, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) asked Fiji to indicate areas where there is 'an interaction between customary law and written law of the country and how the judiciary has dealt with cases of such nature, by providing copies of court decisions'.[138] In 2011, the CEACR also commended Mexico for measures in the administration of justice that take into account the Indigenous habits and customs and ensure the translation of the proceedings to the Indigenous languages.[139]

Problems arise when Indigenous customs and decisions of Indigenous institutions conflict with individual rights. The same principles as discussed earlier with respect to other conflicts between Indigenous cultural rights and other rights and interests apply. When a conflict between total Indigenous control over their cultural matters and individual rights arises, the balance lies in principle towards the vulnerable group, namely Indigenous peoples as the victims of continuous disrespect of their cultures. The maintenance of multiple legal systems within the State brings with it some challenges that have to be addressed; one of the main ones, emphasized as seen above by States, has been a possible conflict between a specific Indigenous juridical custom and other human rights. The Australian Report on Customary Law states that customary law may mean control of the judicial processes by male elders or family members who were themselves perpetrators of crimes.[140] UN bodies have also expressed their concern: the Committee on the Rights of the Child has mentioned customary laws and cultural practices that have a detrimental

[136] ILO, *Indigenous and Tribal Peoples Rights in Practice, A Guide to ILO Convention No. 169* (International Labour Standards Department 2009) 46.

[137] ibid 82.

[138] Direct Request (CEACR)—adopted 2012, published 102d ILC Session (2013), C169, Indigenous and Tribal Peoples Convention, 1989 (No 169) Fiji.

[139] Direct Request (CEACR)—adopted 2011, published 101st ILC Session (2012), Indigenous and Tribal Peoples Convention, 1989 (No 169), C169, Indigenous and Tribal Peoples Convention, 1989 (No 169) Mexico.

[140] Australian Report of the Committee of Enquiry into aboriginal customary law, 15.

effect on Indigenous children and especially girls.[141] Article 34 prioritizes international human rights in a possible conflict with Indigenous juridical customs and systems.

The second challenge relates to the hierarchy of systems. Will the State have the ultimate word on a judicial matter? In other words, will the Supreme Court of the State be able to comment and overrule judgments by Indigenous juridical bodies? Indigenous self-determination and Indigenous control as recognized in the UNDRIP will be important guiding principles in answering such difficult questions. In *Apirana Mahuika*, the HRComm linked the limitations of Indigenous cultural rights to the Indigenous group's own right to participation and control over such matters. The Committee decided that the right to culture of an Indigenous population under Article 27 of the ICCPR could be restricted where the community itself participated in the decision to restrict such a right. This conforms with Article 34 of the UNDRIP.

Another challenge relates to the interpretation of Indigenous customs in Western-style law courts. The choice of who will be chosen to give his or her opinion on the Indigenous custom is important and has, in principle, to be made by the Indigenous community in question. For example, in Palau, 'the courts are increasingly viewed as becoming a part of customary processes of dispute resolution, while the inclusion of chiefs in legislature and state government bodies is seen as forging a compromise between western and customary models of governance.'[142] How Indigenous and non-Indigenous systems of law can interact with mutual respect and efficiency are issues that need to be further elaborated. Should Indigenous customary laws also bind non-Indigenous peoples found in Indigenous areas? And what form of recognition may the Indigenous cultural laws take? These are questions that need to be discussed generically but also ad hoc, taking into account the specific circumstances of each case. The implementation of the UNDRIP will push for further reflection and discussion on such matters.

4. Conclusions

The provisions on cultural rights found in the UNDRIP are in general consistent with international law standards on cultural rights. Recent discussions on cultural loyalties, inter-culturality, and the value of culture have been incorporated in the Declaration in a way that make the text up-to-date and progressive. The prohibition of discrimination, an important pillar in the provisions of cultural rights, as discussed in Chapter 7 of this volume, is a well-accepted part of customary international law, in some aspects a peremptory norm of international law. In this respect, provisions that recognize that Indigenous peoples must not be discriminated against with regard to their cultural rights are well established in international law.

The second pillar of the provisions related to cultural rights, the principle of Indigenous control over their future, is a *raison d'être* of the Declaration. Some of the elements of the Declaration do go further than other human rights instruments; rights to Indigenous juridical systems and collective religious rights are two such issues. One has to remember

[141] CommRC, Concluding Observations on the Consolidated Second and Third Report of Namibia. UN Doc CRC/C/NAM/CO/3-4 (2012) para 30(a) and (b); also Myanmar (2012).

[142] B Tobin, 'The Role of Customary Law in Access and Benefit-Sharing and Traditional Knowledge Governance: Perspectives from Andean and Pacific Island Countries' in *WIPO Report* (WIPO and UNU 2008) 1–97.

that although these provisions push the contours of international law further, they are still consistent with the spirit of international law. Being consistent does not mean being repetitive; international law is dynamic and ever evolving;[143] these provisions map such an evolution.

The UNDRIP provisions on cultural rights bring with them their own conflicts and difficulties. Whose interpretation of cultural practices will prevail? What happens when cultural rights of two Indigenous groups are in conflict? Does the State have the ultimate word on juridical issues? These are difficult questions that need further exploring; however, they cannot be used to stall the implementation of the content of the Declaration. States' specific circumstances and Indigenous own reflections will be important in finding solutions for such issues.

In all such questions, the work of both the UN monitoring bodies and the regional human rights bodies should not be undermined. Recent concluding observations of the CERD on New Zealand,[144] the Russian Federation,[145] and other examples prove that the UNDRIP provisions on cultural rights continue to be elaborated, crystallized, and implemented. Such concluding observations, together with the case-law and the several studies demonstrate the invaluable role of international human rights bodies both in pushing forward the implementation of the UNDRIP and interpreting it in a manner consistent both with current standards of international law and the claims of Indigenous peoples.

[143] Thornberry (n 99).

[144] CERD, Concluding Observations on the Combined Twenty-First and Twenty-Second Periodic Reports of New Zealand, UN Doc CERD/C/NZL/CO/21-22 (2017) para 37.

[145] CERD, Concluding Observations on the Twenty-Third and Twenty-Fourth Periodic Reports of the Russian Federation, UN Doc CERD/C/RUS/CO/23-24, para 26.

Chapter 11. Intellectual Property and Technologies

Article 31

Tobias Stoll

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

1. Introduction

Article 31 sets out a number of rights of Indigenous peoples, relating to their science, technology, and culture (paragraph 1), and calls for State action in this regard, which is to be taken with the involvement of those peoples (paragraph 2). The provision relates to three different subject matters, between which there obviously exists quite some overlap. It refers, first, to 'cultural heritage, traditional knowledge and traditional cultural expressions' as such (paragraph 1, first sentence, first part); second, to 'intellectual property' over such heritage, knowledge, and expressions (paragraph 1, second sentence); and, third, to 'manifestations of ... sciences, technologies and cultures', representative examples of which find themselves included in an illustrative list (paragraph 1, first sentence, second part). According to Article 31, with a view to each of these subject matters, Indigenous peoples have a right to 'maintain, control, protect and develop'.

Utilizing such diverse terms, the provision actually seeks to address something that forms a unity in the eyes of Indigenous peoples. Indeed, the 'proper way of life', which unites belief, culture, and practical knowledge, including agriculture, the use of forests, wildlife, and natural resources, and medical practices, has been one of the core issues in the long development process concerning rights of Indigenous peoples.[1] This overarching concept now finds itself reflected by the diverse subject matters of Article 31. As will be seen in detail below, the provision reflects the various demands relating to Indigenous culture and technology, including

[1] See International Law Association (ILA), 'Committee on the Rights of Indigenous Peoples, Final Report' (Sofia 2012) <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> accessed 2 February 2018: '... the protection of cultural identity and cultural rights represents a predominant theme throughout the whole text of the UNDRIP ... This approach is grounded on the centrality of culture for indigenous peoples—in its special holistic construction as entity which covers all aspects of their existence—as the cornerstone around which the entire edifice of indigenous identity is built.'

the demand to defend their use and practice against interference, the call for their respect, for recognition of their value, and for ensuring control over their commercialization.[2]

At the same time, with the language that it uses, Article 31 positions itself squarely in a pre-existing legal and terminological context. Thus, as will be shown below in further detail, the terms employed by Article 31 are closely related to terms and concepts of international and national law. This is not only true for 'cultural heritage', a key term of international cultural law and the UNESCO conventions, but also for 'traditional knowledge', a concept coined in the context of Article 8, lit j of the Convention on Biological Diversity, and for 'traditional cultural expressions', a notion framed in current negotiations within the World Intellectual Property Organization (WIPO).

2. Drafting History

The wording of Article 31 represents the result of challenging negotiations, and its drafting history reflects a difficult process of conceptual clarification.

Indeed, Article 31 roots back to operative paragraph 27 of the Draft Declaration of June 1993, which read as follows:

> Indigenous peoples have the right to special measures to protect, as intellectual property, their sciences, technologies and cultural manifestations, including genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.[3]

This text already contained some of the structural elements of the later Article 31 of the UNDRIP: the assignment of a right, a description of what is to be considered as 'indigenous sciences, technologies and culture', a legal qualification (in this case, intellectual property), and actions to be taken (in this case, special measures to protect). The provision most significantly framed Indigenous peoples' science, technology, and culture as intellectual property and, in this regard, called for special measures of protection against interference by a State. It has to be noted, however, that the right envisaged here would not have directly related to such intellectual property as such, but to the 'special measures' to be taken for the purpose of protection.

It should furthermore be mentioned that operative paragraph 22 of the Draft Declaration was somewhat connected to operative paragraph 27 in addressing more specifically traditional medicines as follows:

> Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals, and minerals ...

That provision, the content of which is now reflected in Article 24 of the UNDRIP, was construed slightly differently from operative paragraph 27 in that it envisaged the postulation of a right of Indigenous peoples to their medicines and practices as such, rather than confining itself to calling for special measures as was the case with operative paragraph 27.

[2] See Commission on Human Rights, Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, UN Doc E/CN.4/Sub.2/1993/28 (28 July 1993); S Wiessner, 'Culture and the Rights of Indigenous Peoples' in A Vroljak (ed), *The Cultural Dimensions of Human Rights* (Oxford: Oxford University Press 2013) 117–58.

[3] Commission on Human Rights, Draft Declaration on the Rights of Indigenous Peoples. Revised Working Paper Submitted by the Chairman-Rapporteur, Mrs Erica-Irene Daes, pursuant to Sub-Commission resolution 1992/33 and Commission on Human Rights Resolution 1993/31, UN Doc E/CN.4/Sub.2/1993/26 (8 June 1993).

Within less than three months, the draft text developed considerably and the results of the Eleventh Session of the Working Group as of 23 August 1993 read quite differently:

> Article 29. Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.[4]

The new draft Article 29 introduced two important additional structural elements as compared to operative paragraph 27, which it replaced. First, it employed a twofold structure in assigning two different entitlements. The first sentence addressed two kinds of 'property'—adding 'cultural' to 'intellectual' property—and thereby highlighted a proprietary entitlement. Meanwhile, the second sentence of the new draft provision now furthermore described rights to Indigenous science, technology, and culture as such and thereby enfolded a separate dimension of right, which can be described as the non-proprietory dimension. This distinction between proprietary and non-proprietary dimensions of the right later became an important structural element of today's Article 31 of the UNDRIP. The second element introduced by draft Article 29 was a description of the uses or activities which were to go along with the entitlement: 'full ownership, control and protection' in the first sentence, and 'control, develop and protect' in the second sentence.

It may be noted that the term 'full ownership' utilized in the first sentence of the new draft Article already represented quite strong language. However, again, the wording fell short of declaring a right of Indigenous peoples directly to the matter at hand, rather proclaiming a 'right to recognition' in the first sentence and a 'right to special measures' in the second sentence.

A significant change in this regard was made by an amended text as of September 2004, which for the first time spelled out, directly, a right of Indigenous peoples to their property, by stating that:

> Indigenous peoples have the right to maintain, protect and develop their cultural and intellectual property and the tangible manifestations of their cultural and intellectual property.[5]

Otherwise, the text was less specific and actually fell back to the earlier focus on intellectual property as manifested in the first draft of June 1993.

When the negotiations were taken up again in 2004, a Chairman's proposal of October 2004,[6] while keeping the above text as one option, also proposed other alternatives, which read:

> Indigenous peoples have the right to, and are entitled to the recognition of the full ownership, control and protection of their genetic resources, traditional knowledge, expressions of culture and cultural heritage [cultural and intellectual property].

[4] Commission on Human Rights, Report of the Working Group on Indigenous Populations on Its Eleventh Session, Chairperson-Rapporteur: Ms Erica-Irene A Daes, Annex I: Draft Declaration as Agreed upon by the Members of the Working Group at Its Eleventh Session, UN Doc E/CN.4/Sub.2/1993/29/Annex I (23 August 1993).

[5] Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Information Provided by States Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, UN Doc E/CN.4/2004/WG.15/CRP.1 (6 September 2004).

[6] Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, Chairman's Summary of Proposals (Mr. Luis-Enrique Chávez), UN Doc E/CN.4/2004/WG.15/CRP.4 (14 October 2004).

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

[Indigenous individuals have the right to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which she is the author, and are entitled to protection under the law, as are other members of the national population.

States should take special measures, as appropriate, to facilitate the efforts of indigenous peoples to develop and protect their sciences, technologies and traditional knowledge, and cultural manifestations including their oral traditions, literatures, designs and visual and performing arts, and their knowledge of the properties of flora and fauna, genetic resources, seeds and medicines.]

The wording of the first paragraph proposed here had obviously been inspired by the WIPO Intergovernmental Committee (IGC) negotiations in referring to genetic resources, traditional knowledge, and expressions of culture, while at the same time using the term 'cultural heritage'—possibly alluding to the adoption of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. The respective entitlement was worded in a twofold manner, as a 'right to' and an 'entitle[ment] to the recognition of'. The second paragraph was more concerned with what was described above as the non-proprietary dimension and envisaged a 'right to special measures' only.

While the third paragraph, which was bracketed, read like a slightly modified version of Article 15, paragraph 1, lit b and c of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the fourth paragraph, bracketed as well, came rather close, in content, to the second paragraph, but was drafted more specifically as an obligation of States.

After the Chairman had proposed various further versions and combinations of earlier texts throughout 2005,[7] actual progress was only made when he presented the following new proposal in December 2005:

Article 29. Indigenous peoples have the right to maintain, ~~control~~, protect and develop their *cultural heritage, traditional knowledge, traditional cultural expressions* / cultural and intellectual property and the tangible and intangible manifestations of their cultural and intellectual property in their sciences, technologies and cultural manifestations, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. *They also have the right to own their intellectual property.* ~~In conjunction with indigenous peoples, States shall take effective measures, including special measures, to recognize and protect the exercise of this right.~~[8]

The wording now introduced a threefold array of subject matter: first, 'cultural heritage, traditional knowledge, traditional cultural expressions/cultural and intellectual property';

[7] Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on Its Tenth Session, Chairperson-Rapporteur: Mr. Luis-Enrique Chávez, UN Doc E/CN.4/2005/89/Add.2 (1 April 2005).

[8] Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Chairperson's Summary of Proposals (Mr. Luis-Enrique Chávez), UN Doc E/CN.4/2005/WG.15/CRP.7 (20 December 2005) (emphasis and strike-out in the original).

second, 'tangible and intangible manifestations of their cultural and intellectual property in their sciences, technologies and cultural manifestations'; and, third, more generally, 'intellectual property'. Aside from the fact that 'intellectual property' now somewhat figured as a sort of common denominator, the proposal provided for a new formulation of the role that States should play in the third sentence.

While this text could still be said to raise a number of questions, it nevertheless proved to be a helpful last step on the way towards the final version, which was introduced by another, and considerably refined, proposal of the Chairman in March 2006, in the Eleventh Session of the informal plenary:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their collective intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
>
> In conjunction with indigenous peoples, States shall take effective measures, including special measures, to recognize and protect the exercise of these rights.[9]

After that, the definitive proposal only made one more change to the text by deleting the words 'including special measures' in the third sentence.

3. A Right to Cultural Heritage

In recognizing a right to cultural heritage in the first sentence of its first paragraph, Article 31 belongs to a group of provisions of the Declaration which address the culture of Indigenous peoples as a key element of their identity.[10] In this regard, this provision aims at giving Indigenous peoples a role and a voice in view of national and international rules and policies on cultural heritage, which so far have been mainly driven by States, national interest, and international bodies (such as UNESCO), or the interest of mankind as a whole, without paying specific attention to Indigenous peoples.

3.1 Background: Cultural Identity of Indigenous Peoples and National and International Cultural Heritage Rules and Policies

The right to cultural heritage in Article 31 has to be understood as situated in, and its interpretation has to be guided by, two types of context. First, the right to cultural heritage has to be seen in the context of other UNDRIP provisions on culture. For one thing, apart from its focus on cultural heritage, Article 31 itself spells out a right to traditional cultural expressions and intellectual property. More generally, the cultural dimension of the rights of Indigenous peoples is furthermore reflected by the rights to: self-determination

[9] Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session, Chairperson-Rapporteur: Luis-Enrique Chávez (Peru), UN Doc E/CN.4/2006/79 (22 March 2006).

[10] See commentary on Art 11 in Chapter 10, this volume.

(Article 3), distinct cultural institutions (Article 5), cultural sites (Article 12(1)), the practice and revitalization of cultural traditions and customs (Article 11(1)),[11] and protection against destruction (Article 8(1)).[12] Taken together, all these rights reflect a more general right of Indigenous peoples to their cultural identity,[13] which can be said to form part of customary international law.[14]

Second, in using the term 'cultural heritage', Article 31 refers to well-established national and international rules and policies on culture, which thus form the second type of context to be taken into account here. At national level, most States have legislation in place for the identification and protection of cultural heritage. Such national legislation is often closely related to international instruments, which were primarily elaborated within UNESCO. UNESCO conventions such as the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage,[15] the 2001 Convention on the Protection of the Underwater Cultural Heritage,[16] and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage[17] define certain kinds of cultural heritage, emphasize its value and significance, and call for action to be taken to safeguard such heritage, including identification, documentation, research, preservation, protection, promotion, enhancement, or transmission.[18] Furthermore, they sometimes envisage the establishment of lists, such as the well-known World Heritage List under the 1972 Convention or the two UNESCO Intangible Cultural Heritage Lists under the 2003 Convention. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property[19] also contains remedies to prevent illicit exports and transfers of ownership of cultural property to prevent the 'impoverishment of the cultural heritage of the countries'.[20]

These rules portray cultural heritage as world heritage, as the heritage of humankind, or as the heritage of particular States.[21] They furthermore assign tasks of identification, safeguarding, protecting, and controlling such cultural heritage to States and international bodies, chiefly UNESCO.

So far, Indigenous peoples have not assumed a specific role in this context and for quite a long time their culture has not been the focus of the system at large.[22] A change in this regard came about, however, with the 2003 UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage[23] and the 2005 UNESCO Convention on the

[11] ibid. [12] Commentary on Arts 7(2), 8, and 43 in Chapter 6, Section 3.4, this volume.

[13] ibid Section 3.1.

[14] See ILA Report (n 1) 17. ILA Resolution No 5/2012 on the Rights of Indigenous Peoples, adopted at the 75th Conference (Sofia 2012) para 6 reads: 'States are bound to recognise, respect, protect and fulfil indigenous peoples' cultural identity (in all its elements, including cultural heritage) and to cooperate with them in good faith—through all possible means—in order to ensure its preservation and transmission to future generations. Cultural rights are the core of indigenous cosmology, ways of life and identity, and must therefore be safeguarded in a way that is consistent with the perspectives, needs and expectations of the specific indigenous peoples.'

[15] 16 November 1972, 1037 UNTS 151. [16] 2 November 2001, 2562 UNTS 3.

[17] 17 October 2003, 2368 UNTS 3.

[18] See, for instance, 2003 UNESCO Convention Art 2, para 3.

[19] 14 November 1970, 823 UNTS 231. [20] Art 2 of the Convention.

[21] See F Francioni, 'Cultural Heritage' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press February 2013); K Odendahl, *Kulturgüterschutz: Entwicklung, Struktur und Dogmatik eines ebenenübergreifenden Normensystems* (Mohr Siebeck 2005).

[22] cf commentary on Art 11 in Chapter 10, Sections 2.1 and 4, this volume.

[23] 17 October 2003, 2368 UNTS 3. On the (potential) role but also the limitations of this Convention concerning the present context, see P Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage' (2004) 1 Macquarie J Int'l & Comparative Environmental L 111–34.

Protection and Promotion of the Diversity of Cultural Expressions,[24] which employ a much broader concept of culture, which importantly also includes the intangible part of culture and which may well cover the major parts of Indigenous culture.

The 2003 Convention is particularly explicit in this regard, in recognizing, in its preambular paragraph 6, that 'communities, in particular Indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity'. Also, in its definitions, the Convention decribes, quite clearly, what Indigenous cultural heritage is all about. Article 2, paragraph 1 states:

> 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity ...

The provision further specifies this statement in paragraph 2 by listing non-exhaustively the following items as covered by the definition:

(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
(b) performing arts;
(c) social practices, rituals and festive events;
(d) knowledge and practices concerning nature and the universe;
(e) traditional craftsmanship.

Additionally, the 2005 Convention, in its guiding principles under Article 2, paragraph 3, stipulates a 'Principle of equal dignity and respect for all culture' and explicitly adds that this includes 'the culture of persons belonging to minorities and indigenous groups'.[25]

3.2 Cultural Heritage and the Right to Self-Determination

In view of Article 31, the concept of 'cultural heritage' as it is employed here can be considered to embrace all representations of such heritage in its entirety. This includes sites, as also mentioned in Articles 11(1) and 12(1) of the UNDRIP,[26] and which are furthermore dealt with in the 1972 World Heritage Convention. It also includes objects, largely in parallel with the traditional cultural expressions, which are also mentioned in Article 31 of the UNDRIP and, in addition to this, which represent 'artefacts' for the purposes of Article 11(1) of the UNDRIP. In international cultural law, such objects are dealt with by the 1970 UNESCO Convention regarding their illicit import, export, and transfer of ownership. Furthermore, cultural heritage includes practices and knowledge as referred to by Article 11(1) of the UNDRIP and as reflected by the 2003 UNESCO Convention on Intangible Cultural Heritage. Lastly, it certainly also includes the relevant

[24] 20 October 2005, 2440 UNTS 311.

[25] See PT Stoll, S Mißling, and J Jürging, 'Preamble' in S von Schorlemer and P-T Stoll (eds), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Explanatory Notes* (Springer 2012) 23–60, 51ff.

[26] See commentary on Art 11 in Chapter 10, this volume.

elements mentioned in the last part of Article 31, paragraph 1, first sentence of the UNDRIP, namely: 'oral traditions, literatures, designs, sports and traditional games and visual and performing arts'.[27]

The right to cultural heritage includes a right of Indigenous peoples to determine and identify the elements of such heritage. For one thing, such self-determination and self-identification can be said to be in line with the right to self-determination of Indigenous peoples in its cultural dimension, as stipulated in Article 3 of the UNDRIP.

In a limited way, this specific right to self-determination in matters of cultural heritage can furthermore be said to add to and build on what has already been stated in the 2003 UNESCO Convention on Intangible Cultural Heritage. Article 2 of that Convention, apart from providing a list of possible elements, states that intangible cultural heritage is to be defined through recognition of something as forming part of such heritage by 'communities, groups and, in some cases, individual[s]'. Accordingly, the 2003 Convention envisages, in its Article 11, lit b, that the identification and definition of 'elements of the intangible cultural heritage present in its territory' by State Parties shall be undertaken 'with the participation of communities, groups and relevant non-governmental organizations'.

While many States have adopted implementing legislation for the 2003 Convention, the Venezuelan Law of the Cultural Heritage of the Indigenous Peoples and Communities of 11 December 2008[28] is particularly noteworthy here, because it is specifically devoted to the recognition and protection of Indigenous cultural heritage. Likewise, the Colombian Decree No 02941 of 6 August 2009[29] should be mentioned at this point, as it envisages, in its Article 7, that, among other entities, Indigenous community authorities can set up their own and separate 'representative list of immaterial cultural heritage' and thus flag their own and proper heritage.

3.3 Dimensions of the Right: Maintenance and Development

According to the language employed throughout Article 31, Indigenous peoples are given the right to 'maintain, control, protect and develop' their cultural property. 'Maintenance' in view of cultural heritage can be understood to involve the activities of enjoying, practising, having access to, participating in, conserving, managing, and carrying on any such matter. Close ties exist at this point to other provisions of the UNDRIP such as Article 11(1) concerning the practice and revitalization of cultural traditions and customs[30] and Article 14(3) calling for measures to be taken in order for Indigenous individuals to have access to education in their own culture.[31]

[27] For details, see Section 4.1 below.

[28] Retrieved from the UNESCO Database of National Cultural Heritage Laws, <http://www.unesco.org/culture/natlaws/> on 3 July 2015.

[29] ibid. In the English translation as provided for in the database, Art 7 of that decree reads: 'In accordance with law 1185 of 2008 each municipality and district, through the Mayor; province, through the Governor; Afro-descendants Community's authorities covered by law 70 of 1993 and indigenous community's authorities recognized by the applicable laws and regulations, may create and manage an LRPCI with the expressions in their corresponding jurisdictions with special relevance for the respective interested communities.'

[30] See ILA Report (n 1) 16 and Chapter 10 in this volume.

[31] See Chapter 13 in this volume.

As to the term 'develop', this certainly covers modifications, adaptations, and innovations of cultural heritage. Here, once more, close ties become apparent to the right to self-determination stipulated in Article 3, which includes cultural development. Quite probably, this right to development goes beyond changes of the intellectual content of cultural heritage. Indeed, 'development' very likely also involves the use of such heritage, including its commercial development, an issue which has quite some relevance, inter alia, with regard to heritage sites.

3.4 Control, Protection, and Prior Informed Consent

Article 31 furthermore spells out a right of Indigenous peoples to control and to protect their cultural heritage. This presupposes the adoption of corresponding policies and rules by Indigenous peoples themselves and entails a requirement for such policies and rules to be respected. In addition to this, where State policies, decisions, and rules have an impact on Indigenous cultural heritage, the 'free, prior, and informed consent' of Indigenous peoples is required.[32]

3.5 The 2009 CESCR's General Comment 21 on the Right of Everyone to Take Part in Cultural Life

In 2009, and thus shortly after the adoption of the Declaration, the Committee on Economic, Social and Cultural Rights adopted General Comment 21 on the Right of Everyone to Take Part in Cultural Life (Article 15, paragraph 1, lit a of the ICESCR), which in its paragraph 37 copied major parts of the wording of Article 31 of the UNDRIP as follows:

> Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts. States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.[33]

3.6 In Detail: The World Heritage Listing Procedure and the Management of World Heritage Sites

A particularly relevant case in this regard was the one decided by Resolution 197 of the African Commission on Human and Peoples' Rights in 2011.[34] It concerned the

[32] Expert Mechanism Advice No 3 (2012): Indigenous Peoples' Languages and Cultures. Annex to UN Doc A/HRC/21/53 (16 August 2012) para 12. For a very concise summary of the evolution of the concept of 'free, prior, and informed consent', see A Perrault, 'Facilitating Prior Informed Consent in the Context of Genetic Resources and Traditional Knowledge' (2004) 4 Sustainable Development L & Policy 21–26, 21. See commentary on Art 11 in Chapter 10, Section 4, this volume.

[33] Committee on Economic, Social and Cultural Rights (CESCR), General Comment 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1(a), of the ICESCR), UN Doc E/C.12/GC/21 (21 December 2009). It should be noted, however, that while the General Comment explicitly refers to UNDRIP Arts 11–13 and 19, it does not mention Art 31.

[34] African Commission on Human and Peoples' Rights, Resolution 197 on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage site of 5 November 2011, <http://www.achpr.org/sessions/50th/resolutions/197> accessed 17 October 2017.

designation of Lake Bogoria as a World Heritage site following a proposal made by the Kenyan government without proper involvement of the Endorois people. In its decision, the Commission found that the inscription on the list 'without involving the Endorois in the decision-making process and without obtaining their free, prior and informed consent' inter alia constituted a 'violation of the Endorois' right to development under Article 22 of the African Charter'. Making explicit reference to the UNDRIP, the Commission emphasized its 'commitment to fostering the values and implementing the principles enshrined in this Declaration'.[35] It voiced its concern about numerous sites in Africa having been inscribed to the World Heritage List without free, prior, and informed consent[36] and recalled Advice No 2 (2011) of the UN Expert Mechanism on the Rights of Indigenous Peoples regarding the right to participate in decision-making.[37] That advice calls on UNESCO to:

> enable and ensure effective representation and participation of indigenous peoples in its decision-making, especially with regard to the implementation and supervision of UNESCO Conventions and policies relevant to indigenous peoples, such as the 1972 World Heritage Convention.

The advice goes on to state that:

> Robust procedures and mechanisms should be established to ensure indigenous peoples are adequately consulted and involved in the management and protection of World Heritage sites, and that their free, prior and informed consent is obtained when their territories are being nominated and inscribed as World Heritage sites.[38]

As concerns international cultural law, the Operative Guidelines to the World Heritage Convention were revised in July 2013.[39] While earlier versions of these guidelines already called for the participation of 'local communities' (paragraph 12) and named them as 'partners in the protection of World Heritage' (paragraph 41) alongside 'other stakeholders',[40] nothing was added in this regard to specifically address Indigenous peoples. The same holds true for the Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage.[41] However, doubts have been raised as to the adequacy of these amendments in the light of Article 31 of the UNDRIP.[42] These doubts would appear to be justified, as the guidelines neither explicitly mention Indigenous peoples nor clearly establish a requirement for prior informed consent of the respective Indigenous peoples concerned in a given case.

[35] Preambular para 6 of Res 197. See also African Commission on Human and Peoples' Rights, Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples of May 2007, <http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf> accessed 17 October 2017.

[36] Preambular para 8 of Res 197. [37] Preambular para 7 of Res 197.

[38] Expert Mechanism Advice No 2 (2011): Indigenous Peoples and the Right to Participate in Decision-Making, Annex to UN Doc A/HRC/18/42 (17 August 2011) para 38.

[39] UNESCO/ICPWCNH, Operational Guidelines for the Implementation of the World Heritage Convention, UNESCO Doc WHC.13/01 of July 2013. See ILA Report (n 1) 18.

[40] UNESCO/ICPWCNH, Operational Guidelines for the Implementation of the World Heritage Convention, UNESCO Doc WHC.05/2 of February 2005.

[41] Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Heritage, <http://www.unesco.org/culture/ich/en/directives> accessed 17 October 2017, last amendment in June 2014. See ILA Report (n 1) 20.

[42] ILA Report (n 1) 18.

3.7 In Detail: Return of Dislocated Cultural Property

Another important issue relates to dislocated property. Indeed, in the past, Indigenous cultural objects such as paintings and sculptures have been taken from Indigenous peoples in large numbers to be acquired by museums or private collectors nationally or even trafficked around the world.

In connection with Article 31, paragraph 2 and Article 11, paragraph 2 of the UNDRIP, a duty of States arises at this point to support the Indigenous peoples concerned in exercising their right to their own cultural heritage by providing the necessary assistance.[43] This would include, in particular, assisting them in preventing the illicit taking of their cultural property and providing for effective mechanisms to this end, possibly including restitution as envisaged by Article 11, paragraph 2 of the UNDRIP. Internationally, this may require a State to take action under the 1970 UNESCO Convention to bring about the restitution of any such cultural property or to become active within the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. Also, action can possibly be brought under the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which, according to its Article 3, paragraph 8, covers 'the restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use'. Furthermore, Article 5, paragraph 3, lit d lists 'the traditional or ritual use of the object by a tribal or indigenous community' as one of interests, in which the competent authorities of a State shall order the return of an illegally exported cultural object. Once such return has taken place, the aforementioned duty to support would furthermore entail that the State institutions involved pass on the object to the respective Indigenous peoples.[44]

3.8 Conclusion

Cultural heritage forms the basis of cultural identity. Therefore, the protection of the cultural identity of Indigenous peoples as envisaged under customary international law[45] also includes the protection of their cultural heritage. As decisions of international bodies and some pieces of national legislation indicate, the requirement of acquiring the free, prior, and informed consent of Indigenous peoples in matters concerning their cultural heritage can at least be considered an emerging rule of customary international law. It is still an open question whether customary rules already provide for a claim for Indigenous peoples to have their illicitly dislocated cultural objects returned to them. The right to cultural heritage in Article 31 of the UNDRIP can provide important support for such claims.

[43] Expert Mechanism Advice No 3 (n 32) para 16 states: 'States should provide incentives for museums and other places where indigenous remains, artefacts and other cultural heritage are stored to inform the relevant indigenous peoples when they hold such treasures and to establish mechanisms to have them restored to indigenous peoples when they so desire.'

[44] A Yupsanis, 'Cultural Property Aspects in International Law: The Case of the (Still) Inadequate Safeguarding of Indigenous Peoples' (Tangible) Cultural Heritage' (2011) 58 Netherlands Int'l L Rev 335–61.

[45] See Section 3.1 above.

4. A Right to Traditional Knowledge

Article 31, paragraph 1, first sentence furthermore stipulates a right of Indigenous peoples to 'their traditional knowledge'. Roughly, such knowledge can be understood as technology, which is traditionally used by Indigenous peoples as part of their lifestyle, culture, and belief.[46] The right to traditional knowledge has two dimensions. On the one hand, it aims at giving Indigenous peoples a right to use, maintain, carry on, and develop such traditional knowledge. On the other, it is to provide protection against the misappropriation of such knowledge by third parties using the knowledge without having acquired the prior and informed consent of the respective peoples or communities.

4.1 Background and Context

The right to traditional knowledge stipulated in Article 31 builds on developments in international environmental and sustainable development law.[47] Early on, international agreements on whaling and seal hunting gave special consideration to Indigenous groups and their traditional forms of hunting and harvesting by exempting them from the general catch limits they imposed.[48] This approach was carried further by the 1992 Convention on Biological Diversity (CBD),[49] which states, in the first part of its Article 8, lit j, that:

> Each Contracting Party shall, as far as possible and as appropriate: ...
>
> (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity ...

In this way, the Convention demands, from an environmental perspective, praise and respect for what later on was to become referred to in short as 'traditional knowledge'. In explicitly calling for respect, preservation, and maintenance of this knowledge, Article 8, lit j of the CBD goes beyond the few aforementioned exemption clauses contained in fisheries conventions. The second part of the provision goes one step further still by adding that the parties shall furthermore

> promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.[50]

[46] See WIPO, Traditional knowledge—Operational terms and definitions, WIPO Doc WIPO/GRTKF/IC/3/9 (May 2002); PT Stoll, S Mißling, and J Jürging, 'Preamble' in von Schorlemer and Stoll (n 25) 23–60, 44ff.

[47] For a more general overview of the international legal framework for the protection of traditional knowledge, see K-J Ni, 'Traditional Knowledge and Global Lawmaking' (2011) 10(2) Northwestern J Int'l Human Rights 85–118, focusing on the UNDRIP at 110–13.

[48] P-T Stoll and A von Hahn, 'Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law' in S von Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (2nd edn, Kluwer 2008) 7–57, 30ff; K Schillhorn, *Kulturelle Rechte indigener Völker und Umweltvölkerrecht—Verhältnis und Vereinbarkeit* (Duncker & Humblot 2000) 128ff; R Gambell, 'International Management of Whales and Whaling: A Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling' (1993) 46(2) Arctic 97–107; see recently International Whaling Commission, Resolution 2014-1. Resolution on Aboriginal Subsistence Whaling, adopted at the 65th Meeting (15–18 September 2014), <https://iwc.int/resolutions> accessed 17 October 2017.

[49] 5 June 1992, 1760 UNTS 9.

[50] See Stoll and von Hahn (n 48) 31ff. See furthermore, on Art 8, lit j CBD and developments related to this norm, M Fitzmaurice, 'The Dilemma of Traditional Knowledge: Indigenous Peoples and Traditional Knowledge' (2008) 10 Int'l Community L Rev 255–78.

With this call for its wider application, Article 8, lit j of the CBD takes account of the dimension of the use of traditional knowledge outside the Indigenous context, including its commercialization. In this regard, the Convention establishes the conditions of acquiring the approval of the knowledge-holders and of sharing with them the benefits arising from such use.

The right to traditional knowledge as stipulated in Article 31 is furthermore closely related to other Articles of the UNDRIP, such as Article 20 on the right to maintain and develop economic systems or institutions, Article 23, which addresses a right to development, and Article 24, which relates to traditional medicines. Other parts of the UNDRIP coming to mind here relate to the means and resources necessary to use and practice Indigenous knowledge, including a right to lands, territories, and resources (Article 26)[51] as well as to the environment and the productive capacity of lands or territories and resources as called for by Article 29.

4.2 Definition

The term 'traditional knowledge' has been framed in the context of Article 8, lit j of the CBD which, as cited above, refers to 'knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles'. A more general definition was recently elaborated in the context of negotiations in the WIPO aiming to set up a specific instrument for the protection of traditional knowledge.[52] The current draft defines traditional knowledge as: 'know-how, skills, innovations, practices, teachings and learnings'.[53] In accordance with many other definitions offered in this regard, an exemplary list of related areas has also been discussed in the negotiations. This list is worth considering for questions of definition even though there is no consensus yet about whether it should be taken up in the final text.[54] It reads as follows:

> Traditional knowledge may be associated, in particular, with fields such as agriculture, the environment, healthcare and indigenous and traditional medical knowledge, biodiversity, traditional lifestyles and natural resources and genetic resources, and know-how of traditional architecture and construction technologies.

Against this background, it becomes clear that the concept of 'traditional knowledge' is quite broad in character. Also, just as in the case of cultural heritage,[55] Indigenous peoples enjoy wide discretion in determining what they deem to qualify as traditional knowledge.

It has to be added that, in spite of certain conceptual parallels, the term 'traditional knowledge' is not to be interpreted through the lens of approaches familiar in intellectual

[51] See commentary on Arts 10 and 25–27 in Chapter 10, this volume.

[52] An overview of the background for these negotiations is provided at <http://www.wipo.int/pressroom/en/briefs/tk_ip.html> accessed 17 October 2017.

[53] The related parts of the definition in the Draft read: 'Traditional knowledge [refers to]/[includes]/[means], for the purposes of this instrument, know-how, skills, innovations, practices, teachings and learnings of [indigenous [peoples] and [local communities]]/[or a state or states].

[Traditional knowledge may be associated, in particular, with fields such as agriculture, the environment, healthcare and indigenous and traditional medical knowledge, biodiversity, traditional lifestyles and natural resources and genetic resources, and know-how of traditional architecture and construction technologies.]'

WIPO, The Protection of Traditional Knowledge: Draft Articles. Rev 2 (March 28, 2014, 8:00 pm), Annex to WIPO-Doc WIPO/GRTKF/IC/28/5, 2 June 2014, 5.

[54] In the draft text as just cited, this part is in entirety put in brackets. This signifies that there is not yet consensus about it.

[55] See Section 3 above.

property law, even where, for instance, terminology such as 'know-how' is used, which is also a concept of intellectual property law. In particular, traditional knowledge does not presuppose that a certain practice or knowledge or even its development can be described or explained in terms of technical rationality as applied, for instance, in the application procedures for parents or utility models.

Another issue concerns the significance of 'tradition' in the concept of traditional knowledge. This can hardly be understood as limiting the scope of relevant knowledge, by, in a way, opposing 'traditional' to 'new'. As both Article 8, lit j of the CBD and the above-mentioned definitions make clear, traditional knowledge may also include 'innovations'. Also, the right to traditional knowledge under Article 31 protects its 'development'. In this light, 'traditional' has to be understood as referring to the method of creation and dissemination of such knowledge rather than as relating to a certain point in time. Thus, 'traditional' can be understood to mean that the respective knowledge has been created and disseminated in ways different from the methods of research, development, and dissemination used in 'modern' science and technology.

4.3 A Right of Indigenous Peoples to Use, Practice, and Develop Traditional Knowledge

As regards protected activities, first of all, the right to traditional knowledge provided for in Article 31 of the UNDRIP relates to the actual use, conservation, carrying on, development, and maintenance of this knowledge. It has to be emphasized that this covers a large part of the lifestyle and activities of Indigenous peoples, including, notably, in the areas of agriculture, forestry, and medicine. In this regard, the right at hand can be understood to provide protection against all sorts of intervention, which would persuade Indigenous peoples to abandon the use and practice of their knowledge. This dimension of the right is of considerable importance in view of the fact that a number of government policies and interventions in the field of medicine, agriculture, and forestry might discourage the continued use and practice of traditional knowledge. Also, requirements regarding professional qualification, mandatory management plans, or licensing or mandatory certification schemes may be taken into focus here, as such requirements can be difficult to meet for Indigenous peoples. The 2004 CBD Akwé: Kon guidelines are relevant in this regard, as they call for and contain standards for the conduction of, inter alia, cultural impact assessments for developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by Indigenous and local communities.[56]

4.4 Control and Protection of Traditional Knowledge

The right to traditional knowledge under Article 31 of the UNDRIP furthermore covers the 'control and protection' of such knowledge.[57] This entails a right of Indigenous peoples

[56] Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental, and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, Decision VII/16 of the Conference of the Parties to the CBD, Kuala Lumpur, February 2004, UNEP/CBD/COP/DEC/VII/16 (13 April 2004).

[57] See, for instance, R Wynberg, D Schroeder, S Williams, and S Vermeylen, 'Sharing Benefits Fairly: Decision-Making and Governance' in R Wynberg, D Schroeder, and R Chennells (eds), *Indigenous Peoples, Consent and Benefit-Sharing: Lessons from the San-Hoodia Case* (Springer 2009) 231–57.

to set up and apply policies and rules concerning use, dissemination, and transfer of such knowledge, as well as a right for these rules to be respected. It should be highlighted that Indigenous peoples indeed often have such rules in place and that these rules in many cases are quite complex.[58] Such rules may, for example, envisage an individual or collective entitlement as well as the principle that knowledge should be publicly available for everyone or for mankind as such. These rules have to be respected by governments and, probably even more importantly, also by third parties. Thus, third parties are required to ask for the prior and informed consent of Indigenous peoples before obtaining and using their knowledge and to respect the conditions imposed on use as defined in this context by the Indigenous peoples concerned.

The right to control and protect traditional knowledge furthermore requires governments to assist Indigenous peoples in effectively controlling the use of their knowledge at national and international levels. Different situations and options are relevant in this regard. Insofar as the requirement of prior and informed consent of Indigenous peoples to the use of their traditional knowledge by third parties is concerned, States should implement this requirement in their national legislation and include remedies for cases of non-compliance.

4.5 Controlling Uses of Traditional Knowledge by Way of Prior Informed Consent

With regard to the legal regime established by and under the CBD, it should be noted that the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity,[59] which was adopted in 2010 and explicitly mentions the Declaration in its preambular paragraph 26, recently entered into force.[60] The Protocol specifically addresses traditional knowledge associated with genetic resources and envisages in its Article 7 that:

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

Furthermore, Article 16 of the Protocol specifically and extensively deals with compliance in this regard by stating that:

> 1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation

[58] See WIPO, Customary Law and Traditional Knowledge, Background Brief No 7, <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_7.pdf> accessed 2 February 2018.

[59] See E Morgera, E Tsioumani, and M Buck (eds), *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-sharing to the Convention on Biological Diversity* (Brill/Martinus Nijhoff 2014).

[60] 29 October 2010, entry into force on 12 October 2014; see <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> accessed 21 June 2015.

or regulatory requirements of the other Party where such indigenous and local communities are located.

2. Each Party shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 above.

3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1 above.

In order to implement the Nagoya Protocol, the European Union has adopted a regulation.[61] It should, however, be noted that the scope of the protocol is somewhat limited, as it covers only traditional knowledge which is associated with genetic resources.

4.6 Controlling and Protecting Traditional Knowledge: Intellectual Property Implications

A particularly controversial issue concerning the protection of traditional knowledge relates to intellectual property rights. This issue has two sides: on one side, a third party using traditional knowledge might acquire intellectual property rights and thus enjoy exclusionary protection. On the other side, Indigenous peoples might consider to seek intellectual property protection for their traditional knowledge themselves.

The first side to the issue has quite some relevance, as third parties such as research institutions and businesses regularly seek patent protection for their developments. Indeed, in a few cases, such patents have later been challenged for using traditional knowledge. The main argument in these disputes was that the traditional knowledge had been known already and that the invention for which the patent had been sought had thus no longer been new at the time of granting or had not actually included an 'inventive step', as is required for patentability. Details of the cases concerned the question of whether widespread practice or even publication of Indigenous knowledge would have to be taken into account when assessing the novelty or inventive step of an invention. In a case before the European Patent Office, it was decided that information about the widespread use of traditional knowledge about anti-pest effects of parts of the neem tree in India had to be taken into account, which led to the patent being revoked by the Office's technical appeals board.[62] The right of Indigenous peoples to control and protect their traditional knowledge under Article 31 of the UNDRIP may indeed be seen as demanding the taking into account of publicly available information about traditional knowledge as regards the novelty and inventive step requirement in patent law. It has been proposed to set up databanks to publish traditional knowledge in order to protect it against such third-party patenting.[63] Another avenue of securing Indigenous rights pursued in this

[61] Regulation (EU) No 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union, OJ L150/59 of 20 May 2014.

[62] European Patent Office, Decision of the Technical Board of Appeal 3.3.2 of 8 March 2005, T 0416/01-3.3.2, <http://www.epo.org/law-practice/case-law-appeals/pdf/t010416eu1.pdf> accessed 17 October 2017; C Sheridan, 'EPO Neem Patent Revocation Revives Biopiracy Debate' (2005) 23 Nature Biotechnology 511–12.

[63] On the possible advantages and disadvantages of such an approach, see TJ Krumenacher, 'Protection for Indigenous Peoples and Their Traditional Knowledge: Would a Registry System Reduce the Misappropriation of Traditional Knowledge?' (2004) 8(1) Marquette Intellectual Property L Rev 143–59. As to the Indian project of a Traditional Knowledge Digital Library (TKDL), see VK Gupta, 'Protecting India's Traditional

regard has been to use the patent system to enforce the observance of the prior and informed consent requirement by requiring patent applicants to present information on the consent given by Indigenous peoples.[64]

As regards the second side to the issue, namely, the possibility for acquisition of intellectual property rights by Indigenous peoples themselves, the existing legal framework, including national patent laws and international agreements, is not very instrumental, as will be seen shortly. However, as explained in more detail below, negotiations are under way in the intergovernmental committee of the WIPO to set up a new international agreement in this regard.[65] If such intellectual property protection were indeed to be made available, Indigenous peoples could then use such entitlements to prevent third parties from seeking protection, to enter into commercial activities themselves, or to grant a corresponding licence to third parties in return for remuneration.

4.7 Conclusion

The right of Indigenous peoples to their traditional knowledge stipulated in Article 31 of the UNDRIP finds itself firmly supported by Article 8, lit j of the 1992 Convention on Biological Diversity and related national legislation. The Declaration clearly had an impact on the Nagoya Protocol to the CBD. It should be noted, however, that the CBD and even more so the Nagoya Protocol are focused on knowledge associated with genetic resources. Article 31 of the UNDRIP could assume a major role in this regard in 'generalizing' rights to traditional knowledge. Also, in stipulating a right to traditional knowledge, Article 31 may be relevant for the application of existing intellectual property rights as well as in regard to their further development. As an example, a customary rule could be seen as emerging, which requires patent offices and courts to consider the availability of information about Indigenous knowledge and practices, when ascertaining the patentability criteria of 'novelty' and 'inventive step'.

5. A Right to Traditional Cultural Expressions

In addition to the aforementioned rights to cultural heritage and traditional knowledge, Article 31, paragraph 1, first sentence furthermore stipulates a right of Indigenous peoples to their 'traditional cultural expressions'. In the context of the UNDRIP, this right addresses expressions of culture as a matter of cultural identity. It is closely related to the right to practise and revitalization of cultural traditions and customs as defined by Article 11(1), since traditional cultural expressions can be seen as the aim and result of such practice and revitalization. The right to traditional cultural expressions furthermore has close ties to the right to cultural heritage also defined by Article 31, as traditional cultural expressions can be said to reflect and add to such cultural heritage. Of further importance in this regard is the fact that international law developments also address traditional cultural expressions. The 2005 UNESCO Convention on the Protection and

Knowledge', *WIPO Magazine* (June 2011), <http://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html> accessed 17 October 2017.

[64] On this approach, see DR Downes, 'How Intellectual Property Could Be a Tool to Protect Traditional Knowledge' (2000) 25 Columbia J Env'l L 253–82, 274ff; MV Gubarev, 'Misappropriation and Patenting of Traditional Ethnobotanical Knowledge and Genetic Resources' (2012) 8 J Food L & Policy 65–98, 95–97.

[65] See Section 7.6 below.

Promotion of the Diversity of Cultural Expressions is relevant in this context, not least because its Article 1, lit e calls for the promotion of 'respect for the diversity of cultural expressions' and for raising awareness 'of its value at the local, national and international levels'. Furthermore, and parallel to traditional knowledge, the exclusionary protection of traditional cultural expressions is currently the subject of negotiations in the WIPO IGC.

5.1 Definitions

Looking at the text of the international instruments just mentioned, 'traditional cultural expressions' can be considered to be quite a broad term. According to Article 4, paragraph 4 of the 2005 UNESCO Convention, cultural expressions are to be understood as comprising 'those expressions that result form the creativity of individuals, groups and societies, and that have cultural content'. Such content is defined by Article 4, paragraph 2 as referring to 'symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities'. At least so far, a similar definition has been underpinning the ongoing negotiations of an international agreement on the protection of traditional cultural expressions in the WIPO. According to the current version of the draft text, 'traditional cultural expressions' might be defined as follows:

> [Traditional] cultural expression means any form of [artistic and literary], [creative and other spiritual] expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, verbal and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms].[66]

Within this broad scope, the identification of particular traditional cultural expressions rests with the Indigenous peoples themselves. As already mentioned in the context of traditional knowledge,[67] the term 'traditional' can hardly be understood here as having to be contrasted with 'new', but rather refers to methods of creation.

5.2 Dimensions and Relevance of the Right

Given the fact that many parallels exist between the rights to 'traditional cultural expressions' and 'traditional knowledge', respectively, much of what was said above with a view to the dimensions of the right to traditional knowledge also applies, *mutatis mutandis*, to the right of Indigenous peoples to their traditional cultural expressions. As

[66] WIPO, The Protection of Traditional Cultural Expressions: Draft Articles. Rev 2 (April 4, 2014, 3.00 pm), Annex to WIPO-Doc WIPO/GRTKF/IC/28/6, 2 June 2014, 5 (footnotes omitted). The text cited can be found under the headline 'use of terms'. Brackets indicate non-consensual text. The footnotes as indicated in the text read as follows:

> 1 [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]
>
> 2 [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]
>
> 3 [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]
>
> 4 [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

[67] See Section 4.1 above.

regards the intellectual property issues involved, the coverage of traditional cultural expressions under existing national and international rules is more advanced than the protection of traditional knowledge.[68]

5.3 Conclusion

The right to traditional cultural expressions is structurally very close to the right to traditional knowledge and shares many of its particularities.

6. The Right to Manifestations of Sciences, Technologies, and Cultures

Alongside the aforementioned three principal subject matters, Article 31, paragraph 1, first sentence also assigns a right to Indigenous peoples concerning a number of additional issues, namely 'the manifestations of their sciences, technologies, and cultures'. A lengthy and non-exclusive list of such matters is also provided by the text in this regard.

6.1 Subject Matter

6.1.1 'Manifestations of Their Sciences, Technologies, and Cultures'

Taken together, the terms 'sciences' and 'technologies' may be understood to cover any findings, insights, and knowledge, including those with a practical application. It should be noted here that the scope of coverage of these two terms is not confined to matters having resulted from and being based on research and development activities, which were undertaken utilizing 'modern' methods. To the contrary, the wording can be seen as a stark statement to that effect, that achievements of Indigenous peoples can be seen as their own and proper science and technology even though they may and often will be obtained without applying such 'modern' methods.

The term 'cultures' is also to be understood in a broad sense. As to the concept of 'manifestations', they may involve any appearances, signs, or occurrences of such sciences, technologies, and cultures.

6.1.2 Human Resources

The exemplary list of specific subject matters of such 'sciences, technologies, and cultures and their manifestations' starts out by mentioning 'human resources'—a term which was introduced into the text of the provision at a later stage of the negotiations without further discussion or explanation. It seems to mean very much the same as in normal language use. The inclusion of human resources can be understood to accommodate the fact that Indigenous sciences, technologies, and cultures are often developed, conserved, and disseminated by interactions in the group rather than by means of documentation and publication. Seen in this perspective, individuals often carry such sciences, technologies, and cultures and thus can be seen to represent a 'human resource', which manifests Indigenous sciences, technologies, and culture.

[68] For details, see Section 7.4 below.

6.1.3 Genetic Resources

More relevant is the mentioning of 'genetic resources', a term which—as mentioned above[69]—is closely related to traditional knowledge. Both terms relate to the Convention on Biological Diversity and the term 'genetic resources' is specifically defined in Article 2 of that Convention to mean 'any genetic material of actual or potential value', on the understanding that 'genetic material' is any biological material containing 'functional units of heredity'. In short, it is material with genetic information in it, in most cases, obviously, functioning DNA. The reason why the CBD characterizes such material as a resource and devotes quite a number of provisions to it is that such material may be used to develop useful products as, for instance, pharmaceuticals, cosmetics, or chemicals. The considerable attention which the Convention pays to genetic resources basically results from the idea that these resources represent a particularly useful dimension of biological diversity.[70]

The pertinent role of genetic resources in this context is highlighted in the objectives of the CBD under Article 1. The Convention's Article 15 assigns these resources to States by reference to the sovereign rights of States over their natural resources (paragraph 1). Furthermore, the provision states that access to these resources should be based on the prior informed consent of States (paragraph 5) and on mutually agreed terms and conditions (paragraph 3), including a fair and equitable sharing of the benefits arising out of the use of such resources (paragraph 7).[71]

The part for Indigenous peoples to play in the context of such 'sustainable use of genetic resources' primarily has been seen in the possible use of their traditional knowledge, which is addressed by Article 8, lit j of the CBD. It has been understood that Indigenous peoples have knowledge about the properties of genetic resources, the ecosystems of which they are part, their means of reproduction, ways of cultivation, and, most importantly, their potential uses. Within Article 31 of the UNDRIP, the right of Indigenous peoples to traditional knowledge, is, as shown above,[72] taken care of by explicitly mentioning traditional knowledge among the three main subject matters under Article 31, paragraph 1, first sentence. However, while genetic resources had been given a much more prominent place in earlier drafts, the text of the final Article 31 is quite cautious in this regard.

Drawing a distinction between genetic resources and associated traditional knowledge, where the former is assigned to States as a sovereign resource, whereas the latter is subjected to a right of Indigenous peoples, has been criticized more than once.[73] For instance, in order to develop a new medicine on the basis of treatment reportedly being used in Indigenous traditional medicine and involving a plant, a researcher would need two

[69] See Sections 4.2 and 4.5 above.

[70] See, for instance, S Bhatti, S Carrizosa, P McGuire, and T Young (eds), 'Contracting for ABS: The Legal and Scientific Implications of Bioprospecting Contracts', IUCN Environmental Policy and Law Paper No 67/4 (IUCN 2009), <https://portals.iucn.org/library/efiles/documents/EPLP-067-4.pdf> accessed 17 October 2017.

[71] See P-T Stoll, 'Access to GRs and Benefit-Sharing: Underlying Concepts and the Idea of Justice' in EC Kamau and G Winter (eds), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit-Sharing* (Earthscan 2009) 3–18.

[72] See Section 4.1.

[73] The more general criticism behind this is directed against the 'State focus' approach employed by the CBD, which strongly puts the emphasis on 'national control'; see J Amiott, 'Investigating the Convention on Biological Diversity's Protections for Traditional Knowledge' (2003) 11(1) Missouri Env'l L & Policy Rev 1–37, 31ff.

separate agreements. On the one side, the prior and informed consent of the Indigenous peoples at hand and an agreement on the sharing of benefits would be required to use the traditional knowledge. On the other side, a similar consent and agreement would be required from the State for using the plant in question as a genetic resource and to undertake research on it.

Indeed, there is quite some reason to believe that it would be more just and practicable to also assign the resources themselves to Indigenous peoples. This claim is well founded at least in cases where such genetic resources in some way are linked to traditional knowledge or, more generally, manifest Indigenous sciences, technologies, and culture. This is the case where genetic resources have been identified, conserved, cultivated, or used in a certain way by Indigenous peoples. The mentioning of genetic resources, therefore, is welcome, as neither Article 26, paragraph 1[74] or Article 32[75] of the UNDRIP, nor the right to traditional knowledge as spelt out in Article 31 itself, reflect this well-founded claim.

6.1.4 Seeds

The list of additional subject matter goes on to mention 'seeds', which can be considered to represent a particular kind of genetic resource embodying traditional knowledge in the way that the respective plants have been cultivated and/or bred in Indigenous agriculture. Seeds are particularly worth mentioning at this point as the role of Indigenous peoples in developing and conserving the world's most relevant food crops has been the subject of intense debate in the UN Food and Agriculture Organization (FAO), which resulted in the conclusion of the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).[76] Generally speaking of farmers, but definitely including Indigenous agriculture, Article 9 of that agreement:

> recognize[s] the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.[77]

The mentioning of seeds in Article 31 is particularly relevant, as the legal situation is thus far unsatisfactory. Indigenous peoples can hardly expect their plants and seeds to enjoy legal protection under plant breeders' rights, which are available in a number of jurisdictions and protected internationally by the International Union for the Protection of New Varieties of Plants (UPOV). In contrast to commercial breeds, seeds used in Indigenous agriculture often will fail to meet the criteria of homogeneity and distinctiveness required for such protection. On the other hand, third-party rights as to genes, gene sequences, or uses of plants may prevent Indigenous peoples from using, further developing, or commercializing their seeds and plants or passing on related rights to others. Even more, the aforementioned ITPGRFA has endorsed a long-standing system

[74] cf commentary on Arts 10 and 25–27 in Chapter 14, this volume.

[75] See commentary on Art 32 in Chapter 15, Section 3, this volume.

[76] On the treaty, see G Rose, 'International Law of Sustainable Agriculture in the 21st Century: The International Treaty on Plant Genetic Resources for Food and Agriculture' (2003) 15 Georgetown Int'l Env'l L Rev 583–632; P-T Stoll, 'The FAO "Seed Treaty"—New International Rules for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture' (2004) 1(6) J Int'l Biotechnology L 239–43. On the related debate, see C Oguamanam, 'Intellectual Property Rights in Plant Genetic Resources: Farmers' Rights and Food Security of Indigenous and Local Communities' (2006) 11 Drake J Agricultural L 273–305.

[77] 3 November 2001, 2400 UNTS 303. See Stoll (n 76) 242ff.

of international agricultural research and development, which allows plant breeders and agricultural research institutions to freely exchange, access, and use seeds, including those which are collected and made available in a number of important seed banks at national and international levels.[78] These seed banks do acquire and collect samples in many regions of the world. It is unclear to what extent Indigenous peoples have been asked for their prior and informed consent in relevant cases. While this system and the work of seed banks, research centres, and breeders have probably contributed considerably to the improvement of agriculture and food security, it nevertheless has to be questioned how it accommodates the interests and expectations of Indigenous peoples as reflected by the right to traditional knowledge and the right to seeds as manifestations of Indigenous peoples' sciences, technologies, and culture.[79] The mentioning of seeds in Article 31 of the UNDRIP should therefore be used to reflect on this issue in the context of the ITPGRFA.

6.1.5 Medicines

The next item on the list refers to medicines, thus appealing to the now widely acknowledged achievements of Indigenous peoples in this area.[80] 'Medicines' will cover any substances being used to treat illness or to improve health. It thus comes close to what we understand to be 'pharmaceuticals'. However, we could understand 'medicines' also to include methods of diagnostics and treatment. Such broader understanding of the term could be advised with a view to Article 24, paragraph 1, which deals with the right of Indigenous peoples 'to their traditional medicines and to maintain their health practices', which can be understood to reflect such a wider understanding. While Article 24 safeguards the practising of Indigenous medicine, its mentioning in context of the right of Indigenous peoples to manifestation of their sciences, technologies, and cultures protects the interest of Indigenous peoples to control and protect their medicines. In part, this interest is already covered by the right to traditional knowledge as discussed above. However, as far as genetic resources are used to produce pharmaceutical substances, the more general term 'medicines' and the related right of Indigenous peoples would also cover them. This can be read as another support for the claim that Indigenous peoples should be entitled to genetic resources at least in cases where it is linked to their traditional knowledge.

6.1.6 Knowledge of Properties of Fauna and Flora

The 'knowledge of the properties of fauna and flora' can be understood to include information about species, their occurrence, ecological conditions, interactions, properties, and characteristics. Such knowledge to quite some degree is already covered by the right

[78] See E Kamau, 'The Multilateral System of the International Treaty on Plant Genetic Resources for Food and Agriculture: Lessons and Room for Further Development' in EC Kamau and G Winter (eds), *Common Pools of Genetic Resources: Equity and Innovation in International Biodiversity Law* (Routledge/Earthscan 2013) 343–98.

[79] See M Tapia and B Tobin, 'Guardians of the Seed: The Role of Andean Farmers in the Caring and Sharing of Agrobiodiversity' in Kamau and Winter (n 78) 79–99.

[80] See, eg, T Swanson, 'The Existence of the Right to Traditional Knowledge in Medicinal Systems: From Hoodia to Frog Slime' (2007) 4(1) Manchester J Int'l Economic L 52–85; G Bodeker, 'Traditional Medical Knowledge, Intellectual Property Rights and Benefit Sharing' (2003) 11(2) Cardozo J Int'l & Comparative L 785–814; M Sinjela and R Ramcharan, 'Protecting Traditional Knowledge and Traditional Medicines of Indigenous Peoples through Intellectual Property Rights: Issues, Challenges and Strategies' (2005) 12 Int'l J Minority & Group Rights 1–24.

to traditional knowledge and by the mentioning of medicines. However, while these two terms cover utilitarian aspects, 'knowledge of properties of fauna and flora' is broader in the sense that it includes information which does not relate directly to potential use. While traditional knowledge and medicines represent useful knowledge and thus come close to what is called 'technology', the non-utilitarian parts of knowledge of properties of flora and fauna may be seen as 'science'. Thus, the mentioning of 'knowledge of properties of fauna and flora' is relevant particularly in view of this 'scientific' type of knowledge of Indigenous peoples. The mentioning of this category of knowledge in the context of the right of Indigenous peoples to the manifestations of their sciences, technologies, and culture is, therefore, an extension of what is already covered by other parts of Article 31.

6.1.7 Oral Traditions and Literatures and Designs

The list goes on in addressing issues which can be associated with culture, such as 'oral traditions', 'literatures', and 'designs', all three of which are closely connected to Article 11 (culture), Article 13, paragraph 1 (histories, languages, oral traditions, philosophies, writing systems, and literatures), and to the rights to traditional cultural expressions and intellectual property rights in Article 31.

6.1.8 Sports and Traditional Games

'Sports and traditional games' are particularly worth mentioning in order to highlight that they indeed can be seen as culture as witnessed by a number of UNESCO activities in this regard.[81]

6.1.9 Visual and Performing Arts and the Lack of an Explicit Mention of Music

This is also true for 'visual and performing arts'. Both of these subjects may also play a considerable role in view of commercialization. It is worth mentioning that *music* is not explicitly listed here. However, as the list is not exhaustive in character, music can still be said to be covered by Article 31, paragraph 1, first sentence, on the understanding that it is a 'manifestation of culture'.

6.2 Dimensions of the Right

The right of Indigenous peoples to their manifestations of science, technology, and culture with all the specific items listed includes the modalities of 'maintaining', 'controlling', 'protecting', and 'developing' as stipulated throughout Article 31, paragraph 1 of the UNDRIP.

6.3 Conclusion

While overlapping, to a considerable degree, with the rights to cultural heritage, traditional knowledge, and traditional cultural expressions, the right to manifestations of sciences, technologies, and cultures, with its many separate items, still serves a commendable

[81] There have even been discussions within UNESCO on the subject, resulting in a 'Preliminary report on the desirability and scope of an international charter on traditional games and sports', UNESCO Doc 33 C/59, 5 October 2005. Also, an 'international platform for the promotion and development of traditional sports and games' has been set up within UNESCO: see <http://www.unesco.org/new/en/social-and-human-sciences/themes/physical-education-and-sport/traditional-sports-and-games/> accessed 17 October 2017.

purpose in complementing and specifying the other entitlements envisaged by Article 31 of the UNDRIP.

7. The Right of Indigenous Peoples to Intellectual Property over Their Heritage, Knowledge, and Expressions

Article 31, paragraph 1, second sentence explicitly addresses a highly controversial issue, which has been a key concern in the evolution of the whole provision. It stipulates a right of Indigenous peoples to 'their intellectual property over cultural heritage, traditional knowledge and traditional cultural expressions'. Intellectual property rights, such as copyright or patent, provide authors or inventors with an exclusionary right to use their works or inventions, to exclude others, and to license such use to third parties. Such rights are based on national legislation and international rules, which provide for international protection. The right to intellectual property as stipulated by Article 31 can be seen as complementing the rights to cultural heritage, traditional knowledge, and traditional cultural expressions by adding an exclusionary entitlement, which could give Indigenous peoples effective control over the uses of their intellectual achievements on national and international markets. The right to intellectual property is related to the rights of Indigenous peoples to their identity, as explained above, and to the right to development under Article 23.[82]

7.1 Background and Context

Indigenous music and narratives, traditional designs, and styles are often used when creating movies, music, or design products. Also, a number of pharmaceuticals are based on traditional knowledge. Such use of Indigenous culture and traditional knowledge by businesses, companies, or research institutions on markets around the world often takes place without the consent of and sharing of benefits with the Indigenous peoples concerned. This neglect is due to the failure of existing intellectual property rights at national and international levels to furnish Indigenous peoples with means of effective control over the use of their intellectual achievements and of preventing third parties from claiming such protection themselves. Eventually, intellectual property protection acquired by third parties might even put into question the own proper use and marketing of Indigenous culture and traditional knowledge by Indigenous peoples themselves.

Aside from a lack of capacities, resources, and skills necessary to actively use intellectual property rights, a number of legal issues prevent Indigenous peoples from effectively making use of those rights. A major obstacle to the protection of such achievements results from the fact that most existing laws on intellectual property rights rest on the concept of an individual creation or invention, which is ill-suited to cover collective achievements and to grant collective rights. Another major issue lies in the fact that traditional knowledge in many cases may have been spread around in the larger group, leaked to third parties, or even published by third parties already. This might foreclose patent

[82] The provision obviously takes account of the fact that the existing system of the protection of intellectual property so far has not proven to be an effective remedy to prevent the misappropriation of the intellectual achievements of Indigenous peoples and to allow them to participate fairly and equitably in the use and commercialization of their achievements.

protection, as this requires novelty, which in turn presupposes that the invention has not already been disclosed. A similar problem arises in view of protecting traditional knowledge as a business secret. In addition to this, Indigenous culture often will not be covered by the definition of subject matter in copyright law. Also, traditional knowledge often fails to meet the further requirements of patentability.

This unfavourable situation has been addressed, from a human rights point of view, by the Committee on Economic, Social and Cultural Rights. In its General Comment 17 of 2005, it stated the following with a view to Article 15, paragraph 1, lit c of the ICESCR:

> With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge.[83]

As mentioned above, Article 8, lit j of the CBD has also been said to call for the effective protection of the rights of Indigenous peoples in this regard.[84]

Within the institutions and forums of intellectual property rights, the issue was already brought up in the 1960s, when the question arose over whether existing intellectual property rights would offer appropriate protection to what in those days was named 'folklore'.[85] The first tangible result of these concerns and related discussions came in the form of the adoption of a model provision for national law, which had been elaborated jointly by the WIPO and UNESCO.[86] Another step forward was the conclusion of the 1996 WIPO Performances and Phonograms Treaty, which contains explicit provisions for the protection of expressions of folklore.[87]

Later on, the WIPO also became concerned with the intellectual property implications of traditional knowledge and particularly the knowledge associated with genetic resources. Clearly, these discussions were largely inspired by the CBD and its Article 8, lit j, and related to developments in biotechnology and corresponding practice in science, industry, and commerce.[88] The issue was raised in related institutions with the aim to prevent misappropriation from 1990 onwards, when it was first tabled in the WIPO standing committee on patents. In the course of these deliberations, the WIPO established a new

[83] CESCR, General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art. 15, para. 1(c) of the Covenant), UN Doc E/C.12/GC/17 (12 January 2006) para 32.

[84] For details, see Section 4.1 above.

[85] A Lucas-Schloetter, 'Section 4, Folklore' in von Lewinski (n 48) 339–505, 370ff; see, more generally, WIPO, *Intellectual Property and Traditional Cultural Expressions / Folklore*, WIPO Publication No 913(E) (no date); WIPO, *Minding Culture—Case Studies on Intellectual Property and Traditional Cultural Expressions, prepared by Ms. Terri Janke* (WIPO 2003).

[86] UNESCO/WIPO, Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Forms of Prejudicial Action, 1982 (Geneva 1985), <http://www.wipo.int/wipolex/en/text.jsp?file_id=184668> accessed 17 October 2017.

[87] 20 December 1996, 2186 UNTS 203. Article 2 reads: '(a) "performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or *expressions of folklore*' (emphasis added).

[88] See WIPO, 'Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions—Overview' (Geneva 2015), <http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf> accessed 17 October 2017; WIPO, The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Background Brief No 2, <http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf>, accessed 1 February 2018.

body, distinctly tasked with discussing issues of genetic resources, traditional knowledge, and the now so-called 'traditional cultural expressions'—the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC). In 2000, negotiations were initiated within this Committee on three different international instruments dealing with folklore (later on replaced by the term 'traditional cultural expressions'), traditional knowledge, and genetic resources with the aim of establishing a system of *sui generis* protection.[89]

7.2 Nature and Subject Matter

The right of Indigenous peoples to their intellectual property over their cultural heritage, traditional knowledge, and traditional cultural expressions at hand here needs clarification.

First, this concerns the nature of that right. As just mentioned, 'intellectual property' can be understood as a general term for a number of special rights, such as copyright and patents. Each of these rights is treated in specific pieces of legislation, such as patent or copyright acts and specific international agreements, such as the Paris Convention, the Revised Berne Convention, and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. This legislation and these agreements define protectable subject matter, set out further requirements for protection, and—above all—form the legal base for the individual entitlement. Article 31 does not contain such details. Nor does it embody a readily available and distinct intellectual property entitlement. However, it can be considered to contain a more general claim, which may inform the application, amendment, and further development of national and international rules on intellectual property.

Second, questions arise in view of the subject matter covered by the right. In view of 'intellectual property over cultural heritage', this may raise concerns, as cultural heritage as such can be deemed to be inalienable. However, as mentioned above, 'cultural heritage' can also be understood as a collective term comprising the manifold objects and manifestations of culture, and thus as a simple reference to the concrete matters and items which in reality represent such heritage. Seen this way and focusing on particular items, the reference to cultural heritage can, accordingly, be understood to simply define the number of objects or practices which are covered.

7.3 Legal Effect and Dimensions of Protection

The right to intellectual property has a number of legal effects at community, national, and international levels. At community level, it entails a right of Indigenous peoples to establish or maintain a proper system of intellectual property rights themselves.

At the national and international levels, the right protects Indigenous peoples with regard to the few entitlements they may enjoy. It furthermore has to be taken into account in the application and interpretation of respective laws and treaty provisions. Also, it can be said to call on States to adapt their laws, where necessary, and initiate and promote the adoption and establishment of new international agreements.

[89] Stoll and von Hahn (n 48) 37.

7.4 National Legislation

At the national level, there is a large amount of potentially pertinent legislation with a view to the present context. A database on legal texts relevant to traditional knowledge, traditional cultural expressions, and genetic resources provided by the WIPO[90] actually lists 114 laws on traditional cultural expressions.[91] Mostly, these laws relate to copyright and provide for a copyright-type protection of 'folklore'. They define this subject matter and in various degrees of specificity provide for further details. The record of the database shows that legislative activities started already in the 1980s[92] and that the bulk of laws were enacted in the 1990s, with some notable recent acts of legislation to follow later on. This impressive record of legislation is a firm basis for the ongoing negotiations on an international instrument for traditional cultural expressions, which take place in the WIPO IGC and amply show that the right to these expressions as referred to in Article 31, including its intellectual property rights dimension, is already taken care of to varying degrees by a large number of national laws. The same database lists thirty-six entries for traditional knowledge. These laws are considerably more diverse and contain legislation in the context of patent law,[93] plant varieties,[94] Indigenous rights,[95] biodiversity,[96] and specific legislation on access to genetic resources[97] and law on traditional medicines.[98]

7.5 Regional Developments

The protection of the intellectual property of Indigenous peoples regading their traditional knowledge and cultural expressions has been addressed in a pioneering agreement by the African Regional Intellectual Property Organization (ARIPO). The 2010 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore[99] provides for such protection and also widely refers to the customary law of Indigenous peoples in this regard.

[90] See <http://www.wipo.int/tk/en/legal_texts/> accessed 17 October 2017.

[91] Accessed 15 December 2014. It should be noted, however, that at least one of the laws listed, namely Law No 10/88 of 22 December 1988 of Mozambique, deals specifically with cultural heritage and not with traditional cultural expressions.

[92] Colombian Law No 23 of 28 January 1982 can be considered one of the pioneering examples; see <http://www.wipo.int/tk/en/databases/tklaws/articles/article_0101.html> accessed 17 October 2017.

[93] See Botswana's Industrial Property Act, 2010, <http://www.wipo.int/wipolex/en/details.jsp?id=9602> accessed 1 February 2018.

[94] See the Malaysian Protection of New Plant Varieties Act No 634 of 2004, <http://www.wipo.int/tk/en/databases/tklaws/articles/article_0012.html> accessed 17 October 2017.

[95] See the Indigenous Peoples Rights Act of 1997 (Republic Act No 8371) of the Philippines, <http://www.wipo.int/tk/en/databases/tklaws/articles/article_0017.html> accessed 17 October 2017.

[96] See the Vietnamese Biodiversity Law, No 20/2008/QH12, 2009, <http://www.wipo.int/tk/en/databases/tklaws/articles/article_0028.html> accessed 17 October 2017.

[97] See The Ethiopian Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No 482/2006, <http://www.wipo.int/tk/en/databases/tklaws/articles/article_0009.html> accessed 17 October 2017.

[98] See the Thai Protection and Promotion of Traditional Thai Medicinal Intelligence Act, BE 2542 (1999), <http://www.wipo.int/tk/en/databases/tklaws/articles/article_0024.html> accessed 17 October 2017.

[99] Reproduced at <http://www.wipo.int/edocs/lexdocs/treaties/en/ap010/trt_ap010.pdf> accessed 17 October 2017.

7.6 Negotiations on Agreements for the Protection of Traditional Knowledge and Traditional Cultural Expressions within the WIPO

As regards the ongoing negotiations within the WIPO IGC on traditional knowledge and traditional cultural expressions, as mentioned above, the UNDRIP has been well received.[100] The negotiations on the two different instruments envisage collective entitlements and special procedures for obtaining them.

7.7 Conclusion

The right to intellectual property over cultural heritage, traditional knowledge, and traditional cultural expressions stipulated in Article 31 of the UNDRIP, as just described, can importantly inform the application and amendment of existing, and the creation of new, rules on the protection of intellectual property of Indigenous peoples with regard to culture and technology.

8. State Action and Participation (Article 31, Paragraph 2)

The second paragraph of Article 31 belongs to the group of fairly diverse UNDRIP provisions which, alongside the general rule of Article 38, deal with implementation, State action, and the participation of Indigenous peoples.

Article 31, paragraph 2 refers to the exercise of the rights of Indigenous peoples as conferred on them by paragraph 1 of the same provision and calls on States to take effective measures to recognize and protect this exercise of rights. It should be noted that, of course, the provision refers to 'States' in general and thus not only establishes an obligation for those States on whose territory the respective Indigenous peoples are situated. The kind of measures to be taken is not specified any further, so that action taken to comply with the obligation established here may include administrative, policy, and legislative measures. The provision makes use of the word 'effective', however, thus indicating that the measures have to stand a test of effectiveness. As mentioned in the above section on the 'drafting history', the addition 'including special measures' was deleted in the last round of drafting.

The provision envisages that the required State measures are taken 'in conjunction with indigenous peoples', thus employing an expression which is also used in other parts of the Declaration.[101] It should be noted, however, that a number of other provisions use the terminology 'in consultation' or 'cooperation'. The term 'conjunction' very likely indicates a narrower interaction between States and Indigenous peoples and in this way takes into consideration that Article 31, paragraph 2 is about the support of States for the exercise by Indigenous peoples of their own proper rights.

[100] See the many interventions made by WIPO members and observers, in WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Thirteenth Session, Geneva (13–17 October 2008), Report, WIPO Doc WIPO/GRTKF/IC/13/11 (30 April 2009).

[101] See: Art 11, para 2; Art 12, para 2; Art 14, para 3; Art 22, para 2; Art 27.

9. Assessment: Relevance and Impact on International Law

Article 31 of the UNDRIP covers the whole spectrum of Indigenous peoples' science, technology, and culture. It certainly is not a pure 'intellectual property' provision as it had initially been intended to be. It deserves to be highlighted that, while addressing this issue in stipulating rights of Indigenous peoples to their tradition knowledge, traditional cultural expressions, and intellectual property, the provision (together with other Articles of the Declaration) also and importantly supports and safeguards the enjoyment, use, and practice of such sciences, technologies, and cultures. It is equally deserving of mention that the Declaration clearly spells out a right of Indigenous peoples to their cultural heritage. The apparent overlap between the different rights at hand is largely due to an overlap of existing structures and concepts in existing international and national law concerning concepts such as cultural heritage and intellectual property rights.

Article 31 introduces a holistic concept of Indigenous culture and knowledge. This has implications for a large variety of legal issues, as national and international law largely separates those issues and deals with them in distinct branches of law, such as cultural heritage law, agricultural and forestry law, medical law, and intellectual property.

Article 31 takes into account a number of developments in international and national law, such as the 2003 and 2005 UNESCO Conventions, Article 8, lit j of the CBD, and legislation and negotiations in the area of intellectual property protection, which are still ongoing. In this context, Article 31 of the UNDRIP has sometimes been used as a reference to promote further progress. Certainly, and in context with other provisions of the UNDRIP, Article 31 can be said to reflect existing, or to promote the emergence of, new rules of customary international law. This clearly is the case in view of rights of Indigenous peoples to maintain and develop their culture and knowledge. Likewise, Article 31 can be seen as one element to justify a claim of Indigenous peoples to participate in relevant decisions and in view of their right to a prior informed consent. Possibly, in some way or another, a rule might emerge to that effect, that third parties are barred from applying for, obtaining, and exercising intellectual property rights which are based on traditional knowledge or traditional cultural expressions of Indigenous peoples and obtained or used without their prior and informed consent.

Chapter 12. Media

Article 16

Daniel Joyce

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

1. Introduction

This contribution analyses Article 16's protection of the right to Indigenous media, and to the participation of Indigenous peoples in mainstream media. This dimension of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is significant for a number of reasons, but principally because it breaks new ground in conceptualizing 'media rights' not so much in terms of the traditional approach to freedom of expression or even media freedom, but rather in terms of the ability of rights-holders to participate in mainstream media, and also to create and participate in Indigenous media. Thus, questions of access, institutional frameworks, development concerns, and equity, which hover in the background of freedom-of-expression provisions, are brought front and centre. This is a right *to* media in the richer sense.

1.1 Relevance and Importance of the Issue Area

Article 16 is crafted as follows:

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately-owned media to adequately reflect indigenous cultural diversity.

This is an innovative and strong provision. Strong because it recognizes the significance of the media and Indigenous media in particular in broader systemic and human rights terms. To be able to claim and debate other rights within the UNDRIP and more broadly within the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), Indigenous people will need to claim the rights associated with freedom of expression—its facilitative role in the articulation of rights discourse more broadly being familiar—but also to do so within a mainstream media which has underreported and underrepresented their concerns

historically.[1] Thus, the approach is two-pronged. Where freedom of expression is couched in terms of the right to express and to receive communication and information, Article 16 is concerned with righting systemic discrimination in terms of media availability, access, language, and institutional development of Indigenous community media. This is an especially innovative and no doubt controversial aspect, for it engages questions of diversity and access at the level of State and private media. It is provocative in that it implicitly calls into question the capacity of freedom of expression protection elsewhere to fully protect Indigenous people and their ability to access mainstream media and develop their own media. As will be developed further below, there is significant overlap with freedom of expression jurisprudence and also a number of other standards relating to the media—many of them ill-fated, such as the right to communicate, UNESCO's Mass Media Declaration, and the media and ICT development-related discourse of the World Summit on the Information Society (WSIS) process conducted by the International Telecommunication Union (ITU) in the context of technological change and the digital divide.

In one sense, by focusing on access and infrastructure, the provision might appear to be quite old fashioned in its approach, but in fact such questions remain prominent in efforts to translate freedom of expression online and into digital contexts. Access and participation lie at the heart of the further development of media and communication-associated rights and have been emphasized as a part of the digital rights movement.[2] Another forward-thinking dimension is revealed in the second part of the provision, which conceives of Indigenous rights to media in terms of both the State and privately owned media. This also draws into view questions of media responsibility and especially corporate social responsibility, which is another developing area of human rights law.

The media matters for a range of reasons, some speech-related and others more broadly connected with public sphere communication's role in democracy, self-determination, autonomy, and as a check on State power. The economist Amartya Sen has written of a role for the press in several key dimensions—in free speech terms, in the dissemination of information, in protecting the interests and rights of the 'neglected and disadvantaged', and in the formation of values and our development of a system of justice.[3] Sen writes of the need to shift entrenched media practices and power: 'The many-sided relevance of the media connection also brings out the way institutional modifications can change the practice of public reason.'[4]

A more diverse media can enrich and empower, it can connect and critique, but we also know that media representations of and opportunities for Indigenous peoples have long been problematic and perversely can be traced to practices of racism, disempowerment,

[1] Graham and Wiessner argue that the 'declaration is consistent with well-established international norms on such matters as autonomy, cultural integrity, and land rights, but it is formulated within the historical and contemporary experiences of Indigenous peoples'. LM Graham and S Wiessner, 'Indigenous Sovereignty, Culture, and International Human Rights Law' (2011) 110(2) South Atlantic Q 403, 406. See further E Stamatopoulou, 'Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples' in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011) 387–89.

[2] See <https://webwewant.org/>, accessed 11 January 2018; D Joyce, 'Internet Freedom and Human Rights' (2015) 26(2) European J Int'l L 493.

[3] A Sen, *The Idea of Justice* (Penguin Books 2010) 335–37. [4] ibid 337.

and displacement.[5] It is in this historical context that an attachment to the notion of Indigenous media by and for Indigenous peoples gains such focus along with wider claims to participation in mainstream political and cultural life.

Here, a 'right to media' is associated with speech, language, education, and cultural rights and it is fitting that Article 16 follows Articles 14 and 15, which deal with issues of education, public information, prejudice, discrimination, and tolerance. The flipside of speech or media-related rights are those directed to protection against racial discrimination and incitement.

The significance of the media for Indigenous peoples also connects with a grand theme and controversy surrounding the UNDRIP, its negotiation, and its realization—namely the extent to which Indigenous self-determination could be guaranteed or at least developed through the UNDRIP mechanism. Megan Davis notes that for 'indigenous peoples, the right to self-determination is the cornerstone of the Declaration'.[6] Karen Engle has powerfully critiqued the 'fragile architecture' of the UNDRIP and pointed to the problems of 'reification' of culture, compromise, and the sidelining of a more radical understanding of self-determination in place of the 'individualistic and liberal form of human rights'.[7] Engle explores the ways in which debate over Article 3 of the UNDRIP and its watering down illustrate the compromise involved. Engle points to the 1993 draft as containing reference to 'areas over which indigenous peoples would have control', including media.[8] This was subsequently changed and this draws into view the significance of Article 16 in terms of self-determination and autonomy. Nevertheless, it is hard to escape Engle's insight that 'something has been lost in the compromise ... external forms of self-determination are off the table for indigenous peoples, and human rights will largely provide the model for economic and political justice for indigenous peoples.'[9] As Kathy Bowrey reflects:

> the UNDRIP recognises that more than "universal" civil and political rights are needed because the Aboriginal self is constantly in tension and bound intimately to the colonial other, facing the existential horror of a placement between subject and object, self and other ... However, it is not really clear that a different state of Indigenous being in relation to the power of the state is actually on offer.[10]

If the UNDRIP can be critiqued in terms of its pragmatism regarding the fundamental question of self-determination, it might explain the necessity of a provision such as Article 16, given the media's central role (and that of freedom of expression) in the fulfilment of autonomy. It is no surprise here that a fundamental traditional justification for free speech has been autonomy and self-determination related. Eric Barendt, in exploring the broader arguments made for free speech and in analysing the various interests in speech, considers the 'theory of free speech [which] sees it as an integral aspect of each individual's

[5] See further on the variety of ways of appreciating 'the function of the media in shaping political life', along with its potential for good and ill. S Marks and A Clapham, *International Human Rights Lexicon* (Oxford University Press 2005) 237–40 and their chapter on 'Media' more generally.

[6] M Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 Melbourne J Int'l L 439, 458.

[7] K Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 European J Int'l L 141, 142–43.

[8] ibid 145. [9] ibid 147.

[10] K Bowrey, 'Law and Its Confinement: Reflections on Trevor Nickolls' *Brush with the Lore*' (2011) 20 Griffith L Rev 729, 738.

right to self-development and fulfillment'.[11] Though Barendt also points to the harms that can come from speech (as in privacy, defamation, or offensive speech), and notes that 'it is far from clear that unlimited free speech is necessarily conducive to personal happiness or that it satisfies more basic human needs and wants than, say, adequate housing and education', the role which freedom of speech and communicative power through media plays in terms of self-fulfilment, and the creation and functioning of public sphere and participatory rights should not be underestimated. This is why Article 16 matters.[12]

It seeks to address historical injustice and to create the conditions for future self-fulfilment and even self-determination and does so through the lens of communal as well as individual identity. Free speech is highly individuated, whereas a right to the media in the terms of Article 16 is not. And yet despite the claims made for the UNDRIP's pioneering recognition of collective rights, critics remind us that this recognition has also entailed limitation and attempts to paper over disagreement.[13] It is early days for the UNDRIP and these criticisms remain a vital warning against the well-intentioned embellishment of its provisions.[14] As Bowrey cautions, '[designating] law as soft law indicates a degree of indeterminacy as to the authority of any Indigenous interpretive community that seeks to assert rights under the instrument.'[15] Whilst this cuts against the hope held by many for the UNDRIP's further development and recognition, such caution is necessary in assessing the text's significance and its potential as an authoritative international instrument. This also helps to keep domestic contexts for its use and the challenge of domestic implementation within view, recognizing that provisions like Article 16 are directed at practical translation of the broader aspiration of self-determination within the limitations of those contexts and through the development of 'indigenous institutions'.[16]

1.2 Historical Context of Standards for the Media

Freedom of expression has been the dominant normative framework for media 'protection' and 'regulation' at the international level within recent history, drawing in turn on the significance of freedom of speech to the Enlightenment project and liberal philosophical approaches to democratic government.[17] Freedom of expression is linked to democracy and is seen as facilitative of the human rights system more broadly. Consequently, its protection has been a significant ingredient of modern constitution-making and at the international level is exemplified by Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the ICCPR.

The UDHR contains a clear protection for freedom of expression. Article 19 states:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

[11] E Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005) 13.

[12] The only significant and sustained scholarship to date on Art 16 is LM Graham, 'A Right to Media?' (2010) 41 Columbia Human Rights L Rev 429.

[13] See esp Engle (n 7).

[14] Megan Davis notes that: 'It is an over-elaborated text and, in some ways, expands upon the content of rights more broadly than any declaration that exists in international law' (Davis (n 6) 465).

[15] Bowrey (n 10) 744, cf 730.

[16] ibid 730, 740; Davis (n 6) 461–62.

[17] See further Barendt (n 11) 18–21.

This is the foundation for freedom of expression and media freedom frameworks in regional and domestic contexts. The text of Article 19 of the UDHR is focused upon expression and opinion, although this is to be achieved 'through any media and regardless of frontiers'. The later Article 19 within the ICCPR draws into view the possibility for limits to be placed on expression, most notably in the context of hate speech, but also more commonly defamation and national security. This formula is replicated elsewhere in regional human rights frameworks as, for example, with Article 10 of the ECHR.

UNESCO's activities have also engaged with issues of media regulation and access, although this has been controversial.[18] The UNESCO Mass Media Declaration (1978),[19] along with efforts to develop a 'right to communicate' in the context of a New World Information and Communications Order, provide important, if controversial, examples of an approach to media regulation, with an emphasis less on freedom of expression and more on recognition of the cultural and political power of the mass media—for good and for ill.[20] The development of these principles was shaped in part by the Cold War and reflected concerns with cultural imperialism and the increasing reach of global media technology with the development of satellites and US–Soviet tensions over conflicting, mediated public diplomacy. While the Declaration reflects the geo-political and ideological conflict of the era, its attention to more expansive themes than traditional human rights protections for expression is of interest with regard to Article 16 of the UNDRIP.

Although couched in the language of human rights and of peace and security, the UNESCO Mass Media Declaration is attentive to notions of media diversity, access, and empowerment. Article II(2) and (3) states that:

> 2. Access by the public to information should be guaranteed by the diversity of the sources and means of information available to it, thus enabling each individual to check the accuracy of facts and to appraise events objectively. To this end, journalists must have freedom to report and the fullest possible facilities of access to information. Similarly, it is important that the mass media be responsive to concerns of peoples and individuals, thus promoting the participation of the public in the elaboration of information.
>
> 3. With a view to the strengthening of peace and international understanding, to promoting human rights and to countering racialism, apartheid and incitement to war, the mass media throughout the world, by reason of their role, contribute to promoting human rights, in particular by giving expression to oppressed peoples who struggle against colonialism, neo-colonialism, foreign occupation and all forms of racial discrimination and oppression and who are unable to make their voices heard within their own territories.

Article IV focuses on the role of the media in educating young people and Article V emphasizes the need for balance and diversity within the media. Article VI recognizes the reality of inequality of access to media and information within developing countries; and Article X(3) states that:

[18] See Graham (n 12) 449, 458 (addressing also aspects of UNESCO's Universal Declaration on Cultural Diversity (2001), esp Art 6).

[19] UNESCO, 'Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War' (28 November 1978), <http://portal.unesco.org/en/ev.php-URL_ID=13176&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed 17 October 2017.

[20] See further K Nordenstreng with L Hannikainen, *The Mass Media Declaration of UNESCO* (Ablex 1984).

it is necessary that States facilitate the procurement by the mass media in the developing countries of adequate conditions and resources enabling them to gain strength and expand, and that they support co-operation by the latter both among themselves and with the mass media in developed countries.

A more recent, and equally controversial, effort to engage more meaningfully with concerns regarding development and access to media in the context of ICT is the ITU-led WSIS process, which has resulted in soft law standards and similarly acrimonious debate over the prospect of international media regulation, in this context, centring on the regulation of the internet. Among a range of commitments and principles, which have been articulated, Principle 55 of the Geneva Declaration of Principles is of particular interest as it directly concerns the media and builds upon preceding principles concerned with the importance of guaranteeing cultural diversity within an information society.[21] Principle 55 states:

55. We reaffirm our commitment to the principles of freedom of the press and freedom of information, as well as those of the independence, pluralism and diversity of media, which are essential to the Information Society. Freedom to seek, receive, impart and use information for the creation, accumulation and dissemination of knowledge are important to the Information Society. We call for the responsible use and treatment of information by the media in accordance with the highest ethical and professional standards. Traditional media in all their forms have an important role in the Information Society and ICTs should play a supportive role in this regard. Diversity of media ownership should be encouraged, in conformity with national law, and taking into account relevant international conventions. We reaffirm the necessity of reducing international imbalances affecting the media, particularly as regards infrastructure, technical resources and the development of human skills.

Again, while acknowledging the dominance of the human rights approach to freedom of the press and of information, the Declaration goes further by pointing to the need for diversity of media ownership and to overcome infrastructural barriers to access. Such concerns were also recognized in the era of the New World Information and Communications Order associated with the UNESCO Mass Media Declaration and articulated in terms of a 'right to communicate'.[22] Along with these historical and contemporary antecedents, there are further provisions in other related instruments which have relevance for Article 16 of the UNDRIP.

1.3 Overlap with Provisions Relating to This Issue in Other Instruments

Article 19 of the ICCPR guarantees:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

[21] WSIS, Geneva Declaration of Principles, WSIS-03/GENEVA/DOC/0004 (12 December 2003), <http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf> accessed 20 July 2015.

[22] Joyce (n 2) 498–500.

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Freedom of expression is a complex and contested area both in philosophical and juridical terms. However, the terms of Article 19 of the ICCPR best illustrate how international human rights law seeks to protect and regulate expression and opinion. The provision begins by declaring in Article 19(1) and (2) that the right 'to hold opinions without interference' and 'to freedom of expression' belong to 'everyone'.

Article 19(2) gives further texture to the meaning of freedom of expression, by stipulating that the right 'shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'. There are a number of important aspects to note here, namely that freedom of expression is a two-way process including dissemination and reception, that what is at stake is the free flow of information and ideas, without regard to boundaries such as jurisdiction, and that the form of expression is not bounded, but rather encompasses all media and expressive conduct, including artistic expression and speech.

While freedom of expression jurisprudence has tended to give particular protection to political expression, and has safeguarded the role of the news-generative media in this regard, it is not limited to media-related expression and can extend to commercial and other forms of expression. Equally, it is of significance for both public and private media, and professional and citizen media. Importantly for the digital era, expression is to be protected regardless of format, and Article 19 can be seen as usefully technology-neutral.[23]

The UN Human Rights Committee (HRComm) has generated a rich jurisprudence regarding Article 19 and has issued an updated General Comment 34 which helpfully extends and summarizes analysis of the contours of freedom of expression protection, notably attempting to bring Article 19's interpretation in line with the developments of the internet era. The Committee notes that freedom of expression is foundational for democracy and necessary to ensure 'the promotion and protection of human rights'.[24] As Sarah Joseph and Melissa Castan summarize, cases before the Committee have covered areas including 'communications on freedom of information, defamation, commercial speech, holocaust denial, as well as restrictions on speech due to national security, public order, and public morals'.[25] The wide-ranging applicability of freedom of expression as a conceptual category is part of its significance and appeal to claimants, but the breadth of its scope[26] can also obscure the specificity of certain interests which may not be fully covered by freedom of expression, or which may overlap with it and other categories of rights protection. Protest is an example—for in some sense its protection is often sought in terms of freedom of expression, assembly, and association, and yet none of these categories fully covers what is ultimately at issue.

[23] HRComm, General Comment 34: Article 19: Freedoms of Opinion and Expression, UN Doc CCPR/C/GC/34 (12 September 2011) paras 14, 15, noting the digital context for freedom of expression and the importance of diverse and independent media to protect the rights of 'ethnic and linguistic minorities'.

[24] ibid paras 2 and 3.

[25] S Joseph and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013) 644.

[26] HRComm, General Comment 34 (n 23) paras 11 and 12.

Equally, there are often attempts to claim freedom of expression as a shield or defence for matters which are more usefully covered in areas of offensive speech, incitement, propaganda, and discrimination.[27] There is also some conceptual complexity regarding the failure to protect freedom of expression positively as opposed to negatively, and in part this may reflect the traditional approach of the common law which has viewed speech as a residual liberty.[28] Case law has tended to deal with questions regarding offensive speech by way of an abuse of the right of freedom of expression, and given the overlap with Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, Joseph and Castan note that the Committee has not yet 'confirmed whether article 20 is justiciable'.[29]

Article 19 is accompanied by Article 20 of the ICCPR, which prohibits propaganda and incitement:

> Article 20
>
> 1. Any propaganda for war shall be prohibited by law.
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The Committee notes optimistically that 'Articles 19 and 20 are compatible with and complement each other.'[30] In addition, hate speech laws at the domestic level largely regulate offensive speech in terms of vilification and discrimination. However, it is significant to note that some domestic traditions, especially those of the United States, are more tolerant of harmful speech. Across these differing approaches it is clear that 'the costs of hate speech ... are not spread evenly across the community that is supposed to tolerate them.'[31]

It is important to note that, except in some domestic contexts, such as that of the United States, where the US Constitution's First Amendment is stated without exception and thus is expansively protected, freedom of expression jurisprudence more broadly is supportive of the notion that freedom of expression may be limited in certain contexts.[32] Indeed, even within the US tradition, limitations are placed on speech, and philosophically speech is considered to be protected to the point of its engagement with, or production of, harm or violence. These questions involve controversy, and there are domestic constitutional and regional variations in the strength of protection offered to expression. These, and the tools of balancing and proportionality,[33] are, however, accepted and familiar in human rights jurisprudence more broadly and can result in freedom of expression being 'balanced' as against other concerns such as freedom of religion, offensive speech and incitement, national security, privacy, the protection of reputation, and the administration of justice. This in part derives from broader concerns with the 'indivisibility' and supposed commensurability of rights.

[27] A potent example is the Australian case of *Eatock v Bolt and Another* (2011) 197 FCR 261. For further commentary, see K Gelber and L McNamara, 'Freedom of Speech and Racial Vilification in Australia: "The Bolt Case" in Public Discourse' (2013) 48 Australian J Political Science 470.

[28] See further A Kenyon, 'Assuming Free Speech' (2014) 77 Modern L Rev 379.

[29] Joseph and Castan (n 25) 644.

[30] HRComm, General Comment 34 (n 23) para 50.

[31] J Waldron, 'Boutique Faith' (2006) 28(14) London Rev Books 23.

[32] The classic US case on the First Amendment is *New York Times v Sullivan* (1964) 376 US 254. A useful contrast in the European human rights context is *Handyside v United Kingdom* (1976) 1 EHRR 737.

[33] HRComm, General Comment 34 (n 23) para 34.

Article 19 states that freedom of expression 'carries with it special duties and responsibilities ... [and] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary'. The restrictions must be proportionate and focused on the following aspects set out in Article 19(3): 'the rights or reputations of others' and 'the protection of national security or of public order (ordre public), or of public health or morals'. But any such restrictions 'may not put in jeopardy the right itself'.[34]

It is notable that Article 16 of the UNDRIP is framed in largely positive terms and comes without specific mention of these limits or obligations to balance such a right 'to media' with other values and/or rights. It is less directly concerned with opinion and expression and more concerned with the establishment of and access to Indigenous media. Indeed, Article 16(2) of the UNDRIP seeks to ensure that both State and private media 'reflect indigenous cultural diversity', and freedom of expression is couched as a potential limit in itself as regards this in relation to private media, lest the State take too heavy-handed an approach to their regulation.[35] Ideas of freedom of expression and speech, then, are strongly connected with Article 16,[36] but not always in ways which might otherwise be anticipated. The Article goes further than translating Article 19 of the UDHR and of the ICCPR for an Indigenous context. Although the familiar political theoretical justifications for freedom of expression—in terms of autonomy and self-fulfilment, participation, truth-seeking, and as a check on the State—resonate with the broader theme of cultural and political self-determination, there is also resonance with cultural and language rights, non-discrimination, education, and development. The roles of UNESCO with regard to regulation of the media and, more recently, of the ITU in developing soft law standards in the context of the WSIS are, as discussed above, of significance here. So, too, are several areas within the ICESCR protections.

Of particular significance within ICESCR is Article 15 which deals with cultural, scientific, and intellectual property-related protections regarding the right to take part in cultural life. It and Article 27 of the ICCPR, which protects language rights, are significant for media-related interests.[37] As Jacqueline Mowbray argues, provisions such as Article 16, with its emphasis on Indigenous language, play a role in highlighting the importance of language rights as regards matters of inclusion, identity, and diversity.[38]

A further international human rights treaty with significance is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). It is relevant in terms of its broader goals to eliminate racism and to protect equality and ensure non-discrimination in terms of human rights protections more broadly. In addition, the CERD addresses the prohibition of racial discrimination in relation to the right to freedom of expression and opinion and the right to equal participation in cultural activities within Article 5(d)(viii) and (e)(vi). Article 7 is explicit in its focus on the institutional and political significance of culture and information, stipulating that:

[34] ibid para 21.

[35] Note here that the HRComm also sees freedom of expression protection in Art 19 of the ICCPR as extending to protecting against media concentration and as being addressed to both public and private media. HRComm, General Comment 34 (n 23) paras 40, 41.

[36] For a useful overview of complementary regional frameworks, see Graham (n 12) 469–72.

[37] See further J Mowbray, *Linguistic Justice: International Law and Language Policy* (Oxford University Press 2012) ch 2 ('Language in Culture and Media: Complexity and Change').

[38] ibid 70–87.

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

Another international treaty which shares some common ground with Article 16 of the UNDRIP and its treatment of and focus upon the media is the Convention on the Rights of the Child (CRC). The CRC also recognizes the significance of the mass media in realizing its broader goals, with Article 17 specifically addressing the issue in the following terms:

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
(c) Encourage the production and dissemination of children's books;
(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Likewise, the Convention on the Rights of Persons with Disabilities (CRPD) goes further than traditional freedom of expression protections in Article 21,[39] which addresses freedom of expression and opinion, and access to information:

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in Article 2 of the present Convention, including by:

(a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
(b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
(c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
(d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
(e) Recognizing and promoting the use of sign languages.

[39] See also CRPD Art 30, which focuses on access to cultural life, including forms of media access.

An interesting further series of questions might relate to the lack of explicit connections made between Article 16 and a broader 'digital rights' agenda of translating freedom of expression and media-related rights into online contexts. The development-focused context for the WSIS process makes more explicit connections with ICT, and recent efforts to re-articulate freedom of expression and privacy in light of the internet and the digital age point to the difficulties associated with doing so, but also to the significance of the attempt at translation.[40] The drafting history outlined below does not highlight that the digital rights agenda was a major influence on the drafting of Article 16, but given the significance of digital media and the internet, this may remain a challenge in its future interpretation and application.[41]

Nevertheless, as noted above, along with significant overlap with key international provisions relating to a range of areas including freedom of expression and racial discrimination, Article 16 can conceptually be seen as having a number of distinctive concerns. There is, of course, no elaborated jurisprudence as yet regarding the provision, but the following aspects should be highlighted.

First, Article 16(1) emphasizes that Indigenous peoples have a right to establish their own media. While perhaps less controversial in an era of digital self-publishing and blogging, as noted above, this significantly extends freedom of expression jurisprudence in the sense that it goes further than protecting the right to freedom of expression and directs such a right in the Indigenous context to creating Indigenous media. It is in this aspect principally that Article 16 is a right *to* media. There is, for some, a distinctive tradition of freedom of expression—termed 'media freedom'—which would see the media as having a particular and distinctive claim to freedom of expression protection, but this does not go so far as establishing the right for a particular group such as Indigenous peoples to create their own media. Such a right would be protected to a degree by freedom of expression, but with less emphasis on the affirmative creation and development of such media.

Second, Article 16(1) configures such a right to media as being linked to Indigenous language media. Again, this extends traditional freedom of expression jurisprudence and points to language and cultural rights, as noted in Lorie Graham's and Amy Van Zyl-Chavarro's contribution to this volume, which reminds us of the significance of such Indigenous language media in the context of education.[42]

Third, Article 16(1) stipulates that Indigenous peoples have the right to 'access all forms of non-Indigenous media without discrimination'. This is then a right to one's own media and also to the media more broadly. This aligns with the element of freedom of expression, which emphasizes the importance of access to information, and also with discrimination protections outlined above, but again it is distinctive for emphasizing that full participation in media not only involves the right to one's own media, but access to all media. There are development, language, and educational aspects which may arise with regard to fulfilment of this aspect of the right. And, again, the role played by digital media and the internet in fulfilling such access will be significant.

[40] Joyce (n 2); D Joyce, 'Privacy in the Digital Era: Human Rights Online?' (2015) 16(1) Melbourne J Int'l L 270.

[41] See, eg, the attempt to do so for freedom of expression; HRComm, General Comment 34 (n 23).

[42] See further Chapter 13 on education, this volume.

Fourth, Article 16(2) requires States to 'take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity'. This links to the protection of culture more broadly articulated elsewhere in the Declaration and discussed in Alexandra Xanthaki's contribution to this volume.[43] It is also reflective of the commitment within freedom of expression jurisprudence, and comparative broadcasting regulation more broadly, to ensure that this equates with broadcasting pluralism and diversity where possible.[44] As the HRComm notes regarding Article 19 of the ICCPR:

> As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media ... States parties should ensure that public broadcasting services operate in an independent manner.[45]

However, here again Article 16(2) goes further than freedom of expression jurisprudence by focusing upon State-owned media in the specific text of the provision, unlike other freedom of expression guarantees such as Article 19 of the ICCPR, for which the State-owned media have both represented a threat to and a form of protection for freedom of expression, depending on political systems and ideological contexts.

As if in recognition of this aspect, fifth and finally, Article 16(2) requires that States 'without prejudice to ensuring full freedom of expression, should encourage privately-owned media to adequately reflect indigenous cultural diversity'. In some sense, this attempts to balance the earlier explicit focus on State-owned media, recognizing, as does freedom-of-expression jurisprudence, the public and private contexts for the media, and their full spectrum as being necessary for ensuring a diverse and free media. As the HRComm notes with regard to Article 19 of the ICCPR, 'private media must not be put at a disadvantage compared to public media in such matters as access to means of dissemination/distribution and access to news'.[46] But equally, ensuring freedom of expression in the context of the variant media landscape means being attentive to media concentration or the dominance of either public or private media.

Nevertheless, there is a balance to be achieved here, given the broader protective and non-regulative character of freedom of expression as regards the media, especially when it is heralded as a 'watchdog', and as being necessary in democratic terms. Article 16 by contrast, though with some qualification regarding freedom of expression, is again more direct in its stipulations regarding the need for effective measures to be taken to protect Indigenous cultural diversity in both State-owned and private media contexts. This goes much further than Article 19 of the ICCPR, or similar regional human rights frameworks. And clearly in all five elements alluded to above, Article 16 is directed at Indigenous media rights specifically, something not replicated elsewhere. The interpretive challenge will be to preserve and even extend these distinctive features of Article 16, while also drawing on overlapping jurisprudence and standards.

[43] See further Chapter 10 on culture, this volume.

[44] L Hitchens, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation* (Hart 2006).

[45] HRComm, General Comment 34 (n 23) paras 14 and 16.

[46] ibid para 41.

2. Overall Drafting History of Article 16

As discussed above, Article 16 has several distinct aspects. Article 16(1) emphasizes the right of Indigenous peoples to 'establish their own media in their own languages'—akin to a right to Indigenous media. But Article 16(2) goes further and establishes that Indigenous peoples have the right 'to have access to all forms of non-indigenous media without discrimination'—emphasizing a second element: the right to participation of Indigenous peoples in mainstream media. Article 16(2) further provides that States shall 'take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity' and should 'encourage privately-owned media' to do so, though 'without prejudice to ensuring full freedom of expression'. In this section, the development of the Article through the drafting and consultation process will be examined, before turning to consider whether in fact the Article as finalized represents a shift in thinking about media and human rights in its emphasis on a 'right to media' rather than 'freedom of expression'.

2.1 The Right to Indigenous Media along with the Right to Participation of Indigenous Peoples in Mainstream Media

The initial draft of what was then operative paragraph 16 of the Draft Declaration on 8 June 1993, developed in the context of the Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities, and submitted by Chairman-Rapporteur Erica-Irene Daes, simply stated: 'Indigenous peoples have the right to the use of and access to all forms of media in their own languages.'[47] At this stage, then, Article 16 was focused on questions of use, access, and overcoming the barrier of language and its exclusion in mainstream media. The second aspect of a right to participation in media was emphasized and the first aspect concerned with a right to distinctive and Indigenous forms of media was not directly articulated. This important first aspect began to take shape in the Draft Declaration of 23 August 1993 as agreed upon by the members of the Working Group on Indigenous Populations in their work in the area for the Sub-Commission. In that draft, the then Article 17 stated:

> Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.
>
> States shall take effective measures to ensure that state-owned media duly reflect indigenous cultural diversity.[48]

This stronger form of a right to their own media in their own languages and the right to equal access to non-Indigenous media is similar in intent if not final form to Article 16, and further complemented by the requirement of States to ensure that State-owned media, though not yet private media, reflect Indigenous cultural diversity. Thus, Article 17 as at 23 August 1993 already captured the essence of the two core conceptual planks of the current Article 16. This was recognized on 5 April 1994 in the technical review of the Draft Declaration where three issues were highlighted: 'the right of indigenous peoples to establish their own media; to have access to all forms of non-indigenous media; and to

[47] Draft Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/Sub.2/1993/26 (8 June 1993) operative para 16.

[48] Draft Declaration as Agreed upon by the Members of the Working Group at Its Eleventh Session, UN Doc E/CN.4/Sub.2/1993/29/Annex I (23 August 1993) Art 17.

have indigenous cultural diversity reflected in State-owned media'.[49] It was noted at this early stage that then Article 17 shared common ground with Article 17 of the CRC and also in its conjunction with Article 29 of the CRC.

In November 1995, further information was received as part of the consideration of the Draft Declaration under the auspices of the Open-Ended Inter-Sessional Working Group on the Draft. The International Postal Union suggested that 'the right to receive and dispatch correspondence' be added to the rights mentioned in the then draft Article 17.[50] The United States suggested that:

> [The] declaration could be made more consistent with international law if the provision in question were to call upon States to take certain measures in appropriate circumstances, rather than purport to create new rights. For example, Article 17, suggesting certain rights of control over access to and content of media, would be consistent with international law if reformulated as a provision calling upon States to take steps to promote diversity of ownership and programming.[51]

This concern reflects an underlying commitment to non-discrimination and individual liberty, especially in the context of freedom of expression, and the tensions created in the drafting process by trying to move beyond such a model and into more prescriptive and creative territory. This was reflected in the suggestion that certain Articles like Article 17 'should be redrafted to ensure that these measures do not impinge upon the human rights of individuals'.[52] In a subsequent report of the Working Group, now chaired by José Urrutia, it was noted that some governments had expressed concerns 'that the language of article 17 is over broad', implying 'a legal responsibility to regulate media so as to provide any group with access'.[53]

The Working Group later reported support for Article 17 as it then was from a variety of States, including Estonia, New Zealand, Brazil, Canada, Sweden, Australia, the United States, Bolivia, and Malaysia; however, some of these States suggested amendments.[54] For example, Australia and the United States had concerns regarding the term 'access'.[55] Malaysia and Japan had concerns regarding the mandatory language used regarding 'effective measures'.[56] Chile indicated that the 'language of article 17 should be revised', and France, while supportive of freedom of expression more broadly, expressed a view that it should be 'universally guaranteed rather than only for indigenous peoples'.[57] In contrast, representatives from a broad range of Indigenous civil society organizations 'expressed strong support' for the draft and for its adoption in its current form.[58] At the end of 1997, the Working Group had held 'nine informal meetings on the principles underlying articles 15, 16, 17 and 18' with the Chairman José Urrutia noting 'that there

[49] Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, Note by the Secretariat, UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994) Art 17, para 62.

[50] Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, Information Received from Intergovernmental Organization (International Postal Union), UN Doc E/CN.4/1995/WG.15/3 (10 November 1995) para 1.

[51] Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, Information Received from Governments (United States of America), UN Doc E/CN.4/1995/WG.15/2/Add.1 (13 November 1995) para 7.

[52] ibid para 12.

[53] Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, UN Doc E/CN.4/1996/84 (4 January 1996) para 77.

[54] Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, UN Doc E/CN.4/1997/102 (10 December 1996) paras 153–68.

[55] ibid paras 164, 166. [56] ibid paras 161, 168. [57] ibid paras 157, 159.

[58] ibid paras 170–72.

was broad consensus for the principles underlying those articles'.[59] There was strong support from Indigenous organizations attending the sessions of the Working Group and some NGOs suggested further strengthening of the draft Article.[60]

The following year, consultations continued, resulting in 'an informal paper in which different governmental positions pertaining to [article 17 were] ... reflected'.[61] Chairman-Rapporteur José Urrutia noted that this paper was viewed by the Indigenous caucus with 'grave concern' as Indigenous representatives 'had not participated in the elaboration of the paper', but also noted that Indigenous civil society participants remained strongly supportive of the current text, with some 'open to considering any proposal that might strengthen the text'.[62] These concerns were addressed in the concession that the working group was not, by such a process, 'engaged in a drafting or negotiating process', although the report's Annex I contained a version of the text of Article 17 incorporating in bold a variety of proposed textual amendments for future consideration—'[b]road consensus on the underlying principles' did not equate with 'consensus on the final wording'.[63]

There was then another change of personnel with Luis Enrique Chávez taking over the role of Chairperson-Rapporteur of the Working Group. In its 6 December 1999 report, it was noted that both Australia and New Zealand were positive about progress made with regard especially to Articles 15, 16, 17, and 18, and the Chairperson-Rapporteur 'asked the governmental delegations to continue informal consultations with a view to bringing closer together the various proposals made', and four informal discussion papers were received.[64] Following nine further informal meetings of governmental delegates, 'the emerging view of the participating governmental delegations was that the alternative texts could be considered as an acceptable basis for further work and could be presented to the working group in order to advance the discussion in plenary'.[65]

While governmental representatives were pleased with this divergence from the original text and happy for the consolidated possible amendments to be the basis for further articulation of the Articles, representatives of the Indigenous caucus were critical and skeptical. There remained differences of view as to the wording 'should' or 'shall' and to the terminology 'indigenous peoples' with its resonance in relation to self-determination. The key difference of opinion, however, related to the method of drafting, with Indigenous representatives happy with the original text and largely of the view that any further debate and discussion should be based around the original text.[66] The working group's report noted that Indigenous representatives emphasized their desire to participate in the drafting process, and that '[a]ll indigenous representatives expressed their opposition to the changes proposed by the governmental representatives to articles 15, 16, 17 and 18, which they believed deleted the recognition of important rights and served to

[59] Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, E/CN.4/1998/106 (15 December 1997) para 45. Note that whilst this report's Annex I sets out a wide variety of proposed amendments to the text of Art 17, the 'broad consensus' did not extend to the text itself at this stage in the drafting and consultation process.

[60] Written Statement submitted by Women's International League for Peace and Freedom, Commission on Human Rights, Amendments to the Draft Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/1998/NGO/33 (6 March 1998) Art 23 (Amended version of Art 17).

[61] Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/1998/82 (20 January 1999) para 73.

[62] ibid paras 80–84. [63] ibid paras 80, 85 and Annex I.

[64] Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2000/84 (6 December 1999) paras 26, 27, 113.

[65] ibid para 114. [66] ibid paras 118–20.

weaken and undermine the current text.'[67] This was, then, significant criticism of both the textual changes and the process by which they were incorporated. It was criticism that resonated with the deeper and core concern with self-determination and its indivisibility from the various Articles within the proposed Declaration.[68] Accordingly, some suggested criteria for further discussion and drafting which would see the text amended only to strengthen the original words and specifically in relation to proposed Article 17; it was noted that Indigenous representatives were in favour of keeping it in its original form and felt changes were either unnecessary or objectionable, such as 'the additional sentence in paragraph 2 of article 17'.[69]

Thus, from the end of 1999 through to early 2002, there was a division between governmental delegates who wished to work with the following text (original in italics) and Indigenous representatives who largely supported the adoption of the original text:

[Indigenous peoples] have the right to establish their own media in their own languages and to access all forms of non-indigenous media, on the same basis as the other members of the society.

*States [shall/*should] *take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.* States, without prejudice to ensuring full freedom of expression, should encourage privately-owned media to adequately reflect indigenous cultural diversity.[70]

Discussion continued in 2004 based on the 1999 text and a Nordic proposal. Three changes were discussed. The first, non-controversial, amendment involved 'merging the two sentences of the first paragraph of the article'; the second was to change the word 'equal' to 'on the same basis as other members of the society'—this remained controversial with Indigenous representatives; and the third involved the addition of 'a sentence to the second paragraph of the article aimed at privately owned media reflecting adequately the cultural diversity of indigenous people'.[71]

The amendments next appear in a Draft Declaration amended text provided by Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland, and there was '[n]ear consensus on this amended article, which was considered for provisional adoption'.[72] At the end of 2004, the Chairman's summary of proposals included two variants of this text and there was an additional streamlined version provided by the Saami Council and Tebtebba Foundation.[73] A subsequent proposal by the World

[67] ibid para 121. [68] ibid para 122. [69] ibid paras 124, 128.

[70] ibid. Annex I, Amendments to Articles 15 to 18 proposed by Governments for future discussion; Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2001/85 (6 February 2001) Annexes I, II, III; Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2002/98 (6 March 2002) Annex I.

[71] Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2004/81 (7 January 2004) paras 41–44, see Annex containing Chairperson's Summary of Proposals.

[72] Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Information Provided by States, Draft Declaration on the Rights of Indigenous Peoples: Amended Text (Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland), UN Doc E/CN.4/2004/WG.15/CRP.1 (6 September 2004); Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Information Provided by States, Draft Declaration on the Rights of Indigenous Peoples: Amended Text (Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland), UN Doc E/CN.4/2004/WG.15/CRP.2 (6 September 2004).

[73] Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, Chairman's Summary of Proposals, UN Doc E/CN.4/2004/WG.15/CRP.4 (14 October 2004); Commission on Human Rights, Working Group Established in

Peace Council in 2005 included further additions relating to access to information and communications technologies and broader goals, including peace and multicultural diversity.[74] The Chairman's proposal on 1 April 2005 was further refined by 22 March 2006 into its near-final form, building on the original text and subsequent proposals to the point where it was included in the majority of 'articles that could be considered as a basis for provisional agreement'.[75] Only the subsequent addition of 'have' into the proposal, and its shifting from Article 17 to 16 as finalized and adopted in 2006 in the Human Rights Council and then on 13 September 2007 in the UN General Assembly, remained to occur.[76]

The final text had been added to and tweaked, most notably in paragraph 2's addition regarding privately owned media, but remained true to the core aspects of its original formulation. It remained a text which built upon exemplars such as protections against discrimination and for freedom of expression, but which went further and did so explicitly in a context of a fuller 'right to media' for Indigenous peoples. While the drafting process was not without its difficulties, and concern was expressed about the method employed by governmental representatives, commentators such as Claire Charters have argued for its legitimacy in a number of senses, including significantly that:

> the 25-year plus negotiations that led to the Declaration, conducted in formal, transparent, established and institutionalised settings lend the Declaration enormous legitimacy, as does the openness. Indigenous peoples could participate at almost every stage ... The unique needs of indigenous peoples are now provided for under international law.[77]

By any measure, the UNDRIP, and its innovative inclusion of creative and tailored provisions such as Article 16 relating to the media, has been a significant achievement. It remains to be seen how Article 16 will translate in practice and how effective and resilient it will be in a changing media landscape and in addressing the fuller criticism of Engle and others of the UNDRIP's 'fragile architecture', as discussed above. By remaining technology neutral, and by going further than, but drawing on, freedom of expression, the provision makes important steps towards a fuller conception of a right to media for Indigenous peoples. It may not, of course, be able to deliver more significant gains in terms of deeper forms of self-determination, but it might help that process.

Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, Information Provided by the Saami Council and the Tebtebba Foundation endorsed by the Saami Parliamentarian Council, UN Doc E/CN.4/2004/WG.15/CRP.5 (28 October 2004).

[74] Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, UN Doc E/CN.4/2005/89/Add.1 (24 February 2005) Addendum.

[75] Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on Its Tenth Session, UN Doc E/CN.4/2005/89/Add.2 (1 April 2005) Addendum; Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session, UN Doc E/CN.4/2005/WG.15/CRP.1 (22 March 2006) para 25 and Annex I.

[76] For further detail on the final dynamics in the drafting process, see A Regino Montes and G Torres Cisneros, 'The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship between Indigenous Peoples, States and Societies' in C Charters and R Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs 2009) 141–51.

[77] C Charters, 'The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples' in Charters and Stavenhagen (n 76) 298.

3. A Right to Media?

While some, like Rodolfo Stavenhagen, have argued that the UNDRIP 'does not actually establish any new rights and freedoms that do not exist in other UN human rights instruments', although it does 'spell out how these rights must relate to the specific conditions of indigenous peoples', there is an argument to be made that Article 16 does in fact forge new ground in terms of media-related rights and freedoms, while doing so for Indigenous peoples specifically.[78] Indeed, Helen Quane argues that the UNDRIP as a whole 'breaks new ground', and that substantively it is 'anything but a codification of existing international law'.[79] Article 16 as analysed in this chapter goes further than traditional freedom of expression guarantees, emphasizing participation in mainstream and Indigenous forms of media and what might be termed a 'right to media',[80] a stronger form concept more associated with the controversial UNESCO Mass Media Declaration than with Article 19 of the ICCPR.[81]

There is also much to be gained from exploring the ways in which an international norm and standard such as Article 16 will travel from the municipal to the international and back again, operating at levels of consciousness and advocacy and taking further institutional forms.[82] It is interesting to note here that media features in Article XIV of the subsequent American Declaration on the Rights of Indigenous Peoples, which addresses 'Systems of Knowledge, Language and Communication'. Provision and protection for Indigenous media is dealt with specifically there and not in Article XX, which considers (among other matters) freedom of expression. Article XIV(3) of the American Declaration states that:

> Indigenous peoples have the right to promote and develop all their systems and media of communication, including their own radio and television programs, and to have equal access to all other means of communication and information. The states shall take measures to promote the broadcast of radio and television programs in indigenous languages, particularly in areas with an indigenous presence. The states shall support and facilitate the creation of indigenous radio and television stations, as well as other means of information and communication.

As a matter of practice, it is also important to recognize that the articulation of Article 16 (and Article XIV(3) of the American Declaration above) sits alongside long-standing development of Indigenous media organizations. To take just one domestic example,[83] Australia, there are a wide range of Indigenous media organizations which contribute to the Indigenous and non-Indigenous media landscapes and consequently have social, cultural, and political effects, assisting if not overcoming the paucity of coverage of Indigenous issues in mainstream commercial media.[84] Faye Ginsburg notes that in

[78] R Stavenhagen, 'Making the Declaration Work' in Charters and Stavenhagen (n 76) 355.

[79] H Quane, 'The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights' in Allen and Xanthaki (n 1) 58.

[80] This draws on the work of Lorie Graham and her comprehensive examination of Art 16 (Graham (n 12)).

[81] See here also ILO, C169—Indigenous and Tribal Peoples Convention, 1989 (No 169), Part VI relating to Education and Means of Communication.

[82] For more on this methodologically, see M Goodale and S Engle Merry (eds), *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge University Press 2007).

[83] For further domestic examples, see Graham (n 12) 472–505.

[84] For example: <http://www.sbs.com.au/nitv/>; <http://www.imca.net.au/>; <http://www.koorimail.com/>; <http://www.kooriradio.com/>; <http://caama.com.au/>; <http://www.australia.gov.au/about-australia/australian-story/indigenous-broadcasting>; <http://www.powerhousemuseum.com/hsc/bracs/>; <http://www.imparja.com/>; <http://ictv.net.au/> all accessed 17 October 2017. Regarding the 'demand for more Aboriginal participation

the Australian context 'Aboriginal media productions are as various as Aboriginal life itself' and have grown in a variety of ways since the 1970s.[85] Graham confirms this more broadly and notes the 'substantial increase' in Indigenous media in the present day, but that this development pre-dates the UNDRIP.[86] Ginsburg conceives of Indigenous media production 'as a form of social action', and argues that it is 'understood by its producers to be operating in multiple domains as an extension of their collective ... self-production'.[87] Ginsburg further ties Indigenous media practices, as does Article 16 and its inclusion in the UNDRIP, with 'helping to develop support and sensibilities for indigenous actions for self-determination' and 'to the creation of new transnational arenas that link indigenous makers around the globe in a common effort to make their concerns visible to the world'.[88] Ginsburg goes further to argue powerfully that:

> Indigenous media productions and the activities around them are rendering visible indigenous cultural and historical realities to themselves and the broader societies that have stereotyped or denied them. The transnational social relations built out of these media practices are creating new arenas of cooperation, locally, nationally, and internationally.[89]

These arguments resonate with present-day advocacy for Indigenous media and with those who through UN and other institutional settings argue for increased attention to and support for Indigenous media.[90] As Julian Burger has noted, the UNDRIP 'is not an abstract document. It responds to the real-life problems that threaten the existence of indigenous peoples as identified by indigenous peoples themselves.'[91] Article 16 foregrounds the two driving principles of the UNDRIP, self-determination and non-discrimination,[92] and does so by providing both a normative standard and a communicative process, in the form of Indigenous participation in mainstream and Indigenous media and guarantees which aim to improve the historically problematic representation of Indigenous peoples. In doing so, Article 16 highlights some of the rationales for free speech, such as truth-seeking, autonomy, and democratic significance, but goes further than this in taking a practical view of the media's complex power. It does so in combination with related provisions such as Articles 14 and 15. As noted above, perhaps more could have been made of the developing digital media landscape[93] and the internet's increasing role, but the process of digital rights translation may assist here too, as it has with reinterpretation of freedom of expression and privacy in a digital age.

4. Conclusion

Article 16 of the UNDRIP is a significant development in the area of media-related rights within international law. It builds on important normative frameworks such as freedom of

and visibility in the Australian mediascape' and examination of the '[c]ontinuing exclusion of work by Aboriginal people from Australia's media institutions', see F Ginsburg, 'Embedded Aesthetics: Creating a Discursive Space for Indigenous Media' (1994) 9(3) Cult'l Anthrop 365, 373–74 (quotations from 373). Ginsburg also addresses the transnational dimension at 376–77.

[85] Ginsburg (n 84) 365–66. [86] Graham (n 12) 468. [87] Ginsburg (n 84) 368.
[88] ibid 378. [89] ibid.
[90] Elsa Stamatopoulou notes: 'The role of the media has been repeatedly stressed in terms of combating racism and discrimination vis-a-vis indigenous peoples and minorities' (Stamatopoulou (n 1) 403).
[91] J Burger, 'The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation' in Allen and Xanthaki (n 1) 42.
[92] ibid 43. [93] Its potential is discussed in Graham (n 12) 464.

expression, access to information, incitement, discrimination, the right to communicate, and cultural rights more broadly. Underlying the provision is a commitment to redressing historic injustice and misrepresentation, but also an awareness of the significance of media power and its role in public life. This provision points to Indigenous peoples' 'right to media', but also to the responsibilities of States, and State-owned and private media, to affording inclusion in the mainstream media landscape, and a commitment to the further development of Indigenous media. Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people S James Anaya's first report concluded with the statement that:

> Civil society actors, including the educational sector and the media, religious groups, non-governmental organizations and the private sector, further have roles in supporting the broad societal changes required to meet the challenges involved in making the United Nations Declaration a living reality.[94]

The media's significance is thus imagined as both tied to Article 16, but also more broadly to the future development of the UNDRIP and its implementation. It is for these reasons that the provision emphasizes the right to Indigenous media along with the right to participation of Indigenous peoples in mainstream media, and can be viewed more broadly than as an elaboration of freedom of expression or media freedom. Rather, it is a right to media and also recognition of the media's role in effecting deeper goals of self-determination, non-discrimination, participation in decision-making, cultural and linguistic survival, and diversifying information and communication flows within transnational and domestic public spheres.[95] As Lorie Graham argues, 'the lives of indigenous peoples have been intimately shaped and impacted by mainstream media', which 'has been predominately presented in non-indigenous languages, from a non-indigenous worldview, and at best has tended to focus predominantly on non-indigenous issues'.[96] Article 16 also offers States the opportunity to redress past wrongs and misrepresentation through support for Indigenous media and participation.[97] At a wider level, as Graham argues, 'the recognition of a right to media under international law is a critical first step in the process of improving relations between indigenous peoples and other segments of society.'[98]

The challenge remains for UN human rights treaty bodies and institutions, media organizations, Indigenous peoples, States, and communities to embrace the possibilities within Article 16 and its accompanying provisions. To this end, 9 August 2012, the International Day of the World's Indigenous Peoples, prioritized the theme and goal of 'Indigenous Media, Empowering Indigenous Voices'. Institutional settings and organizations, like the World Indigenous Broadcasters Network, the UN Permanent Forum on Indigenous Issues, the UN Development Programme, and UNESCO, joined

[94] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, S James Anaya, Human Rights Council, UN Doc A/HRC/9/9 (11 August 2008) para 90.

[95] Graham and Wiessner (n 1) 414, 417–18. See also Graham (n 12) 436, 439–41, 444, 453, 458.

[96] Graham (n 12) 430, 432. Graham traces the impetus for including Art 16 back to the 1983 report by José Martínez Cobo, Study of the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1983/21/Add.8 (30 September 1983), discussed in Graham (n 12) 431–34.

[97] ILA, 'Rights of Indigenous Peoples: First Report', Rio de Janeiro Conference (2008) 10–11; ILA, 'Rights of Indigenous Peoples: Interim Report', The Hague Conference (2010) 26–28; ILA, 'Rights of Indigenous Peoples: Final Report', Sofia Conference (2012).

[98] Graham (n 12) 506.

others, including former UN Secretary-General Ban Ki-Moon and Special Rapporteur Anaya, in calling for greater recognition of the media's communicative power for transformation of Indigenous lives, while recognizing the challenges that remain and the role of the UNDRIP.[99] In 2012, the International Law Association (ILA) Conference in Sofia adopted a number of conclusions and recommendations of its Committee on the Rights of Indigenous Peoples, conceding that the UNDRIP 'as a whole cannot yet be considered as a statement of existing customary international law', yet recommending further action and concluding that 'States must recognize the right of indigenous peoples to establish their own ... media.'[100] Much more could be done in terms of implementation, but much has already been achieved, including through the creation of Article 16.

[99] See: <https://www.unngls.org//index.php/un-ngls_news_archives/2012/308-indigenous-media-empowering-indigenous-voices>; <http://www.unesco.org/new/en/kathmandu/about-this-office/single-view/news/indigenous_media_empowering_indigenous_voices/#.Vgy6ts5idek>; <http://www.un.org/apps/news/story.asp?NewsID=42649#.Vgy5tM5idek>; <http://www.un.org/esa/socdev/unpfii/documents/int-day-12-undp.pdf> all accessed 17 October 2017.

[100] Resolution 5/2012, 'Rights of Indigenous Peoples', 75th Conference of the International Law Association held in Sofia, Bulgaria (26–30 August 2012) para 8.

Chapter 13. Indigenous Education and the UNDRIP

Article 14

*Lorie M Graham and Amy B Van Zyl-Chavarro**

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

1. Introduction

Not long ago, 'education' was the primary tool used by dominant societies to achieve the dual aims of forcible assimilation and cultural destruction against Indigenous peoples. The kinds of practices put in place ranged from the forcible removal of young children from their families and communities to residential boarding schools, to the more subtle practice of having Indigenous children be schooled in a language other than their mother tongue. Efforts at forced assimilation through education extended beyond the classroom and included stereotypic portrayals of Indigenous peoples in stories, film, laws, and other publicly disseminated materials. These portrayals led to a further decline in the cultural, emotional, physical, and spiritual well-being of Indigenous peoples. They also contributed significantly to the negative stereotypes of Indigenous peoples that live on today in the media, in textbooks, in the classroom, and elsewhere. Equally relevant is the impact that assimilationist practices had on the political and economic well-being of the individual and the group. They alienated Indigenous peoples from their own roots, while at the same time creating significant barriers to fully participating in the dominant society in which they now found themselves. Yet, education as a human right is intended to achieve just the opposite. It is intended to '[develop fully] the human personality and the sense of its dignity', to 'enable ... persons to participate effectively in a free society', and to 'strengthen ... respect for [all people's] human rights and fundamental freedoms' by 'promot[ing] understanding, tolerance and friendship among ... nations and ... groups'.[1]

* This chapter was prepared in 2014 and the analysis is current to the state of the law at that time. For more current information on the right to education, see L Graham and A Van Zyl-Chavarro, *Education, Media, and the UN Declaration on the Rights of Indigenous Peoples* (Carolina Press 2017). Additionally, due to the dynamic nature of the internet, some of the internet addresses may have changed or ceased to exist since 2014. A special thanks to our research assistant Brian Badgley and research librarian Jeanie Fallon.

[1] International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966) 993 UNTS 3, Art 13(1) (ICESCR); Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A, Art 26 (Universal Declaration).

It is against this backdrop that Article 14 of the UN Declaration on the Rights of Indigenous Peoples (the Declaration or UNDRIP) was formulated. Not surprisingly, one of the primary aims of this provision (along with aspects of Article 15) is to put into place a set of principles that, once implemented, will work to correct these injustices. However, the provision is not merely aimed at righting past wrongs or even ongoing harms that may be perpetuated through educational systems that were built, in part, on flawed ideologies. Rather, Article 14 is written in a manner that seeks to ensure that Indigenous peoples, as individuals and as self-determining communities, are able to fully realize the positive aims that can be derived from the recognition and fulfillment of the fundamental right to education.

Thus, Article 14 takes on a special meaning and purpose in terms of repairing, restoring, and strengthening Indigenous communities and cultures through education. In looking at the history of this provision, its language, and its place within established international human rights norms, these aims are to be achieved through linkages with other basic rights, such as the rights of self-determination, non-discrimination, and cultural and linguistic integrity. For instance, Article 14 provides for the right of Indigenous peoples to develop and control educational systems that are consistent with their linguistic and cultural methods of teaching and learning. It also includes the right of Indigenous individuals to have access to these or other similarly situated educational systems or programmes. In addition to promoting and protecting Indigenous ways of learning and teaching, Article 14 articulates a more general right of non-discriminatory access to all levels and forms of education within the State, thereby ensuring that Indigenous pupils are placed on an equal footing with non-Indigenous pupils. Finally, it ensures that any action that a State takes with regard to the education of Indigenous individuals is done in partnership with Indigenous communities.

It is worth mentioning here that Article 15 of the Declaration, a provision discussed further in Chapters 10 and 7 of this book, complements Article 14 by broadening the scope of the Declaration to eliminate inaccurate, prejudicial, and distorted information in public documents and educational materials reaching both Indigenous and non-Indigenous peoples. In particular, it states that Indigenous peoples have the right to have 'their cultures, traditions, histories, and aspirations ... appropriately reflected in education'.[2] Similar to Article 14, States are required under Article 15 to work with Indigenous peoples to not only combat prejudice and discrimination in education, but to actively develop educational tools that 'promote tolerance, understanding, and good relations among indigenous peoples and all other segments of society'.[3]

Section 2 of this chapter begins with a closer look into the history behind Article 14's protection of education for Indigenous peoples. Understanding the historical background of this Article helps us to better understand its role in fulfilling some of the purposes articulated in the Preamble of the Declaration. Some of these purposes include addressing 'historical injustices' (including 'doctrines, policies, and practices' that promote 'superiority of peoples or individuals'), respecting and promoting cultural 'diversity and richness', ensuring that 'indigenous families and communities ... retain shared responsibility for the upbringing, training, education and well-being of their children',

[2] Declaration on the Rights of Indigenous Peoples (13 September 2007) UNGA Res 61/295 (UNDRIP) Art 15.

[3] UNDRIP (n 2) Art 15(2).

and '[re]affirm[ing] the fundamental importance of the right to self-determination of all peoples'.[4] From there, we will explore the meaning behind Article 14, identifying the underlying themes that the drafters of the Declaration assumed were fundamental to an empowering education for Indigenous students.

In Section 3, we will consider the international legal framework that is embedded in different aspects of Article 14, helping us discern which aspects of this Article are established concepts of international law and which parts are still emerging norms. Given the well-articulated nature of the basic right to education in a wide variety of international instruments, it will come as no surprise that most of what is reflected in the Declaration relating to Indigenous education is also recognized as a matter of conventional or customary international law. As a complement to and further articulation of international law, regional laws and domestic practices are explored in Section 4, with emphasis on 'best practices'. The chapter ends, in Section 5, with a brief discussion of some of the implementation issues that States and Indigenous peoples may face as they move forward with fulfilling the aims of Article 14, and how they might begin to measure success in this area.

2. History and Meaning of Article 14

A liberating education nurtures empathy, a commitment to community, and a sense of self-worth and dignity.[5]

2.1 Brief History of Indigenous Peoples and Education

Much scholarship exists on how nation-States used education as a tool to further the aim of forced assimilation.[6] What follows is a brief synopsis of this history.

Although the international community has long recognized education as essential to the well-being and development of individuals and communities, State policies

[4] ibid Preamble.

[5] M Villegas, S Rak Neugebauer, and KR Venegas (eds), *Indigenous Knowledge and Education: Sites of Struggle, Strength, and Survivance* (Harvard Educational Publishing Group 2008) 160.

[6] See UN Commission on Human Rights (UNCHR), Study of the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1986/7/Add.2 (11 March 1986) vol III, ch XIII, paras 26–75, 118–30 (submitted by José Martínez Cobo) (note this study was originally published as a series of reports from 1981 to 1983) (Martínez Cobo vol III); UNCHR, Study of the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1986/7/Add.4 (March 1987) vol V, paras 89–162, 428–94 (submitted by José Martínez Cobo); UNCHR, Addendum to Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Conclusions and Recommendations of the Expert Seminar on Indigenous Peoples and Education, UN Doc E/CN.4/2005/88/Add.4 (15 December 2004) para 10(j) (prepared by R Stavenhagen) (Conclusions and Recommendations). See generally Australian Human Rights and Equal Opportunity Commission, 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families' (1997), <http://www.austlii.edu.au/au/other/IndigLRes/stolen/index.html> accessed 18 October 2017 (HREOC, 'Bringing Them Home'); Canada's Indian Residential Schools Settlement Agreement (8 May 2006), <http://www.residentialschoolsettlement.ca/Settlement.pdf> accessed 18 October 2017; M Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia, 1880–1940* (University of Nebraska Press 2009); P Farb, *Man's Rise to Civilization* (1968) 257–59 (as cited in LM Graham, 'The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine' (1998) 23 Am Indian L Rev 1, 16); LM Graham, 'Reparations, Self-Determination, and the Seventh Generation' (2008) 21 Harvard Human Rights J 47.

and actions around the world have too frequently prevented Indigenous peoples from receiving a truly empowering education. This has been achieved in a variety of ways: passively by ignoring or failing to consider the economic, cultural, and linguistic realities of Indigenous peoples; and actively by deliberately minimizing or excluding aspects of their language and culture from educational programme design and execution. However, the unwillingness of State-run educational programmes to value and incorporate Indigenous languages and cultures has an even more disturbing past than mere neglect. According to one UN study on the issue, '[t]here are countless examples from many parts of the world from the early and mid-1800s onwards and up to the mid-1900s and even longer where the intention to destroy an indigenous group [through education] ... has ... been *overtly* expressed.'[7]

Many nation-States born of the process of conquest and colonization embraced the idea of 'assimilation' to the extreme, removing Indigenous children from their families and communities to boarding schools or other similar institutions. The dominant State language, culture, and religion were forced upon these students to the exclusion of anything Indigenous; and many were subjected to physical, psychological, and even sexual abuse. One scholar described the process and its impact in this way:

> [Indigenous] children usually were kept at boarding school for eight years, during which time they were not permitted to see their parents, relatives, or friends. Anything Indian—dress, language, religious practices, even outlook on life ... was uncompromisingly prohibited. Ostensibly educated ... in the English language, wearing store-bought clothes and with their hair short and their emotionalism torn down, the boarding-school graduates were sent out either to make their way in a White world that did not want them, or to return to a reservation to which they were now foreign.[8]

Even when States established schools in or near Indigenous communities, these schools were often geared towards assimilation, causing Indigenous communities to identify education in schools as a symbol of their overall marginalization. Moreover, national education often reinforced negative stereotypes and discriminatory views of Indigenous peoples in its general curricula.[9]

Not surprisingly, the harms caused by these educational policies have been intergenerational. Children raised in assimilationist schools suffered from low self-esteem, familial dislocation, and alienation from their native languages, cultures, and communities. They were prevented from learning the values and traditional practices of their peoples, which in turn severely hampered their ability to later transmit these to their own children. Their ability to become active participants in the socio-economic and political structures of their communities was also hampered. In addition, the discriminatory content of national curricula adversely impacted the way in which Indigenous students

[7] UN Permanent Forum on Indigenous Issues, Forms of Education of Indigenous Children as Crimes against Humanity?, UN Doc E/C.19/2008/7 (11 February 2008) 11, para 31 (submitted by R Dunbar, Dr T Skutnabb-Kangas, OH Magga, and L-A Baer) (Permanent Forum 2008) (emphasis in original). See also generally UN Permanent Forum on Indigenous Issues, Forum Expert Group, 'Indigenous Children's Education and Indigenous Languages', UN Doc E/C.19/2005/7 (2005) (Permanent Forum 2005).

[8] Farb (n 6). See generally Jacobs (n 6); HREOC, 'Bringing Them Home' (n 6); Canada's Indian Residential Schools Settlement Agreement (n 6).

[9] See, eg, Martínez Cobo vol III (n 6) ch XIII, paras. 329–72. The issue of mascots is a contemporary example of this problem. See, eg, 'Stolen Identities: The Impact of Racist Stereotypes on Indigenous People, Hearing before the Committee on Indian Affairs of the US Senate', 112th Congress (5 May 2011) 3, <https://turtletalk.files.wordpress.com/2011/12/66994.pdf> accessed 24 November 2017.

were perceived by their non-Indigenous peers.[10] Thus, while we often think about education as a force of empowerment, empathy, and strength, just the opposite has been true for Indigenous peoples throughout history.

However, the human rights issues surrounding education and Indigenous peoples are not merely historical. According to recent UN studies, Indigenous peoples still face a number of difficulties, most notably in the area of discrimination.[11] An additional issue is the ongoing disconnect between mainstream education and Indigenous knowledge and learning. A fundamental purpose of education is to provide individuals with the necessary tools to participate fully and successfully in society.[12] Yet, for Indigenous peoples, this idea of participating successfully in society takes on its own meaning and purpose. As one scholar of Indigenous knowledge puts it:

> [Indigenous knowledge] serve[s] as the basis for a pedagogy of place that shifts the emphasis from teaching about local culture to teaching through the culture as students learn more about the immediate places they inhabit and their connection to the larger world within which they will make a life for themselves ... As Indigenous people reassert their world views and ways of knowing in search of a proper balance between ... 'two worlds,' they offer insights into ways by which we can extend the scope of our educational systems to prepare all students to not only make a living, but to make a full-filling and sustainable life for themselves [and their communities].[13]

Most educational systems available to Indigenous peoples tend to impose upon them teaching methods and curricula that were originally designed for a non-Indigenous cultural and linguistic context.[14] As a result, very few Indigenous students receive the tools they need to find a 'proper balance' between two worlds.

Thus, it should come as no surprise that a main purpose of Article 14 of the Declaration is to remedy the historical and contemporary inequalities in education. Relying on consultation with Indigenous representatives and studies produced by UN bodies, the Working Group on Indigenous Populations (WGIP) sought to identify in Article 14 some of the central mechanisms that States needed to put into action in order to begin to equalize the standard and quality of education for Indigenous peoples. Three means for eradicating discrimination and inequality that kept recurring in the WGIP's discussions were: (1) self-determination in the creation and management of Indigenous schools; (2) instruction in the pupils' Indigenous language; and (3) instruction within the context of the pupils' Indigenous culture.[15] What follows is a brief narrative of these three underlying themes, which we see as a crucial first step to the process of being able to deconstruct the language of Article 14 and analyse its legal implications (see Section 3 below).

[10] See Conclusions and Recommendations (n 6) para 10. [11] ibid.

[12] See ICESCR (n 1) Art 13.

[13] Villegas et al (n 5) 4 (quoting Ray Barnhardt). See also UN Expert Mechanism on the Rights of Indigenous Peoples, Study on Lessons Learned and Challenges to Achieve the Implementation of the Rights of Indigenous Peoples to Education, UN Doc A/HRC/12/33 (26 June 2009) paras 43–50.

[14] See Martínez Cobo vol III (n 6) ch XIII, paras 61, 283. See also, eg, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Sixteenth Session, UN Doc E/CN.4/Sub.2/1998/16 (19 August 1998) para 66 (WGIP 16th Sess Report).

[15] See WGIP 16th Sess Report (n 14) para 52. See generally Martínez Cobo vol III (n 6) ch XIII; C Price Cohen, 'The Sacred and the Profane: Second Annual Academic Symposium in Honor of the First Americans and Indigenous Peoples Around the World: Development of the Rights of the Indigenous Child under International Law' (1996) 9 St Thomas L Rev 231.

2.2 The Meaning of Article 14

The history of education of Indigenous peoples demonstrates that there are collective and individual aspects to this right that need to be considered and addressed, and that these aspects involve other important human rights norms, such as non-discrimination, cultural integrity, and self-determination. In the language of human rights law, Article 14 ensures the right of self-determination in education through the development of Indigenous educational systems and initiatives.[16] It ensures cultural integrity rights by recognizing Indigenous ways of knowing and learning.[17] And it expands our understanding of the right to non-discrimination by ensuring that Indigenous students have access to a culturally and linguistically relevant education.[18] By linking together these core human rights precepts, the collective and individual aspects of Article 14 can be realized.

2.2.1 Self-Determination in Education

The first theme recognized in Article 14 is one of self-determination, a principle explored more fully elsewhere in this book. According to Ole Henrik Magga, former chairperson of the UN Permanent Forum on Indigenous Issues (UNPFII), 'the right to preserve and to develop [Indigenous] reservoir[s] of knowledge is a fundamental aspect of self-determination ... Education is the door to [this] knowledge.'[19] By preserving and enhancing this knowledge, Indigenous peoples can work to further many of the aspects of self-determination recognized under international law, including 'freely determin[ing] their political status[,] freely pursu[ing] their economic, social and cultural development[, and] ... freely dispos[ing] of their natural wealth and resources'.[20]

Education that is focused on and drawn solely from the dominant culture (sometimes called assimilationist education) violates the core principles of Indigenous self-determination. First, it fails to provide Indigenous communities with the type of empowering education envisioned by well-established universal human rights norms, including the 'full development of the human personality and the sense of its dignity'.[21] Instead, such an education achieves the opposite by suppressing Indigenous cultures and languages and alienating Indigenous individuals from their families and communities.[22] Second, it furthers the economic, social, and political marginalization of Indigenous peoples: 'today formal education and especially subtractive education, the use of a dominant non-indigenous language as the teaching language (together with non-indigenous curricula and

[16] See UNDRIP (n 2) Art 14(1): 'Indigenous peoples have the right to establish and control their educational systems and institutions ...'

[17] See ibid: 'Indigenous peoples have the right to ... education in their own languages, in a manner appropriate to their cultural methods of teaching and learning'; and Art 14(3): 'States shall, in conjunction with indigenous peoples, take effective measure ... to have access, when possible, to an education in their own cultures and provided in their own language.'

[18] See ibid Art 14(2).

[19] OH Magga, Chairperson, UN Permanent Forum on Indigenous Issues, Speech on Indigenous Peoples' Perspectives on Quality Education (8 January 2003), <web.archive.org/web/20050415131355/http://www.un.org/esa/socdev/unpfii/pfii/members/Magga-Indigenous%20Education.htm> accessed 18 October 2017. See also UN Expert Mechanism (n 13) paras 6, 70.

[20] ICESCR (n 1) Art 1; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, Art 1 (ICCPR).

[21] ICESCR (n 1) Art 13.

[22] See Martínez Cobo vol III (n 6) ch XIII, paras 234–35. See also, eg, WGIP 16th Sess Report (n 14) paras 54–55, 72.

teaching methods)[,] play an increasingly important role in reproducing the powerless economic and political status of indigenous peoples.'[23]

Article 14 advocates an opposite approach, one that embraces Indigenous self-determination in education, both in terms of redressing and repairing the intergenerational harms inflicted on Indigenous peoples through education, as well as finding ways to prevent similar harms from recurring in the future. Key aspects of accomplishing these goals include the establishment and management of Indigenous schools, as well as partnering and consulting with Indigenous communities prior to the establishment of State educational systems or programmes.[24] Studies on education and retention support this approach. For instance, 'Indigenous children were more likely to attend school if their communities participated in all decisions about the content and management of their educational systems', and if the 'schools ... harmonized with their culture and traditions in a language they understood'.[25]

As discussed more fully in Section 4 below, changes such as these are beginning to take hold in some parts of the world. They include both Indigenous-controlled schools and changes in how Indigenous knowledge and educational needs are researched and incorporated not only in Indigenous educational settings, but in educational settings generally.[26] As former Chairman Magga notes, 'combin[ing] the best from [Indigenous] traditions with the best of [other] traditions. This is quality in a true sense.'[27] In the end, whatever the chosen curricula, research suggests that the context and content should be driven by the Indigenous community it seeks to serve, which is consistent with notions of self-determination in education. Article 14 reflects this conclusion.

2.2.2 Linguistically Pertinent Education

The second theme recognized in Article 14 relates to a linguistically pertinent education, where the interrelatedness between the right to education and the right to language is well established.[28] Experts in education have long articulated the benefit of teaching children in their mother tongue:

> It is axiomatic that the best medium for teaching a child is his mother tongue. Psychologically, it is the system of meaningful signs that in his mind works automatically for expression and understanding. Sociologically, it is a means of identification among the members of the community to which he belongs. Educationally, he learns more quickly through it than through an unfamiliar linguistic medium.[29]

This principle is supported by other educational and linguistic research, which shows, among other things, that using the mother tongue as the main teaching language during the first six to eight years increases students' likelihood of success in the classroom

[23] Permanent Forum 2008 (n 7) para 26.

[24] See, eg, Conclusions and Recommendations (n 6) para 10(l); Martínez Cobo vol III (n 6) ch XIII, paras 177–80, 373.

[25] Press Release, Statements by Rima Saleh, Deputy Executive Director, UNICEF, the Permanent Forum on Indigenous Issues Fourth Session, UN Doc HR/4841 (19 May 2005).

[26] See nn 240–56 and accompanying text. See generally Permanent Forum 2005 (n 7); UN Expert Mechanism (n 13).

[27] Indigenous Peoples' Perspectives on Quality Education (n 19).

[28] See Conclusions and Recommendations (n 6) para 18. See also Permanent Forum 2008 (n 7); Permanent Forum 2005 (n 7).

[29] *The Use of Vernacular Languages in Education: Monographs on Fundamental Education* (UNESCO 1953) No ED 57.III.8aA 11 (as cited in Martínez Cobo vol III (n 6) ch XIII, para 156).

(including increasing their chances of becoming competent in the dominant language).[30] Thus, while learning to read and write in the country's official language is important to ensure full participation within the wider society, instruction in the mother tongue as the first medium of education ultimately fosters this and other equally important educational goals by creating an environment conducive to learning. In fact, this increased classroom success is, in turn, 'closely associated with upward socio-economic mobility'.[31]

Yet, State-dominated languages are often imposed upon Indigenous students. Two studies conducted by the UNPFII demonstrate the many harmful consequences that flow from what has been called '[s]ubtractive education—teaching ... the dominant language at the cost of the mother tongue and thus subtracting from the children's linguistic competence'.[32] This is contrasted with 'additive education' in which children 'learn their mother tongues ... in addition to learning a dominant language'.[33] The harmful consequences flowing from subtractive education include higher drop-out rates and lower educational scores. Other negative socio-economic and psychological consequences include higher rates of unemployment, lower incomes, feelings of exclusion and loss, and an increase in the number of teenage and adult suicides.[34] Not surprisingly, all of these elements are interconnected. As one Ojibway elder describes it: 'Our language is dying, that is the first sign of deterioration. Our native style of life has to be based on four elements—heritage, culture, values, language—and if you take one away it begins to break down. Then we have the symptoms of this breakdown, alcoholism[,] ... abuse, and poverty.'[35]

Because of the harmful effects from subtractive education, Article 14 embodies an important principle: Indigenous children have a right 'to be taught to read and write in their own ... language or in the language most commonly used by the group to which they belong'.[36] However, it is not only the Indigenous individual that is affected by a policy of subtractive education. Such practices greatly impact the intergenerational transmission and survival of Indigenous languages. According to the UNPFII studies:

> Subtractive teaching subtracts from the child's linguistic repertoire, instead of adding to it. In this enforced language regime, children ... or at least their children, are effectively transferred to the dominant group linguistically and culturally. This also contributes to the disappearance of the world's linguistic diversity ... Optimistic estimates of what is happening suggest 50% of today's spoken languages may be extinct ... around the year 2100 ... Most of the disappearing languages are indigenous languages, and ... [e]ducation is one of the most important direct causal factors in this disappearance.[37]

[30] See Permanent Forum 2005 (n 7) paras 14, 6–9; Permanent Forum 2008 (n 7) para 7. See also UN Expert Mechanism, Lessons Learned (n 13) paras 74–80.

[31] AK Mohanty and G Misrai (eds), *Psychology of Poverty and Disadvantage* (Concept Publishing 2000) 135–36 (quoted in Permanent Forum 2005 (n 7) para 15).

[32] Permanent Forum 2008 (n 7) para 11. See also Permanent Forum 2005 (n 7) paras 15–18.

[33] Permanent Forum 2008 (n 7) para 11.

[34] See ibid paras 22, 11.

[35] ibid para 10.

[36] UN Permanent Forum on Indigenous Issues, Information Received from the United Nations System, UN Doc E/C.19/2004/5/Add.11 (5 March 2004) Annex, para 19(b) <http://www.un.org/en/ga/search/view_doc.asp?symbol=E/C.19/2004/5/Add.11> accessed 24 November 2017 (quoted in Permanent Forum 2005 (n 7) para 23).

[37] Permanent Forum 2005 (n 7) paras 4–5. See also HRC, Human Rights Legal Framework and Indigenous Languages, UN Doc PFII/2008/EGM1/15 (8–10 January 2008) para 2 (Human Rights Legal Framework): '... from an approximate number of 6700 languages that are believed to exist today, over 3000 are in serious danger of disappearance. Indigenous peoples' languages represent at least 4000 languages of the world's linguistic diversity and most of the indigenous languages belong nowadays to the category of languages seriously endangered.'

The use of these languages in educational systems and programmes is therefore vital to their preservation.[38] Moreover, the value of doing so extends beyond mere linguistics. Language is 'not only ... a means of communication, but ... the basis of identification for an ethnicity, and ... a repository of [traditional] knowledge'.[39] Consequently, use of Indigenous languages in schools and programmes is vital to both preserving Indigenous languages and transmitting Indigenous knowledge to future generations. In the end, then, what Article 14 seeks to foster is a linguistic model that promotes good educational goals (as well as rights) for Indigenous individuals and their communities.

2.2.3 Culturally Pertinent Education

The final theme in Article 14 is cultural integrity. As noted above, education is much more than a vehicle for learning basic skills. Many Indigenous peoples view education as a holistic system, designed to teach a child that all things in life are related.[40] This system of learning is often tied to the kinship community. In his book *Look to the Mountain: An Ecology of Indigenous Education*, Gregory Cajete describes how family and community can define the content and process of a child's education: 'The living place, the learner's extended family, the clan and [community] provide[] the context and source for teaching. In this way, every situation provide[s] a potential opportunity for learning ... [where] basic education [is] not separated from the natural, social, or spiritual aspects of everyday life.'[41] It is this 'cumulative knowledge' derived from the community and passed from generation to generation that shapes the identity of the individual and the group, and that ensures a future existence for both.

An important goal of education under international law is to strengthen a student's identity. Yet, education for Indigenous students has often had the contrary effect. For instance, when they are taught exclusively the histories and ways of life of peoples other than their own, Indigenous students end up having no historical or contemporary figures with whom they can identify and whom they can emulate.[42] This further alienates them from their own cultures and communities. Yet, in the process of losing that important connection to community and culture, they often fail to gain access to another.[43]

[38] UNESCO has identified nine factors that are important predictors of the viability of a language: (1) 'absolute number of speakers'; (2) 'proportion of speakers within the total population'; (3) 'availability of materials for language education and literacy'; (4) 'response to new domains and media'; (5) 'type and quality of documentation'; (6) 'government and institutional language attitudes and policies, including official status and use'; (7) 'shifts in domains of language use'; (8) 'community member's attitudes toward their own language'; and (9) 'intergenerational language transmission'. UNESCO, 'A Methodology for Assessing Language Vitality and Endangerment', <http://www.unesco.org/new/en/culture/themes/endangered-languages/language-vitality/> accessed 18 October 2017.

[39] UNCHR, Prevention of Discrimination: Prevention of Discrimination and Protection of Indigenous Peoples, UN Doc E/CN.4/Sub.2/2005/26 (12 August 2005) para 46.

[40] See Indigenous Peoples' Perspectives on Quality Education (n 19) para 2.

[41] GA Cajete, *Look to the Mountain: An Ecology of Indigenous Education* (Kavaki Press 1994) 33. See also Martínez Cobo vol III (n 6) ch XIII, para 203; Indigenous Peoples' Perspectives on Quality Education (n 19) para 4. See, eg, WGIP 16th Sess Report (n 14) para 66. See also UN Expert Mechanism, Lessons Learned (n 13) paras 43–50 for another good description of what 'traditional education' can look like.

[42] In Chile, eg: 'A young Mapuche boy from the Cho-Chol region will certainly find it easier to understand that one cow plus another cow makes two cows, than that one orange plus another orange makes two oranges. He is familiar with cows and interested in them because they belong to his environment. As for oranges, he has never seen them growing, he is unfamiliar with the tree that produces them, and he therefore finds it difficult to picture them.' Martínez Cobo vol III (n 6) ch XIII, para 296. See also UN Expert Mechanism, Lessons Learned (n 13) paras 69–70.

[43] See, eg, Martínez Cobo vol III (n 6) ch XIII, paras 197, 200, 234–35; See also, eg, WGIP 16th Sess Report (n 14) paras 54–55, 72.

Incorporating Indigenous history, knowledge, values, and customs into the curricula helps to prevent this type of individual and communal alienation. As one Indigenous organization in Canada noted, 'children will continue to be strangers in Canadian classrooms until the curriculum recognizes [Indigenous] customs and values, [Indigenous] languages, and the contributions which the [Indigenous] people have made to Canadian history.'[44] From a group standpoint, an educational system that incorporates Indigenous knowledge and practices into its curricula not only stimulates the curiosity of an individual student, it also helps to preserve and protect his or her heritage for future generations.

Thus far we have identified the major themes that served as a foundation for the drafting of Article 14. The next section will explore how these themes fit within existing international human rights structures.

3. Issues and Analysis of International Legal Framework

3.1 International Legal Framework for Article 14

This section demonstrates two key points. (1) The larger rights that make up Article 14—non-discrimination, cultural and linguistic integrity, self-determination, and education—are established principles of international law. (2) Even within the basic right to education, there is a fair amount of existing international law to support Article 14's formulation of this right. The UN Declaration seeks to ensure that these long-established human rights are extended fully and equally to Indigenous peoples.

This section explores the existing international legal framework for the protection and advancement of Indigenous education. It is not intended to provide a comprehensive look at the right to education. Rather, it highlights aspects of that right that are relevant to the realization of the aims articulated in Article 14 of the Declaration, and that ultimately establish the binding nature of these aims. It begins with a brief introduction into the right of education generally and then covers more specifically the aims articulated in Article 14 of the Declaration. Subsumed within this discussion are the comments and recommendations of various UN human rights bodies.

3.1.1 The Right to Education

The 1948 Universal Declaration of Human Rights (UDHR) proclaimed that '[e]veryone has the right to education[, which] shall be free ... in the elementary and fundamental stages.'[45] This proclamation of rights was followed by widely adopted treaties that addressed more specifically the key aspects of the right to education, and include the International Covenant on Economic, Social and Cultural Rights (ICESCR)[46] and the Convention on the Rights of the Child (CRC).[47] In particular, the ICESCR requires States to actively pursue a system of schools at all levels, with primary education being compulsory and free for all, secondary education being generally available and progressively free, and higher education being equally accessible to all.[48] There are other more

[44] National Indian Brotherhood, *Indian Control of Indian Education* (1972) 26 (as cited in Martínez Cobo vol III (n 6) ch XIII, para 199).

[45] Universal Declaration (n 1) Art 26.

[46] See ICESCR (n 1) Arts 13–14.

[47] See Convention on the Rights of the Child, UNGA Res 44/25, UN Doc A/44/49 (2 September 1990) Arts 28–29 (CRC).

[48] See ICESCR (n 1) Art 13. See also CESCR, General Comment 13: Implementation of the International Covenant on Economic, Social, and Cultural Rights, UN Doc E/C.12/1999/10 (8 December 1999) para 25.

specific instruments that create legally binding obligations relating to Indigenous peoples and education. In particular, ILO Convention 169, Concerning Indigenous and Tribal Peoples in Independent Countries, provides for the right of Indigenous peoples 'to acquire education at all levels'.[49] This includes the right to a linguistically and culturally appropriate education that is developed with and controlled by Indigenous peoples.[50] Various provisions of the CRC similarly provide for the rights of children to have access to a culturally appropriate education.[51]

The various human rights instruments cited above also speak to the aims and objectives of education, which include 'full[y] develop[ing] ... the human personality and the sense of its dignity ... enabl[ing] ... persons to participate effectively in a free society', 'strengthen[ing] ... respect for [all people's] human rights and fundamental freedoms', and 'promot[ing] understanding, tolerance, and friendship among all nations ... and groups'.[52] In terms of general legal obligations, the Committee on Economic, Social and Cultural Rights (CESCR) notes that '[t]he right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil.'[53] The obligation of respect requires States not to interfere with or hinder the enjoyment of the right to education. The obligation to protect requires States to take measures to prevent others from interfering with this right. And the obligation to fulfil denotes an obligation on the part of States 'to take positive measures that enable and assist individuals and communities to enjoy the right to education'.[54]

Non-discrimination is an additional norm relevant to the full realization of the right to education. According to the CESCR, States 'have [an] immediate obligation[] in relation to the right to education ... [to ensure] that the right will be exercised without discrimination of any kind'.[55] Article 29 of ILO Convention 169 deals directly with the linkages between educational aims and non-discrimination, noting that '[t]he imparting of ... knowledge and skills that will help children belonging to the peoples concerned to participate fully and on equal footing in their own community and in the national community shall be the aim of education.'[56] Thus, States have a duty under international law to provide for the right to education by means that most appropriately ensure equal opportunity for each individual member of society. This relationship between the right to non-discrimination and the right of education is explored more fully below.

[49] ILO Convention 169, Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989) Art 26. The Convention has been ratified by twenty countries, but is also being used by regional and domestic bodies as evidence of customary law as it relates to Indigenous peoples. See generally ILO, Application of Convention No 169 by Domestic and International Courts in Latin America (2009), <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_123946.pdf> accessed 18 October 2017 (ILO, Application of Convention 169). See, eg, *Aurelio Cal in [sic] his own behalf and on behalf of the Maya Village of Santa Cruz and Others v Attorney General of Belize and Others*, Judgment, Supreme Court of Belize (18 October 2007); *Case of the Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs), Judgment, Inter-American Court of Human Rights (28 November 2007); *Case of Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations, and Costs), Judgment, IACtHR Series C No 146 (29 March 2006); Colombia Constitutional Court, Judgment C-208/07, Rapporteur: Rodrigo Escobar Gil (21 March 2007). Moreover, the ILO's educational provisions track the rights that are part of widely adopted treaties, such as the ICESCR and CRC.

[50] See ILO Convention 169 (n 49) Arts 27–28.

[51] See, eg, CRC (n 47) Art 29(c); Permanent Forum 2005 (n 7) para 23.

[52] ICESCR (n 1) Art 13(1); Universal Declaration (n 1) Art 26(2).

[53] CESCR, General Comment 13 (n 48) para 46.

[54] ibid para 47.

[55] ibid para 43.

[56] ILO Convention 169 (n 49) Art 29.

In terms of recent international initiatives, the Education for All movement, of which UNESCO is the lead agency, embodies many of the educational rights advanced under international human rights law.[57] This movement includes 'six internationally agreed education goals [designed] to meet the learning needs of all children, youth and adults by 2015'.[58] These goals include: (1) expanding early childhood care and education; (2) providing free and compulsory primary education for all; (3) promoting learning and life skills for young people and adults; (4) increasing adult literacy; (5) achieving gender parity and gender equality; and (6) improving the quality of education.[59] These goals align well with the educational rights of Indigenous peoples outlined in the Declaration and are being advanced through a number of UNESCO-sponsored programmes.[60]

Finally, the right to education is a fundamental right, as well as an essential means by which other important human rights are realized.[61] As former Special Rapporteur on the Right to Education Katarina Tomasevski once stated, the right to '[e]ducation operates as a multiplier, enhancing ... all ... rights and freedoms where [it] is effectively guaranteed, while [jeopardizing them all] where [it] is ... violated'.[62] This understanding of the right to education is particularly relevant given the concerns of Indigenous peoples discussed earlier: the right to education is essential to, and can only be fully achieved by, the realization of other important human rights, such as the right to Indigenous self-determination and the right to cultural and linguistic integrity.[63] The international legal framework that supports the intersection of these rights is explored next.

3.2 Article 14(1): Indigenous Educational Systems

(1) Indigenous Peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

[57] The EFA movement includes an array of participants including 164 governments, UNESCO, UNICEF, and the World Bank to name a few. See UNESCO, 'Education for All (EFA) International Coordination', <http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all/> accessed 18 October 2017.

[58] UNESCO, 'Education for All Goals', xii–xiv, <http://unesdoc.unesco.org/images/0023/002322/232205e.pdf> accessed 24 November 2017.

[59] ibid.

[60] See Division for the Promotion of Quality Education, UNESCO, 'UNESCO's Work on Indigenous Education', <http://unesdoc.unesco.org/images/0013/001355/135576eo.pdf> accessed 18 October 2017. See also UNESCO, 'Indigenous Education', <http://www.unesco.org/new/en/education/themes/strengthening-education-systems/languages-in-education/indigenous-education/> accessed 18 October 2017; UNESCO, 'Local and Indigenous Knowledge Systems', <http://www.unesco.org/new/en/natural-sciences/priority-areas/links/indigenous-education/> accessed 21 February 2013.

[61] See CESCR, General Comment 13 (n 48) para 1. See also UN Expert Mechanism, Lessons Learned (n 13) paras 5–6: 'Education is recognized as both a human right in itself and an indispensable means of realizing other human rights and fundamental freedoms, the primary vehicle by which economically and socially marginalized peoples can lift themselves out of poverty and obtain the means to participate fully in their communities. Education is increasingly recognized as one of the best long-term financial investments that States can make.'

[62] K Tomasevski, *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Novum Grafiska AB 2001) 10. See also K Tomasevski, *Human Rights Obligations in Education: The 4-A Scheme* (Wolf Legal Publishers 2006).

[63] See Tomasevski, *The 4-A Scheme* (n 62) ch 3 ('Acceptability') for a discussion of language, as well as discrimination in education.

Article 14(1) involves two aspects of the right of self-determination: (a) the right of Indigenous peoples to be in charge of the creation and control of schools serving their communities; and (b) the right of Indigenous peoples to provide an education in their Indigenous languages and within their Indigenous cultures. Both major UN human rights covenants, the ICCPR and the ICESCR, protect the right of self-determination, which includes the right of all peoples to 'freely determine their political status' as well as to 'freely pursue their economic, social and cultural development'.[64] Education is a key aspect of a people 'freely determining' and achieving these ends.

The first part of Article 14(1) includes the right to develop and maintain non-governmental schools, as well as exercising control and authority over government-funded schools serving Indigenous communities. In terms of non-governmental schools, States have a responsibility under the ICESCR to respect the right of 'individuals and bodies to establish and direct educational institutions'.[65] Article 27(3) of ILO Convention 169 similarly articulates that 'governments shall recognise the right of [Indigenous] peoples to establish their own educational institutions and facilities'.[66] Under international law, this right is limited only in the sense that the schools must meet 'minimum standards' established by the State in consultation with Indigenous peoples.[67]

However, international human rights law does not limit the right to self-determination in education to the establishment and control of private schools. On the contrary, States have an obligation to assist Indigenous peoples in establishing government-funded educational facilities and initiatives within their own communities. This is reflected in the ICESCR, which requires States to take 'deliberate, concrete, and targeted' steps to provide 'free' education at the primary school level, and to develop 'system[s] of schools at all levels'.[68] The CRC similarly requires States to provide 'free' and 'available' primary education, as well as secondary education that is generally 'available and accessible' to all children.[69] ILO Convention 169 mirrors these international standards, requiring that State-supported schools be 'developed and implemented in co-operation with [Indigenous communities] to address their special needs, and [to] incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations'.[70]

Indigenous-run schools and initiatives are also consistent with the right of parents and guardians under the ICESCR to direct the 'religious and moral education of their children' and to choose schools for their children 'other than those established by the public authorities'.[71] The CRC provides more specifically that 'the education of a child shall be directed to ... [t]he development of respect for the child's parents, his or her own cultural identity, language and values.'[72] Similar treaty provisions can be found in the UNESCO Convention against Discrimination in Education (CADE).[73]

[64] ICESCR (n 1) Art 1(1)–(2); ICCPR (n 20) Art 1. [65] ICESCR (n 1) Art 13(4).

[66] ILO Convention 169 (n 49) Art 27(3).

[67] See ILO, 'ILO Convention on Indigenous and Tribal Peoples 1989 (No 169): A Manual' (rev edn, 2003) 12, <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/instructionalmaterial/wcms_088485.pdf> accessed 18 October 2017. See also ICESCR (n 1) Art 13(4).

[68] ICESCR (n 1) Art 13; CESCR, General Comment 13 (n 48) para 43.

[69] CRC (n 47) Art 28. [70] ILO Convention 169 (n 49) Art 27(1).

[71] ICESCR (n 1) Art 13(3). [72] CRC (n 47) Art 29(1).

[73] UNESCO, 14 November–15 December, Convention against Discrimination in Education (14 December 1960) Arts 2(b), 5(1)(b), <http://www.unesco.org/education/pdf/DISCRI_E.PDF> accessed 17 October 2017 (CADE); Universal Declaration (n 1) Art 26(3).

The second part of Article 14(1) deals with the right of Indigenous peoples to an education consistent with their cultural methods of teaching and learning and in their own language. This is consistent with both the CRC and the ICCPR, which protect the right of Indigenous individuals 'in community with ... other members of their group, to enjoy their own culture ... or to use their own language'.[74] The CRC takes this one step further when noting that a child's education should 'be directed to ... the development of ... his or her own cultural identity, language and values'.[75] ILO Convention 169 mirrors this legal mandate, recognizing the right of Indigenous students to be educated in their own language.[76] Since children learn best in their mother tongue for all the reasons previously discussed, the right to be taught in their own language is inextricably linked to the right to achieve the same level of proficiency as non-Indigenous children in basic skills and subjects.

Although educational systems and initiatives are subject to 'minimum [governmental] standards', a culturally and linguistically relevant education is consistent with this requirement, particularly when one considers some of the primary aims of a universal education, such as the '[full] development of the child's personality, talents and mental and physical abilities' and '[t]he development of respect for the child's parents [and for] his or her own cultural identity, language and values'.[77] As earlier explained, an education that is devoid of or demeaning of a child's cultural or linguistic context has the opposite effect, impairing her ability 'to participate effectively in a free society or to develop fully "the human personality" or "[its] sense of ... dignity"' as articulated in the ICESCR.[78] This interpretation of international law finds support in the General Comments of the CESCR and the Committee on the Rights of the Child (CommRC).[79]

Many other UN human rights bodies have reached similar conclusions regarding the need for the development of linguistically and culturally relevant educational systems for Indigenous peoples. For instance, the Office of the High Commissioner for Human Rights (OHCHR) International Expert Group on Indigenous Languages concluded in 2008 that '[i]nternational contemporary law provides the legal framework for the protection

[74] ICCPR (n 20) Art 27; CRC (n 47) Art 30.

[75] CRC (n 47) Art 29(1).

[76] ILO Convention 169 (n 49) Art 28.

[77] CRC (n 47) Art 29(1). See also ICESCR (n 1) Art 13(1).

[78] ICESCR (n 1) Art 13(1). Many of the same educational objectives quoted in this paragraph are also reflected in numerous international instruments: UN Charter (1945) Art 1(3); Universal Declaration (n 1) Art 26(2); CADE (n 73) Art 5(1)(a); UNESCO, 'World Conference on Education for All, World Declaration on Education, Jomtien, Thailand (Mar. 5–9, 1990)', Art 1, <http://www1.umn.edu/humanrts/instree/educonference1990.html> accessed 18 October 2017; World Conference on Human Rights, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (12 July 1993), <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/CONF.157/23> accessed 24 November 2017; Plan of Action for the United Nations Decade for Human Rights Education 1995–2004: Human Rights Education—Lessons for Life, UN Doc A/51/506/Add.1 (12 December 1996) para 2, <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/51/506/Add.1> accessed 24 November 2017.

[79] CESCR, General Comment 13 notes that education must be 'relevant, culturally appropriate and of good quality', as well as 'flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings'. CESCR, General Comment 13 (n 48) para 6(c)–(d). The CommRC not only agreed with the CESCR in its General Comment 1, but went on to clarify that the right to education is not completely fulfilled when the curriculum 'limit[s] the benefits [a group] can obtain from the educational opportunities offered, and by unsafe or unfriendly environments which discourage [that group's] participation' in the learning process. CommRC, General Comment 1: The Aims of Education, UN Doc CRC/GC/2001/1 (17 April 2001) paras 9–10. (In para 10, the Committee was using the extreme example of how curricula could perpetuate gender discrimination, but it is clear that the Committee means for the example to apply to any group suffering from discrimination.)

of the use of one's own language' and that the protection of this right is interrelated to the 'cultural and physical survival' of Indigenous peoples.[80] Similarly, the UNPFII has recommended 'that all education programmes for Indigenous children ... be based on the insights from solid research over many years that mainly mother tongue medium ... bilingual education is superior to all other forms of education in order to achieve literacy and generally effective learning'.[81] Finally, the OHCHR Expert Seminar on Indigenous Peoples and Education highlighted in 2004 the obstacles to Indigenous peoples' full enjoyment of their right to education, including the lack of linguistically and culturally appropriate education that is shaped and directed by Indigenous peoples.[82]

3.3 Article 14(2): Non-Discrimination in Education

(2) Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

Article 14(2) of the Declaration specifically addresses the right of non-discrimination in 'all levels and forms' of State-sponsored education. Article 14 of the Declaration directly responds to historical and contemporary discrimination against Indigenous peoples specifically in State education systems. It also identifies central mechanisms that States need to put into place to eradicate discrimination and equalize education for Indigenous peoples, including self-determination in the creation and running of schools, as well as the advancement and support of linguistically and culturally relevant instruction. Beyond mere access to existing State institutions, it affirms Indigenous pupils' right to receive education to the same extent and of the same quality as non-Indigenous pupils. In other words, its goal is to provide education that ultimately enables Indigenous pupils to participate in society on an equal footing with non-Indigenous pupils regardless of differences in backgrounds and needs. This is consistent with the mandate under international law that States secure and protect the right to education without discrimination.[83]

The principles of equality and non-discrimination take on special meaning with regard to the right to education. Just as education is a prerequisite for the enjoyment of other human rights,[84] so too is non-discrimination an important prerequisite for the enjoyment of one's right to education. All the major international human rights instruments relating to education address this issue of non-discrimination in education, including the ICESCR, the CRC, and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).[85] UNESCO's CADE is perhaps the most comprehensive in this regard. It prohibits States from: (1) denying any individual or group 'access to education of any type or at any level'; (2) providing them with an 'education of an inferior standard'; or (3) inflicting on them 'conditions which are incompatible with the dignity of man'.[86] The duties of a State under this Convention include 'abrogat[ing] ... statutory

[80] Human Rights Legal Framework (n 37) paras 29–30.

[81] Permanent Forum 2005 (n 7) para 32. See generally Permanent Forum 2008 (n 7).

[82] Conclusions and Recommendations (n 6) para 10.

[83] See Universal Declaration (n 1) Art 2; UN Charter (1945) Art 1(3); ICESCR (n 1) Art 2(2); CRC (n 47) Art 2(1).

[84] See Report of Expert Mechanism, Lessons Learned (n 13) paras 5–6.

[85] See ICESCR (n 1) Art 2(2); CRC (n 47) Art 2(1); UN International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, entered into force 4 January 1969, Art 7, S Exec Doc C 95-2 5, 660 UNTS 195, Art 5(e).

[86] CADE (n 73) Art 1.

provisions ... [or] practices which involve discrimination in education' and advancing a 'national policy [that] ... promote[s and ensures] equality of opportunity and ... treatment'.[87] ILO Convention 169 similarly provides for education of Indigenous peoples 'on at least an equal footing with the rest of the national community'.[88] Moreover, States have an 'immediate obligation' to meet this duty of non-discrimination in education.[89] Indigenous students who are in schools that hamper their academic success by ignoring their linguistic and cultural needs do not benefit from the right to education on an 'equal footing' with the rest of society and are in fact being subjected to 'education of an inferior standard'.[90]

More specifically, when considering issues of non-discrimination in education, States must be cognizant of how UN bodies have defined a meaningful education. According to the CESCR, education 'in all its forms and at all levels' should be 'available, accessible, acceptable and adaptable'.[91] For instance, the right to education requires that schools at all levels be physically 'available' to all potential students. States must therefore increase the available infrastructure of schools for Indigenous peoples to meet whatever need exists.[92] Second, schools must be 'accessible' without discrimination, including on the basis of economic status, race, culture, language, sex, or religion.[93] Thus, States must go beyond simply opening school enrollment to all who need it, and take further steps to 'enhance equality of educational access' for individuals from disadvantaged groups, including Indigenous peoples.[94] However, State responsibility towards Indigenous peoples does not end with merely facilitating the unrestricted access of Indigenous pupils to existing State schools. Rather, education must 'adapt' to the particular needs and best interests of each child. Under international law, this includes the 'imparting of general knowledge and skills' that will help Indigenous children 'participate fully and on an equal footing in their own community *and* in the national community'.[95] In order to meet the goals of preparing Indigenous pupils for a blended way of life, State curricula will therefore need to be adaptable, incorporating Indigenous ways of knowing and learning in addition to general knowledge and skills needed for survival outside of the Indigenous community. On the issue of 'acceptability', the CESCR has made it clear that under international law 'the form and substance of education, including curricula and teaching methods, have to be acceptable (eg relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents.'[96] Thus, non-discrimination in the education of Indigenous pupils includes, at minimum, curricula and teaching methods relevant to and consistent with the cultural and linguistic needs and concerns of students and their families.

[87] ibid Arts 3–4. [88] ILO Convention 169 (n 49) Art 26.

[89] ibid Art 26; ICESCR (n 1) Art 13.

[90] ILO Convention 169 (n 49) Art 29; CADE (n 73) Art 1(1)(b).

[91] CESCR, General Comment 13 (n 48) para 6. In her 1999 Preliminary Report, the Rapporteur on the Right to Education 'structured [governmental obligations corresponding to this right generally] into a 4-A scheme, denoting the four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability': Preliminary Report of the Special Rapporteur on the Right to Education, UN Commission on Human Rights, 55th Sess Prov Agenda Item 10, UN Doc E/CN.4/1999/49 (13 January 1999). The 4-A Scheme is also explained in great detail in Tomasevski, *The 4-A Scheme* (n 62).

[92] See CESCR, General Comment 13 (n 48) para 6. [93] ibid para 7.

[94] Some meaningful steps articulated by the CESCR include creating fellowship systems and economic subsidies, as well as providing such things as adequate clothing, transportation to schools, and other necessary accommodations. See generally CESCR, General Comment 13 (n 48) para 26. See also ICESCR (n 1) Art 13(2)(e).

[95] ILO Convention 169 (n 49) Arts 29, 28(2) (emphasis added). See also ICESCR (n 1) Art 13(1).

[96] CESCR, General Comment 13 (n 48) para 6.

Under international law, a State can establish, maintain, or permit separate educational systems or programmes for religious, cultural, or linguistic reasons without running afoul of the principle of non-discrimination.[97] However, schooling that looks on its face to be equal, but actually limits Indigenous pupils to an 'education of an inferior standard' (particularly as it relates to educational outcomes), would run afoul of this principle.[98] These points are further illustrated in the next section on 'effective measures'.

3.4 Article 14(3): Effective Measures, Right of Access, and Consultation

(3) States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

In ascertaining the meaning of Article 14(3), we are faced with the initial question of whether it stands alone or is in some way connected to the other paragraphs of Article 14. A review of the drafting history of this provision suggests that paragraph (3) complements paragraphs (1) and (2), as well as imposes additional obligations on States. The eight commas and nine clauses of this provision make it difficult to ascertain its meaning. However, the drafting history supports the following interpretation, which is consistent with international law precepts. First, Article 14(3) requires States to take affirmative steps to ensure that all the rights articulated in Article 14 are met. Second, it requires States to take these steps in consultation with Indigenous peoples. Third, it independently requires States to address, when possible, the unique situation of Indigenous individuals living outside their community, often as the result of State removal policies. This section explores each of these requirements within the context of international law and Article 14 generally.

Research on the evolution of Article 14 through the WGIP indicates that the three independent paragraphs of Article 14 are related in one key respect: the 'States shall, in conjunction with indigenous peoples, take effective measures' language of paragraph (3) represents a positive obligation on States to facilitate the rights encompassed in paragraphs (1) and (2).[99] Thus, paragraph (3) of Article 14 represents to some degree the practical application of the first two paragraphs, requiring States to take 'effective measures' to facilitate the right to self-determination in education under paragraph (1) and the right to non-discrimination under paragraph (2). This includes affirmative steps to ensure that Indigenous pupils have access to linguistically and culturally appropriate education. This duty to take 'effective measures' is consistent with a State's general obligation under international law.

According to the CESCR, States have a specific and continuing 'obligation to move as expeditiously ... as possible' towards the full realization of the right to education.[100] More specifically, a State has the duty to 'respect, protect and fulfil' the right to education.[101] Thus, States can comply with aspects of Article 14(3) by meeting their international obligations. For instance, 'respecting' Indigenous peoples' right to education would include not interfering or placing undue restrictions on their right to establish culturally and

[97] See, eg, CADE (n 73) Art 2(b). See also CESCR, General Comment 13 (n 48) para 33.

[98] CADE (n 73) Art 1(b). See also Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 31 August–8 September 2001), UN GAOR, UN Doc A/CONF.189/12 (2002) para 123(b)–(e).

[99] See Human Rights Legal Framework (n 37) para 22.

[100] CESCR, General Comment 3: The Nature of States Parties Obligations, UN Doc E/1991/23 (14 December 1990) Art 2, para 1; CESCR, General Comment 13 (n 48) para 56.

[101] CESCR, General Comment 13 (n 48) para 46.

linguistically appropriate educational programmes and systems. Some examples of this lack of respect given by the UN Special Rapporteur include national policies and practices that require 'birth certificates for the enrolment of children and the denial of indigenous names, long hair, and traditional dress at school'.[102] Additionally, States can 'protect' Indigenous individuals' rights to education by ensuring that others do not interfere with their basic rights. Finally, given the significant disparities that exist between Indigenous and non-Indigenous peoples in the area of education, largely due to a long history of discriminatory practices, compliance with Article 14(3) will require States to 'fulfil' their international obligations by taking affirmative steps to equalize and ensure a right to Indigenous education. This could include such things as committing additional resources to provide for schools and appropriately trained teachers within Indigenous communities, as well as making changes to Statewide curricula to ensure bilingual and intercultural programming.[103]

Some States may have concerns, when meeting their duty to take 'effective measures', with using governmental resources to support special measures for Indigenous peoples. However, such expenditures are consistent with international principles on non-discrimination. According to the CESCR, 'special measures intended to bring about de facto equality ... for disadvantaged groups is not a violation of the right to non-discrimination [in] education, so long as such measures do not lead to the maintenance of unequal ... standards for different groups.'[104] In terms of potential 'disparities in spending', such disparities constitute discrimination under international law only insofar as they 'result in *differing qualities* of education'.[105] Indeed, not providing adequate resources to ensure the same quality of education between Indigenous and non-Indigenous students would be inconsistent with a State's duty to 'take steps' and with its mandate of non-discrimination.

Government responsibility for funding Indigenous educational systems under Article 14(3) is also compatible with the right of Indigenous self-determination, particularly Indigenous peoples' right to control the development, establishment, and maintenance of government-funded systems. In fact, ILO Convention 169 assumes that given the problems of poverty created by past governmental discrimination and neglect, it will not be economically feasible for many Indigenous groups to develop and maintain schools that adequately serve the needs of their pupils without the financial help of State governments and other entities.[106]

Some States have expressed concern that their resources may be insufficient to comply fully with the requirements of Article 14(3) in terms of *effective measures*, or alternatively, that other more immediate societal concerns take precedence over compliance with these requirements. In working through these questions, States can be guided by the CESCR's General Comment 3, which requires States to use 'all resources that are at its disposition' to meet its 'minimum core obligation' with regard to the right of education, including 'ensur[ing] the widest possible enjoyment' of this right 'under the prevailing circumstances'.[107]

Article 14(3) of the Declaration requires that States take effective measures 'in conjunction with *indigenous peoples*'. This duty of consultation is a crucial aspect of not only Article 14, but the Declaration generally.[108] States have a history of making unilateral decisions affecting Indigenous Peoples, often to their detriment. This is particularly true

[102] Conclusions and Recommendations (n 6) para 10(d).
[103] See ibid para 10.
[104] CESCR, General Comment 13 (n 48) para 32.
[105] ibid para 35 (emphasis added).
[106] See ILO Convention 169 (n 49) Art 27; 'ILO Convention Manual' (n 67) 18, 68–72.
[107] CESCR, General Comment 3 (n 100) paras 10–11.
[108] See UNDRIP (n 2) Arts 11(2), 12(2), 15(2), 17(2), 19, 22(2), 27, 30, 31(2), 36(2), 38.

in the context of Indigenous education, where educational policy was often set by the State with an aim of advancing the State's own goals (such as forced assimilation). Today, international human rights law requires States to consult with and seek the consent of Indigenous peoples and their families on matters such as the education of their children.[109] This duty of consultation and consent is explored more fully elsewhere in this volume.

Finally, research on the evolution of Article 14(3) through the WGIP suggests that its 'when possible' clause relates solely to the issue of children living outside their communities and therefore does not limit a State's obligation generally under Article 14. It was added to later versions of Article 14 to address State concerns with being able to, in all circumstances, provide 'access' to children 'living outside their communities' to a culturally and linguistically appropriate education.[110] One of the reasons that the clause 'including those living outside their communities' was added to paragraph 3 of Article 14 was to specifically acknowledge and address the history of forcible assimilation and removal of Indigenous peoples. As one UN study notes, such removals have had a 'negative effect[] on the preservation of indigenous languages and cultures'.[111] In any case, this obligation to ensure that Indigenous individuals living outside their communities 'have access, when possible, to an education in their own culture and provided in their own language' is consistent with the duty of States under international law to eradicate discrimination in all sectors of society and address the needs of all individuals no matter where they are physically situated.[112]

4. Regional Law and Domestic Practices

Many of the international norms discussed above have begun to work their way into regional and domestic spheres. While implementation remains a pressing problem, progress is being made on these fronts primarily due to the advocacy efforts of Indigenous peoples. This section begins with a brief look at some of the existing regional norms that align with the educational aims of the Declaration. We then take a look at some domestic developments and practices in this area and identify some common factors that aid in the promotion of

[109] See CESCR, General Comment 13 (n 48) para 47: 'The obligation to fulfil requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education.' See CRC (n 47) Art 29(1)(c); ICESCR (n 1) Art 13(3); CADE (n 73) Arts 2(b), 5(1)(b); Universal Declaration (n 1) Art 26(3).

[110] See UNCHR, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples: Information Received from Intergovernmental Organizations, UN Doc E/CN.4/1995/WG.15/3 (10 October 1995) para 5 (IGO Report); see also UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/1997/102 (10 December 1996) 30. As one intergovernmental organization noted before the Working Group, 'indigenous children living outside their communities have the right to education in their own culture and language at the State's expense, which could be difficult to implement in many countries due to resource constraints' (see IGO Report 5). In order to ensure country support, various proposals were advanced, such as this proposed remedy by the representative of Canada that '[i]ndigenous children living outside their communities should have adequate opportunities to education in their own culture and language, *where demand and resources allowed*' (emphasis added) (UN Doc E/CN.4/1997/102, 156). Ultimately, the Working Group settled on the language 'when possible'.

[111] Conclusions and Recommendations (n 6) para 10(j). This direct link between the damage that has been done by displacement and an opportunity for reparations from the States involved may also speak to the 'when possible' language, not just because of lack of available resources, but because not all countries have removal or displacement issues.

[112] See CESCR, General Comment 13 (n 48) paras 6, 31–37.

the right to education for Indigenous peoples. We also identify some of the common issues faced by States and Indigenous peoples. Ultimately, what we have found is that the educational norms articulated in the Declaration are making their way into domestic practices. We see this as further evidence that States are increasingly considering themselves bound by the norms set forth in Article 14. Examining domestic practices also enriches our understanding of what those norms entail both in terms of interpretation as well as challenges.

4.1 Regional Human Rights Obligations

Regional instruments are generally in accord with international norms in recognizing not only a universal right to education, but one that is also culturally and linguistically appropriate.[113] These instruments similarly speak to the need for community-driven learning and educational development. The following discussion highlights regional norms relating to the aspects of the Declaration explored in this chapter, including any relevant regional cases on education. In order to gain a fuller understanding of where the regions are with regard to other relevant Indigenous rights—such as self-determination, non-discrimination, and cultural and linguistic integrity—other chapters of this book should be consulted.

4.1.1 The Americas

The Charter for the Organization of American States (OAS) recognizes that the 'rapid eradication of illiteracy and expansion of educational opportunities for all' is integral to the important goals of creating 'equality of opportunity' in other spheres of life and in encouraging 'full participation of [its] peoples in decisions relating to their own development'.[114] To this end, and similar to the ICESCR, the American Convention on Human Rights obligates States to progressively adopt measures that ensure the full realization of the right to education.[115] The American Declaration on the Rights and Duties of Man also provides for a 'right to education' that prepares individuals 'to attain a decent life, to raise [their] standard of living, and to be ... useful member[s] of society'.[116] Both the Convention and the Declaration address the right of non-discrimination and equality in education.[117] As discussed above, in order to prepare each Indigenous student to participate fully and equally as a 'member of society', States will need to develop educational programmes and systems that speak directly to the political, economic, cultural, and linguistic needs of Indigenous peoples. Both the Inter-American Commission and the Inter-American Court have, within the context of the American Convention, articulated a right

[113] See nn 152–84.

[114] Charter of the Organization of American States, entered into force 13 December 1951, 119 UNTS 3, Art 34(h) (OAS Charter).

[115] See American Convention on Human Rights, opened for signature 22 November 1969, entered into force 18 July 1978, 1144 UNTS 123, Art 26 (American Convention).

[116] According to the IACtHR, this Declaration is the controlling text that 'defines the human rights referred to in the Charter' for those OAS Member States that have not ratified the American Convention. American Declaration of the Rights and Duties of Man (adopted by the Ninth International Conference of American States 1948), OAS Res XXX, Art XII reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System (1992) OEA/Ser.L.V/II.82 doc 6 rev 1 17 (American Declaration). See also Robert F Kennedy Memorial Center for Human Rights, 'Right to Education of Afro-Descendant and Indigenous Communities in the Americas: Report Prepared for the Thematic Hearing before the Inter-American Commission on Human Rights' (12 March 2008) 13, fn 39, <http://www.law.virginia.edu/pdf/news/hrclinic_report.pdf> accessed 18 October 2017 (Right to Education).

[117] See American Declaration (n 116) Art XII; American Convention (n 115) Arts 1, 24.

to education that both 'respects [the] cultural traditions' of Indigenous communities 'and guarantees the protection of their own language'.[118]

With regard to incorporating Indigenous knowledge and culture into education, various OAS instruments already recognize 'the right to take part in the cultural life of the community', as well as 'the duty of man to preserve, practice and foster culture by every means within his power'.[119] The OAS Charter further provides that in working towards 'meet[ing] ... educational needs', States are 'bound to preserve and enrich the cultural heritage of the American peoples'.[120] Finally, the OAS Charter identifies education and culture as pathways 'toward the overall improvement of the individual, and as a foundation for democracy, social justice, and progress'.[121]

The OAS is currently working on two additional instruments that address the educational and identity rights of Indigenous peoples.[122] The one most directly on point, Article XIV of the Draft American Declaration on the Rights of Indigenous Peoples (OAS Declaration), includes the three major elements found in Article 14 of the Declaration: the right of Indigenous peoples to control their own educational systems, the right to have access to all levels of education without discrimination, and the right to a culturally and linguistically relevant education. Thus, many OAS States have been active in recognizing through various regional instruments the core principles of Article 14.

4.1.2 Africa

The African (Banjul) Charter on Human and Peoples' Rights recognizes the core aspects articulated in Article 14 of the Declaration, including the right to education (Article 17(1)), culture (Article 17(2)), non-discrimination (Article 2), and various collective rights like the right to self-determination (Articles 19 to 24).[123] Article 25 of the Charter specifically obligates States to utilize education to comply with their duty to advance these various rights throughout society.

[118] *Case of the Xákmok Kásek Indigenous Community v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No 214 (24 August 2010) paras 211, 301, <http://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf> accessed 18 October 2013 (within the context of the right to life under Art 4 of the American Convention, in 2010, the IACtHR ordered Paraguay to 'guarantee [Indigenous] children access to basic education, paying special attention to ensuring that the education provided respects their cultural traditions and guarantees the protection of their own language. To this end, [the Court also directed] the State [to] ... consult the Community as necessary'). Previous to the 2010 *Xákmok Kásek* case, the IACtHR directed Paraguay to provide two other Indigenous groups with bilingual education that included their mother tongue. See *Sawhoyamaxa Indigenous Community v Paraguay* (n 49) para 230; *Case of the Yakye Axa Indigenous Community v Paraguay* (Merits, Reparations, and Costs), Judgment, IACtHR Series C No 125 (17 June 2005) para 221.

[119] American Declaration (n 116) Art XIII, Preamble. See also OAS Charter (n 114) Art 34; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, signed 17 November 1988, OAS Treaty Series No 69 (1988) Art 14 (Protocol of San Salvador), <http://www.oas.org/juridico/english/sigs/a-52.html> accessed 18 October 2017.

[120] OAS Charter (n 114) Art 48. In the context of adult education, OAS States are also bound to 'give special attention to the eradication of illiteracy' by 'strengthen[ing] adult and vocational education systems' and 'ensur[ing access to] ... the benefits of culture' (ibid Art 50).

[121] ibid Art 47.

[122] See OAS, 'Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples', GT/DADIN/doc 334/08 rev 7 (2 May 2012) 3, <http://www.oas.org/consejo/cajp/Indigenous%20documents.asp#Record> accessed 18 October 2013. The most recent Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples cites XIV (Education) as having been 'approved'. See also OAS, 'Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance', OEA/Ser.G/CAJP/GT/RDI-179/11 rev 14 (11 May 2007), <http://www.oas.org/consejo/cajp/RACISM.asp> accessed 18 October 2017.

[123] See African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, 21 ILM 58.

The African Charter on the Rights and Welfare of the Child emphasizes the role that education plays in the overall 'development of [a] child's personality, talents, and mental and physical abilities' and links those educational aims to 'the preservation and strengthening of positive African morals, traditional values and cultures'.[124] This Charter also recognizes the rights and duties of parents to choose their children's schools, so long as those schools 'conform to ... minimum standards ... approved by the State'.[125]

In October 2000, the African Commission on Human and Peoples' Rights established the Working Group on Indigenous Populations/Communities with a mandate to, among other things, study the relationship between the African Charter on Human Rights and the 'well-being of indigenous communities', and to make 'appropriate recommendations for the monitoring and protection of the rights of indigenous communities'.[126] The Working Group's report includes a section on the right to education, noting that '[l]iteracy rates are poor for most indigenous peoples and often school attendance is less than 50% below the national level.'[127] The Working Group highlights some reasons for these numbers that are consistent with the underlying concerns that informed the drafting of Article 14 of the Declaration: 'Since most of them live at the periphery of their respective countries, it is often very difficult if not impossible for [Indigenous] children to walk to school. Their nomadic lifestyle is often blamed for this, rather than the inability of governments in Africa to adjust to the varying needs of different communities within their borders.'[128] The Working Group went on to identify some of the pressing questions facing African countries with regard to Indigenous education, including the issue of what role culture and language should play in ensuring access to education. In particular, the Working Group acknowledged that:

> It is known that an education system that assumes aspects of dominant cultural perceptions towards indigenous peoples tends to be alien and non-accepting of them. This tends to lead to a high drop-out rate due to discrimination by teachers and other students; absenteeism when the children join their parents for gathering, herding or other activities; intensification of poverty and reliance on government hand-outs due to unemployment ...[129]

The Working Group has singled out Namibia's treatment of the San people in particular as 'a useful example of how appropriate education models can be developed' to benefit Indigenous peoples.[130] This example is discussed more fully below.[131]

[124] African Charter on the Rights and Welfare of the Child, entered into force 29 November 1999, OAU Doc CAB/LEG/24.9/49 (1990) Art 11(2)(a)–(c). In line with Art 15 of the Declaration, this charter also affirms that education should 'foster[] respect for human rights and fundamental freedoms' and 'prepar[e] ... the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups' (Art 11(2)(b)–(d)).

[125] ibid Art 11(4). For a comprehensive look at the region's views on the Declaration, see W van Genugten, 'The African Move Towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: The Substantive Arguments Behind the Procedures' (2010) 104(1) Am J Int'l L 29–65.

[126] ACommHPR, 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities' (Transaction Publishers 2005) 10–11.

[127] ibid 55. [128] ibid. See also van Genugten (n 125).

[129] ibid 55.

[130] ibid 56. See also CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Addendum: Namibia, UN Doc CERD/C/NAM/12 (26 September 2007).

[131] The African Commission and its Working Group are also attempting to address the reluctance on the part of some African governments to distinguish between Indigenous and non-Indigenous peoples. It is also seeking to address serious threats to the survival of Indigenous cultures, such as land dispossession and negative stereotyping and discrimination. How it is choosing to do this is through the promotion of collaboration and

4.1.3 Europe

The European Social Charter likewise identifies education as a key component to 'protect[ing individuals] against poverty and social exclusion'.[132] The same document also echoes international law in requiring Member States to 'provid[e] for the establishment or maintenance of institutions and services sufficient and adequate' to ensure children and young people with an education aimed at their 'right ... to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities'.[133] In line with these principles is the recognition of parents' right to educate their children 'in conformity with their religious, philosophical and pedagogical convictions'.[134]

Europe has also considered the important issues of language in a child's educational development. Most of the legal development has been around minority rights generally, which are a separate concern from those of Indigenous peoples. However, these laws help us to better understand where European countries stand on the more general issue of language and schooling, which in turn may be relevant to various Indigenous peoples throughout Europe, most notably the Saami peoples. For instance, Article 19(12) of the European Social Charter calls for Member States 'to promote and facilitate, as far as practicable, the teaching of the migrant worker's mother tongue to the children of the migrant worker'.[135] Other regional language instruments include the Framework Convention for the Protection of National Minorities, which underlines the necessity for national minorities to participate in the decision-making process, especially when the issues being considered affect them directly.[136] The Convention acknowledges the right of national minorities to 'set up and to manage their own private educational and training establishments', and requires States to 'foster knowledge of the culture, history, language and religion of their national minorities'.[137] Additionally, the European Charter for Regional and Minority Languages obligates States to make minority languages available in pre-school and primary and secondary-level schools, as well as in higher education, vocational, and technical schools.[138]

dialogue between States and Indigenous communities, through among other things, 'regional sensitization seminars', the first of which was held in Yaounde, Cameroon in 2006. These educational techniques, undertaken in a spirit of collaboration and good relations between various segments of society, are similar in many key respects to the use of education and public information as a means of combating prejudice, eliminating discrimination, and promoting tolerance under Art 15 of the Declaration. See generally ACommHPR et al, 'Report of the Regional Sensitisation Seminar: The Rights of Indigenous Populations/Communities in Central Africa, 13–16 September, 2006', <http://www.achpr.org/files/special-mechanisms/Indigenous-populations/idp_seminar_cameroun_2006_en.pdf> accessed 18 October 2017. See also ACommHPR, 'About: Working Group on Indigenous Populations/Communities in Africa' (2013), <http://www.achpr.org/mechanisms/indigenous-populations/about/> accessed 18 October 2017.

[132] European Social Charter (Revised) (3 May 1996) CETS No 163, Art 30.

[133] ibid Art 17.

[134] Charter of Fundamental Rights of the European Union, Art 14(3), adopted 7 December 2000, entered into force 1 December 2009, 2000/C 364/01; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 3 September 1953 (ETS 5), 213 UNTS 222, Protocol No 1, Art 2.

[135] European Social Charter (n 132) Art 19(12).

[136] See Framework Convention for the Protection of National Minorities, 34 ILM 351 (1 February 1995) Art 15.

[137] ibid Arts 12–13. [138] ibid Art 8.

Other influential non-treaty standards include the Hague Recommendations Regarding the Education Rights of National Minorities, which were meant to serve as a general framework for States. The recommendations recognize, among other things, the right to equality and non-discrimination, the right of national minorities to establish and manage their own schools, and the right of individuals to learn in their native tongue at pre-school, kindergarten, and primary levels.[139] The High Commissioner on National Minorities, who was responsible for drafting the Recommendations, has said '[i]t is clear that education is an extremely important element for the preservation and the deepening of the identity of persons belonging to a national minority.'[140] This reading of regional law is strengthened by the European Court of Human Rights' decision in *Cyprus v Turkey*, in which the Court ruled that the lack of any Greek-medium education at the secondary level in Turkish-controlled Cyprus amounted to a denial of the right to education.[141]

The European Union has also begun to consider policies that address its involvement in supporting the rights and concerns of Indigenous peoples in other parts of the world. In 1998, the Council of the European Union adopted a resolution that provides guidelines for this purpose. The resolution was created with input from Indigenous groups and recognizes that 'Indigenous cultures constitute a heritage of diverse knowledge and ideas, which is a potential resource to the entire planet.'[142]

The regional instruments discussed above articulate and reinforce educational structures that can be particularly beneficial to Indigenous peoples. The instruments touch on many facets of the educational system, including Indigenous involvement in the creation and operation of educational systems, use of non-dominant languages in curriculum reform, and development and incorporation of different ways of knowing and learning with regard to education and schooling. As we will see below, these regional norms, along with international law, are shaping law and practice at the domestic level.

4.2 Domestic Practices

As demonstrated in Section 2 of this chapter, an Indigenous person's full educational potential is tied to his or her ability to learn in a linguistically and culturally-relevant environment that is shaped and controlled by Indigenous peoples and that is free of discrimination. Both the UN Declaration and regional norms recognize these essential aspects of the right to education for Indigenous peoples. This section highlights some country practices supporting Article 14's central goal of equalizing the standard and quality of education for Indigenous peoples. They do not include all the different initiatives happening on the part of States or Indigenous peoples. A more comprehensive exploration of these practices and the challenges they present can be found in our larger study on Indigenous education.[143]

[139] See Organization for Security and Co-operation in Europe, High Commissioner on National Minorities, 'The Hague Recommendations Regarding the Education Rights of National Minorities' (1996) Arts 1, 2, 8, 11–12, <http://www.osce.org/hcnm/32180?download=true> accessed 24 November 2017.

[140] ibid Introduction. See also European Convention for the Protection of Human Rights and Fundamental Freedoms (n 134) Art 2.

[141] *Cyprus v Turkey* (2001) 23 EHRR 478 (the Court held that Art 2 of Protocol 1 of the European Charter for the Protection of Human Rights and Fundamental Freedoms had been violated, which states that 'no person may be denied the right to education ... in conformity with their own religious and political convictions').

[142] UNHCHR, 'Guide for Minorities Pamphlet No 14: The European Union: Human Rights and the Fight against Discrimination' (2001), <http://www.ohchr.org/Documents/Publications/GuideMinorities14en.pdf> accessed 18 October 2017.

[143] LM Graham, 'The Right to Education and the UN Declaration on the Rights of Indigenous Peoples', Suffolk University Law School Research Paper No 10-61 (2010).

Readers might also want to consult the most recent UN study on Indigenous education entitled 'Lessons Learned and Challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education'.[144]

From our examination of country practices, we have discerned some key factors that aid in the promotion of the right to education for Indigenous peoples, as well as identified some common challenges faced by States and Indigenous peoples. Additionally, it is evident that the international norms that make up the educational provisions (eg self-determination in education, non-discrimination, and cultural and linguistic integrity) are making their way into domestic law-making and policy initiatives,[145] Indigenous peoples' advocacy efforts,[146] and court decisions.[147]

[144] Expert Mechanism, Lessons Learned (n 13) para 86.

[145] The clearest example is perhaps Bolivia, a country that has undergone a series of legislative changes in favour of Indigenous peoples' rights, starting with the adoption of the UNDRIP into national law in November 2007. See Law No 3760 (7 November 2007) [3039] GO (Bolivia), <http://gacetaoficialdebolivia.gob.bo/index.php/normas/view/834> accessed 6 November 2017. Also inspired by the UNDRIP, the Republic of the Congo passed Act No 5-2011 of 25 February 2011 on the Promotion and Protection of Indigenous Populations, <http://www.iwgia.org/images/stories/sections/regions/africa/documents/0368_congolese_legislation_on_indigenous_peoples.pdf> accessed 18 October 2017. See also Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, The Situation of Indigenous Peoples in the Republic of Congo, UN Doc A/HRC/18/35/Add.5 (11 July 2011) paras 40–48 (by S James Anaya). Mexico conducted a consultative process with Indigenous peoples with the goal of reforming its current General Education Law and making it more compliant with both the UNDRIP and ILO Convention 169. See Comision Nacional para el Desarrollo de los Pueblos Indigenas, Consulta Para La Reforma a La Ley General de Educacion 2011–2012: Informe Final (2013), <https://www.gob.mx/cms/uploads/attachment/file/37018/cdi_ley_fed_edu_2011_2012.pdf> accessed 6 November 2017. Similar efforts are also being made within Mexico's National Conference of Governors in an effort to bring State/regional laws into further compliance with the UNDRIP. See 100 Propuestas para Construir una Nueva Política de Desarrollo Social y Pueblos Indígenas, 55. Conferencia Nacional de Gobernadores (July 2012), <https://www.conago.org.mx/Comisiones/Actuales/DesarrolloSocialPueblosIndigenas/documentos/100PropuestasCODESPI.PDF> accessed 9 March 2013. In June 2011, the US Senate Committee on Indian Affairs held an oversight hearing to review the UNDRIP's implications on US domestic policy. Transcript of the hearing available at <https://www.indian.senate.gov/sites/default/files/upload/files/060911CHRG-112shrg67606.pdf> accessed 6 November 2017. Finally, the Paraguayan government's Institute for Indigenous Peoples states on its website that Paraguay holds itself to be subject to the UNDRIP. See <http://www.indi.gov.py/pagina/2-el-indi.html> accessed 6 November 2017. Others can be found throughout the domestic section.

[146] See, eg, National Congress of American Indians, '2012 White House Tribal Nations Summit: Tribal Leaders Briefing Book' (2012), <http://files.ncai.org/2012%20TNS%20Briefing%20Book/2012%20WH%20TNS%20-%20Full%20Briefing%20Book.pdf> accessed 21 February 2013, where there was a push by Indigenous nations for full implementation of the UNDRIP in the United States. In 2012, Indigenous leaders of the British Columbia Assembly of First Nations also stated in their Proposed National First Nations Education Legislation that 'any national legislation regarding First Nations education … [should] be measured against the principles of the Convention on the Rights of the Child and the UNDRIP.' British Columbia Assembly of First Nations, BCAFN 9th Annual General Meeting, 27 November 2012, Res 04/2012, 3, <http://www.afn.ca/resolutions/> accessed 21 February 2013. Also in 2012, the Tasmanian Aboriginal Centre, in Australia, drew from the UN Declaration when submitting comments to the Australian Parliament Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into Language Learning in Indigenous Communities. See Tasmanian Aboriginal Centre's Submission to the UN Expert Mechanism on the Study on Indigenous Peoples' Languages and Cultures (22 February 2012) 1, 4, <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/SubmissionsStudyLanguages.aspx> accessed 7 March 2013. Finally, Indigenous peoples from the Barents Euro-Arctic Region were '[g]uided by the purposes and principles of the UN Declaration' when adopting their most recent resolution and Action Plan. See Resolution from the 2nd Barents Indigenous Peoples' Congress 2012 (9–10 February 2012), <http://www.barentsindigenous.org/2nd-barents-indigenous-peoples-congress-resolution.5021269-198961.html> accessed 18 October 2017.

[147] In 2007, eg, Colombia's Constitutional Court relied on the various aspects of ILO Convention 169 discussed in Section 3 of this chapter that relate directly to the education norms advanced in the UN

4.2.1 Factors

Our examination of country practices suggests the following factors that aid in State promotion of the right to Indigenous education: (1) meaningful dialogue and ongoing consultation with Indigenous peoples in the legal and educational reform process; (2) laws that recognize and solidify Indigenous peoples' cultural and linguistic rights; (3) a comprehensive educational strategy that is informed by the history and needs of the different Indigenous peoples of a State; (4) promotion of Indigenous-controlled educational systems, programmes, and initiatives; and (5) steps to engage regional and international expertise and resources with and on behalf of Indigenous peoples.

An additional factor (6), the embracing and promoting of Indigenous ways of knowing and learning throughout society, is more closely related to Article 15 of the Declaration, and is therefore beyond the scope of this chapter. This final factor is nevertheless crucial to improving educational outcomes for Indigenous peoples, because the other five factors and related initiatives can only be fully realized if there is some recognition by the larger community of the values inherent in Indigenous systems and structures. In other words, change that is substantive and sustainable requires a transformation in the way in which non-Indigenous peoples perceive and understand the diversity of Indigenous cultures, traditions, histories, and aspirations.[148]

These factors interrelate with one another and can often occur simultaneously. For instance, the first factor, the duty of consultation, informs all the remaining factors, since consultation should occur throughout the process. Additionally, subsumed within any comprehensive strategy will be laws and policies that recognize and promote Indigenous languages and cultures, and that embrace Indigenous-controlled initiatives. Some countries are further along than others in carrying out these different factors, but many are in the process of making aspects of Article 14 a reality. Below, we offer some examples of those initiatives, using the factors as our guide. While space limitations prevent us from offering a critique of these initiatives, some of that information can be found throughout the footnotes.

4.2.1.1 Meaningful Dialogue and Ongoing Consultation

The duty of consultation and seeking consent is a crucial aspect of Article 14 and the Declaration generally. In addition to being a stand-alone right, consultation is also a necessary predicate to recognizing and exercising Indigenous peoples' right of self-determination in education. Consultation ensures community involvement in all stages of the educational process, including promoting changes in educational policy and curricula that meet Indigenous peoples' unique linguistic and cultural needs. As explored above, consultation and consent are predictors of higher school attendance and academic success for Indigenous students. Equally important, consultation ends the historic trend of imposing unwanted or irrelevant educational programmes and initiatives on Indigenous peoples without their consent.

Declaration. See ILO, Application of Convention 169 (n 49) 116–20; *Xákmok Kásek Indigenous Community v Paraguay* (n 118) para 211; *Sawhoyamaxa Indigenous Community v Paraguay* (n 49) para 230; *Yakye Axa Indigenous Community v Paraguay* (n 118) para 221.

[148] One measure that States can take to accomplish this Art 15 goal is to expose non-Indigenous peoples to accurate information about Indigenous peoples through national curricula and through teacher training. Other measures may involve States giving public credence to Indigenous ways of life. One example is making Indigenous languages into official or nationally recognized languages, as we will see in factor 2. Another is supporting and promoting Indigenous initiatives in education, as we will see in factors 1 and 4. A third is through public apologies and reparation plans for past wrongs, such as the removal of Indigenous children.

Many countries are beginning to acknowledge and implement this duty to consult. For instance, both the United States[149] and Canada[150] have adopted legislation and policies that require them to partner with Indigenous peoples in the development of educational initiatives affecting Indigenous students. Bolivia has created by law indigenous advisory groups, known as the Educational Councils of Native Peoples (CEPOs), to ensure consultation with each of the main Indigenous groups (Aymara, Quechua, and Guarani), as well as the peoples of the Amazon.[151] These initiatives are designed to ensure input in the formulation of educational policy at the national level.[152] Guyana's constitution has established a similar mechanism for consultation through the Indigenous Peoples' Commission (IPC).[153] The IPC's mandate 'includes offering recommendations on ... educational policies to advance the interest of indigenous people and the promulgation of [their] cultural heritage and language'.[154] In the case of the Saami, the Norwegian government must, pursuant to a 2005 agreement with the Norwegian Saami Parliament, consult with the Saami Parliament regarding 'matters that may affect Saami interests directly', including education.[155] Congolese Act No 5-2011 similarly requires the Congolese government to consult with Indigenous peoples 'in a suitable manner and [to] implement[] culturally appropriate mechanisms for those consultations before any consideration, formulation or implementation of legislative or administrative measures, or development

[149] For instance, in the United States, all projects funded under the Indian Education Act of 1972 'must be developed and conducted with the cooperation of the tribes, parents, and students so that the Indian future in education can be determined in full conjunction with Indian desires and decisions'. US Department of Health, Education and Welfare, The Indian Education Act: Reformation in Progress (DHEW Publication No OE 76-02403 1976) 8. See also, eg, Indian Self-Determination and Education Assistance Act of 1975, 25 USC § 450 (1975); Indian Education Act of 1972, Pub L No 92-318, 86 Stat 235, 334–45 (1972).

[150] See, eg, First Nations Education Act, Statutes of British Columbia SBC 2007 ch 40, Art 3 (Can); First Nations Jurisdiction over Education in British Columbia Act, SC 2006, ch 10 (Can). See also Gathering Strength: Canada's Aboriginal Action Plan, which 'calls for a renewed partnership with Aboriginal people based on recognizing past mistakes and injustices, the advancement of reconciliation, healing and renewal, and the building of a joint plan for the future'. Royal Commission on Aboriginal Peoples, *Report of the Commission on Aboriginal Peoples: Gathering Strength* (The Commission, 1996) vol 3.

[151] Ley No 070, ley de 20 de Diciembre de 2010, Ley de la Educación, 'Avelino Siñani-Elizardo Pérez', Art 92(c) (Bolivia).

[152] The CEPOs have existed in Bolivia since 1994. ME Contreras and ML Talavera Simoni, 'The Bolivian Education Reform 1992–2002: Case Studies in Large-Scale Education Reform' (November 2003) 11(2) The World Bank Country Studies, Education Reform and Management Publication Series 48.

[153] See Constitution of the Co-operative Republic of Guyana Act sec 212S. See also Guyana's Response to the UN Expert Mechanism's 2011–2012 UNDRIP Questionnaire (24 February 2012) 10, <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/QuestionnaireDeclaration.aspx> accessed 18 October 2017.

[154] See Guyana's Response to the UN Expert Mechanism (n 153) 11.

[155] See Procedures for Consultations between the State Authorities and the Sami Parliament [Norway] (11 May 2005) sec 2, <http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/docs/contributions/Norway_2.pdf> accessed 18 October 2017. See also Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, The Situation of the Sami People in the Sápmi Region of Norway, Sweden and Finland, UN Doc A/HRC/18/35/Add.2 (6 June 2011) paras 16–17 (by S James Anaya). For a critique of where Norway is in terms of meeting its obligations with regard to consultation, see 'The Situation of the Sami People', para 39.

programmes and/or projects which are likely to affect them directly or indirectly'.[156] Finally, in Colombia in 2007, the Constitutional Court held that the government could not make any decisions regulating the education of Indigenous peoples, including the methods that would be used to recruit and select teachers, without first consulting the affected communities in a manner that was culturally appropriate to each specific community.[157] The Court relied on the various aspects of ILO Convention 169, discussed in Section 3 of this chapter, that relate directly to the norms advanced in the UN Declaration.

There are other various examples of consultation in practice. New Zealand, through its Ministry of Education, has undertaken extensive consultation with the Māori peoples to develop a 'Māori Education Strategy'.[158] The Malaysian government has sought the assistance and guidance of Indigenous education groups in the region of Sabah, for developing Kadazandusun language curricula for use in State schools.[159] And recently in the United States, the federal government held consultation meetings with tribal leaders and Indigenous organizations in a series of 'listening' and 'learning' sessions, designed to formulate a strategy relating to the educational needs of Native students.[160] Paraguay[161]

[156] Congolese Act on the Promotion and Protection of Indigenous Populations (n 145) Art 3. See also The Situation of Indigenous Peoples in the Republic of Congo (n 145) para 48. For a critique of what additional steps Congo needs to take, see generally ibid.

[157] The Court was responding here to a claim filed against the constitutionality of a regulation regarding the public competition process for recruitment of teachers for public schools. The Court deemed the regulation inapplicable for recruitment of teachers for schools located in Indigenous territories, because the regulation had been created without prior consultation with Indigenous communities. See ILO, Application of Convention 169 (n 49) 116–20. For a critique of steps that Colombia needs to take in order to more fully comply with this and other similar Constitutional Court decisions, see Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, the Situation of Indigenous Peoples in Colombia: Follow-Up to the Recommendations Made by the Previous Special Rapporteur, UN Doc A/HRC/15/37/Add.3 (25 May 2010) (by S James Anaya) paras 44–48, 56, 78–79.

[158] See generally *Ka Hikitia: Managing for Success—Māori Education Strategy, 2008–2012* (rev edn, 2009) Part One, 1–20, <http://www.education.govt.nz/assets/Documents/Ministry/Strategies-and-policies/Ka-Hikitia/KaHikitia2009PartOne.pdf> accessed 6 November 2017; and Part Two, 21–45, <http://www.education.govt.nz/assets/Documents/Ministry/Strategies-and-policies/Ka-Hikitia/KaHikitia2009PartTwo.pdf> accessed 6 November 2017. See also 'ILO Convention Manual' (n 67) 66. New Zealand is currently undertaking a form of consultation using the internet to seek input on the creation of its *Ka Hikitia—Accelerating Success 2013–2017* programme from parents, learners, education professionals, and community organizations. See *Me Kōrero—Let's Talk!*, Te Kete Ipurangi (25 September 2012), <http://temangoroa.tki.org.nz/Stories/Me-Korero-Let-s-Talk> accessed 6 November 2017.

[159] R Lasimbang and T Kinajil, 'Changing the Language Ecology of Kadazandusun: The Role of the Kadazandusun Language Foundation' (2000) 1(3) Curr Iss Lang Planning 419. See also R Lasimbang, 'To Promote the Kadazandusun Languages of Sabah' (2003–2004) 34(2) Asian/Pacific Bk Dev; and 'About', KLF e-Newsletter, <http://klfnews.wordpress.com/about/> accessed 18 October 2017.

[160] Pursuant to a memo issued by President Obama in November 2009, 'requiring federal agencies to develop plans of action for consultation and coordination with [IPs]', the US Department of Education conducted its first ever nationwide consultation effort in 2010. See US Department of Education and others, 'Tribal Leaders Speak: The State of American Indian Education, 2010; Report of the Consultations With Tribal Leaders in Indian Country' (2011) 1, <https://www2.ed.gov/about/inits/ed/indianed/consultations-report.pdf> accessed 7 November 2017. Consultations continued in 2011 and 2012 and are required by President Obama's 2011 Executive Order 13592 for 'Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities'. See <http://edtribalconsultations.org/> accessed 18 October 2017 and <https://sites.ed.gov/whiaiane/2012/07/25/tribal-consultations/> accessed 7 November 2017. The full text of the executive order is available at <http://www.whitehouse.gov/the-press-office/2011/12/02/executive-order-improving-american-indian-and-alaska-native-educational-> accessed 18 October 2017.

[161] See Direccion General de Educacion General Indigena, *Se reunió comisión de estructuración de la ley de Educación Indígena*, Ministerio de Educacion y Cultura (28 March 2012), <http://www.mec.gov.py/indigena/entradas/292099> accessed 22 August 2016.

and Mexico[162] are also currently in the process of consultations with Indigenous representatives regarding educational reform for Indigenous peoples. And in 2011, following a visit by the UN Special Rapporteur for the Rights of Indigenous Peoples, Australia undertook 'more than 470 consultation meetings in over 100 hundred [sic] towns and communities' as part of the process of reforming its Northern Territory programme.[163]

As more countries acknowledge through their laws and policies the duty of consultation in education, the more robust the practice will become. These experiences will in turn help to identify some of the challenges faced by States and Indigenous peoples in meeting this obligation.[164] Various international experts, such as the UN Special Rapporteur on the Rights of Indigenous Peoples, have already begun to offer guidance to States on the contours of this 'duty to consult and the objective of obtaining consent'.[165] What these examples demonstrate, however, is the beginning of a major ideological shift on the part of States that have historically practised a more paternalistic approach to Indigenous educational issues.

4.2.1.2 Legal Reform on Cultural and Linguistic Rights

Another important factor to the educational reform process is legal reform that addresses the linguistic and cultural rights contained in Article 14 of the Declaration. Domestic legal structures, as well as a host of political factors, will influence whether these reforms take place through constitutional amendments, simple legislation, or court-mandated rules. Whatever the avenue for reform, such steps must be consistent with the duty of States to consult and cooperate directly with Indigenous peoples.

Bolivia is a particularly useful example as it was the first country to incorporate all of the provisions of the Declaration into national law.[166] Colombia has likewise incorporated into its national law all of the provisions of ILO Convention 169, which, as discussed previously, is very closely aligned with the Declaration with regard to education rights.[167]

[162] See generally Comision Nacional para el Desarrollo de los Pueblos Indigenas, *Consulta Para la Reforma de la Ley General de Educacion, Fase Consultiva—Cuadernillo 2a Parte [Consultation for the Reform of the General Law of Education, Consultation Phase—Manual Part 2]* (2012), <http://www.cdi.gob.mx/consultaeducacion/cuadernillo_faseconsultiva_junio12.pdf> accessed 18 October 2017.

[163] The Australian Government, Stronger Futures in the Northern Territory: Policy Statement, 1 (November 2011), <https://www.yumpu.com/en/document/view/28257391/stronger-futures-in-the-northern-territory-policy-statement-pdf-/3> accessed 29 January 2018; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Situation of Indigenous Peoples in Australia, UN Doc A/HRC/15/37/Add.4 (1 June 2010) (by S James Anaya), <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/15/37/Add.4> accessed 7 November 2017.

[164] In order for meaningful dialogue to take place between States and Indigenous groups, the format to be followed for consultation needs to be fluid, because it must adapt to the needs, culture, and societal structures of each people concerned. This level of flexibility can be difficult for States, especially when coupled with financial and geographic challenges. However, these challenges can only be met by States embracing the duty of consultation in the first place.

[165] See, eg, UNGA, Rights of Indigenous People: Note by the Secretary-General, UN Doc A/66/288 (10 August 2011) paras 15–18.

[166] See Bolivia's Law 3760 (n 145). See also UNESCO, Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues, The Role of ILO in the Promotion and Protection of Indigenous Languages, UN Doc PFII/2008/EGM1/14 (Morse Caoagas Flores, 8–10 January 2008) 7.

[167] See Law No 21 of 1991 (Colombia), <http://colombia.justia.com/nacionales/leyes/ley-21-de-1991/gdoc/> accessed 18 October 2017.

Some other examples include the constitutions of Bolivia[168] and Guatemala,[169] and Congolese Act No 5-2011,[170] which echo Article 14(2) of the Declaration in guaranteeing the right to education without discrimination. Ecuador,[171] Guatemala,[172] Mexico,[173] Nepal,[174] and Panama[175] have gone a step further and included in their constitutions language that promotes either bilingual education or education in the mother tongue for Indigenous peoples. Finland, Norway, and Sweden also recognize the right to mother tongue education through domestic legislation.[176] The constitutions of Argentina,[177]

[168] Constitución de 2009 (Bolivia) Art 17: 'Every person has the right to receive an education at all levels and in a manner that is universal, productive, free of charge, integral and intercultural, without discrimination.'

[169] Republic of Guatemala, 1985 Constitution with 1993 Reforms, Art 74. See also 'Right to Education' (n 116) 88; ('Article 71 obligates the State to provide education without discrimination').

[170] Congolese Act on the Promotion and Protection of Indigenous Populations (n 145) Art 17: 'The State guarantees the right to access to education at all levels falling under the national educational system to all indigenous children without discrimination.' See also 'New Congolese Law "Significant" Step for Indigenous Rights—UN Expert', *UN News Centre* (7 January 2011), <http://www.un.org/apps/news/story.asp?NewsID=37223&Cr=indigenous&Cr1> accessed 18 October 2017.

[171] See Republic of Ecuador, Political Constitution of 1998, Art 84(11): 'The State shall recognize and guarantee to indigenous peoples, in conformity with this Constitution and the law, with respect to public order and human rights, the following collective rights: ... To access a quality education. To rely on the system of intercultural bilingual education.' See also Art 84(13). Ecuador has also defined a right of self-determination for Indigenous peoples, which includes the right to 'formulate priorities in plans and projects for the development and improvement of their economic and social conditions, and to adequate financing from the State'. This would necessarily include educational projects and programmes (quotes translated by the author).

[172] See Guatemala, 1985 Constitution with 1993 Reforms (n 169) Art 76: Educational system and bilingual instruction. The administration of the educational system should be regional and decentralized. In the schools established in areas with predominantly indigenous populations, instruction should preferably be imparted in a bilingual format.

[173] See Mexican Constitution, Art 2(B)(II). 'To eliminate the scarcities and leftovers that affect indigenous people and communities, these authorities have the obligation to: ... II. Guarantee and increment the levels of education, favoring bilingual and bicultural education, literacy, completion of basic education, vocational training, and mid-superior and superior education. Establish a system of grants for indigenous students at all levels. Define and develop educational programs of regional level that recognize the cultural heritage of their peoples, in agreement with the laws about the matter and in consultation with indigenous communities. Stimulate the respect and knowledge of the diverse cultures that exist in the nation.'

[174] Interim Constitution of Nepal 2063 (2007) Pt III (17)(1), (3): 'Cultural and Educational Right: (1) Each community shall have the right to get basic education in their mother tongue as provided for in the law. ... (3) Each community residing in Nepal shall have the right to preserve and promote its language, script, culture, cultural civility and heritage.'

[175] See *Soberanía nacional: Análisis comparativo de constituciones de los regímenes presidenciales*, Georgetown University: Center for Latin American Studies Research (Base de Datos Políticos de las Américas 1998), <http://pdba.georgetown.edu/Comp/Derechos/indigenas.html#pan> accessed 18 October 2017. See specifically Panama's constitutional provisions, Art 84: 'Aboriginal languages shall be the object of special study, conservation and dissemination and the State shall promote bilingual literacy programs in indigenous communities' (quotes translated by the author).

[176] See Language Act (Finland 423/2003) § 4; Swedish Code of Statutes: Act Concerning the Right to Use the Sami Language in Dealings with Public Authorities and Courts (1999) § 8; Act on the Sami Parliament (Finland 974/1995) § 9; Act of June 1987 No 56 Concerning the Sameting (the Sami Parliament) and other Sami Legal Matters (the Sami Act) (Norway) §§ 3–8.

[177] See Argentine Republic Constitución de 1994, ch IV, § 17: 'To guarantee respect for the identity and the right to bilingual and intercultural education. To recognize the ethnic and cultural pre-existence of indigenous peoples of Argentina. To guarantee respect for the identity and the right to bilingual and intercultural education'. For a critique of additional steps that Argentina needs to take, see Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Indigenous Peoples in Argentina, UN Doc A/HRC/21/47/Add.2 (4 July 2012) (by S James Anaya) paras 60–67, 106–08.

Bolivia,[178] Brazil,[179] Colombia,[180] and Venezuela[181] and the Mexican 'General Law on Linguistic Rights of Indigenous Peoples' [182] all establish a right for Indigenous peoples to education that is not only bilingual, but also inter-cultural. This is parallel to the second part of the Declaration's Article 14(1). The constitutions of Mexico[183] and Nepal,[184] as well as domestic legislation in Norway, [185] also guarantee the general rights of Indigenous peoples to the promotion and preservation of language and culture.

Along this same vein, some countries, like Bolivia,[186] Mexico,[187] and New Zealand,[188] have taken an additional step in protecting the rights reflected in Article 14 of the Declaration, by giving Indigenous languages 'official' or 'national language' status, recognizing that they are of equal importance to the dominant languages of these countries and of fundamental value to preserving Indigenous cultures. Mexico's General Law on Education states explicitly that one of the objectives of State-sponsored education is to 'promote the Nation's linguistic plurality [as well as] respect for indigenous peoples' linguistic rights'.[189] In New Zealand, the United States, and Canada, protection for Indigenous peoples' educational rights can also be found in treaties. For instance, in

[178] Constitución de 2009 (Bolivia) (n 168) Art 17.

[179] Brazilian Constitution, Art 210(2): 'Regular elementary education shall be given in the Portuguese language and Indian communities shall also be ensured the use of their native tongues and their own learning methods.'

[180] See Constitucion Politica de Colombia. Art 10: 'The education provided in communities with their own linguistic traditions will be bilingual.' Art 68: 'The members of ethnic groups will have the right to training that respects and develops their cultural identity.'

[181] See Derechos de los Pueblos Indigenas, Comparacion de Constituciones (see specifically Venezuela's constitutional provisions), <http://pdba.georgetown.edu/Comp/Derechos/indigenas.html#ven> accessed 18 October 2017. Art 121: 'The State shall promote the appreciation and dissemination of the cultural manifestations of the native peoples, who have the right to their own education, and an education system of an intercultural and bilingual nature.' See <http://www.venezuelaemb.or.kr/english/ConstitutionoftheBolivarianingles.pdf> accessed 18 October 2017.

[182] Ley General de Derechos Lingüísticos de los Pueblos Indígenas (General Law on Linguistic Rights of Indigenous Peoples), Diario Oficial de la Federación [DO], 13 de marzo de 2003 2006 (Mexico) (General Law on Linguistic Rights of Indigenous Peoples). Government analysis: <http://www.cdi.gob.mx/derechos/vigencia_libro/vigencia_derechos_indigenas_diciembre_2007.pdf> accessed 18 October 2017; see also The Role of ILO in the Promotion and Protection of Indigenous Languages (n 166) 206; UN Expert Mechanism (n 13) para 56.

[183] Mexican Constitution (n 173) Art 2, sec A IV: 'A. This Constitution recognizes and guarantees the right of indigenous peoples and communities to self-determination, and, in consequence, autonomy to: ... IV. Preserve and enrich their languages, awareness of their heritage, and all the elements that constitute their culture and identity.' See also The Role of ILO in the Promotion and Protection of Indigenous Languages (n 166) 6.

[184] Interim Constitution of Nepal 2063 (2007) (n 174) Part III(17)(1)(3).

[185] Constitution of the Kingdom of Norway of 1988, Art 110(a): 'It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.'

[186] Constitución de 2009 (n 168) Art 5(I).

[187] General Law on Linguistic Rights of Indigenous Peoples (n 182). See generally n 223 for more information on this law.

[188] Māori Language Act (1987) (New Zealand).

[189] 'Ley General de Educación' DOF (13 July 1993) (Mexico) Art 7, IV (quote translated by author). <http://www.wipo.int/wipolex/en/text.jsp?file_id=341263> accessed 7 November 2017.

New Zealand, the Māori language (*'te reo Māori'*) is protected under the Waitangi Treaty as *'taonga'* (a valued Māori treasure).[190] In the United States and Canada, various treaties recognize the right of Indigenous peoples to education, language, and cultural practices within their territories.[191] Indigenous treaty rights and aboriginal rights were given further protection in Canada's constitutional reform process.[192] In the United States, language and cultural rights are also promoted through legislative initiatives.[193]

Yet there are many challenges faced by countries in the implementation of these laws, particularly in countries where educational policy is spread across sections of the country or is assigned to localities that are not well versed in the rights of Indigenous peoples. For example, in Canada there are differences between provinces. Indigenous peoples who have negotiated treaties or legal reforms that recognize their autonomy, like in Nunavut[194] and British Columbia,[195] have been able to make great strides in realizing educational rights for their people. In other places, where there are discrepancies in laws and funding relating to reserve and province schools, the overall educational achievement for Indigenous students is often lower and the rate of adult illiteracy higher.[196] While Indigenous education policy in the United States is formed at a national level, there are nevertheless a wide spectrum of local laws and policies that impact Indigenous peoples, with some individual States within the United States taking additional efforts to promote Indian education.[197] The next factor offers ways in which to bring about uniform

[190] *Managing for Success* (n 158) 11, 25.

[191] For the United States, see, eg, Treaty with the Cherokee (19 July 1866) 14 Stat 799, Art V; Treaty of Hellgate, US-Creeks (16 July 1855) 12 Stat 975, Art V; Indian Self-Determination and Education Assistance Act of 1975, 25 USC § 450 (1975) (amended in 1988) was later created with the intent of making it easier for the federal government to enter into contracts with tribes where the government could commit to provide federal services that were under the control of the Indigenous community. For Canada, see, eg, Tsawwassen First Nations Treaty, <http://www.tsawwassenfirstnation.com/pdfs/TFN-About/Treaty/1_Tsawwassen_First_Nation_Final_Agreement.PDF> accessed 7 November 2017; see also Education Jurisdiction Framework Agreement (5 July 2006), <http://www.fnesc.ca/Attachments/Jurisdiction/PDF%27s/Ed_Agreement.pdf> accessed 7 November 2017; First Nations Education Act, 2007 (n 150). For more examples of Canadian treaties, see n 196.

[192] While there is much debate (in scholarship and case law) as to the scope and meaning of this constitutional provision, education in one's own language, culture, and community has been a central or inherent aspect of aboriginal society and thus a crucial aspect of aboriginal rights. See, eg, J Paquette and G Fallon, 'First-Nations Education and the Law: Issues and Challenges' (2008) 17 Education & LJ 347, 366–75.

[193] See, eg, Native American Languages Act (1990) 25 USCA § 2901 (PL 101-477); Esther Martinez Native American Languages Preservation Act of 2006, PL 109-394, 120 Stat 2705; Native American Graves Protection and Repatriation Act (1990) PL 101-601, 104 Stat 3048 (codified as amended at 25 USC §§3001–3013 (2006)); Indian Arts and Crafts Act of 1990, 25 USC 305 (2003).

[194] Government of Nunavut, <http://www.gov.nu.ca> accessed 18 October 2017.

[195] 'First Urban Treaty in B.C. History Takes Effect Today' (Tsawwassen First Nation, Office of the Premier, 3 April 2013), <http://www2.news.gov.bc.ca/news_releases_2005-2009/2009OTP0060-000606.htm> accessed 18 October 2017; 'B.C. and First Nations Sign Education Agreement' (Office of the Premier, First Nations Education Steering Committee, 5 July 2006), <http://www2.news.gov.bc.ca/news_releases_2005-2009/2006OTP0117-000907.htm> accessed 18 October 2017; First Nations Jurisdiction over Education in British Columbia Act 2006 (12 December 2006) SC 2006 ch 10.

[196] See, eg, 'Canada's First Nations Stand Up for Education, Demand Their Issues Be a Part of Federal Election Now', *NationTalk* (26 September 2008), <http://nationtalk.ca/story/canadas-first-nations-stand-up-for-education-demand-their-issues-be-a-part-of-federal-election-now/> accessed 18 October 2017. See generally Assembly of First Nations, 'First Nations Education Action Plan' (31 May 2005), <http://www.nvit.ca/docs/assembly%20of%20first%20nations%20first%20nations%20education%20action%20plan.pdf> accessed 7 November 2017.

[197] See, eg, Indian Education for All, Law Mont Code Anno § 20-1-501. This State law was intended to ensure that all educational personnel have an understanding and awareness of Indian nations. This law is part

improvements in the recognition of educational rights for Indigenous peoples, while providing for differences in cultures, languages, and histories.

4.2.1.3 Comprehensive Educational Strategy

It is important that countries create a plan for implementing the educational rights of Indigenous peoples that is comprehensive, but also responds to the unique needs of each Indigenous group. In other words, the plan must identify and address a variety of issues in education that impact all Indigenous peoples, whether it be the need for reforms relating to the recognition of bilingual education or community-controlled schools, while at the same time addressing the particular needs of a community, such as the rate of removal of children from that community and the impact that removal has had on the transmission of the community's language and cultural norms. In some countries where educational policy is most effectively addressed at the local level, a nationwide policy statement that embraces the norms in Article 14 (self-determination in education for Indigenous peoples, non-discrimination, cultural and linguistic integrity) may be sufficient to set the groundwork for the development of successful regional and local educational strategies. In other countries, the strategy itself might need to be formulated at the national level. Both types are represented in the examples below. Regardless of the approach, however, Indigenous groups need to be actively engaged in shaping the country's strategy.

New Zealand is undoubtedly the clearest example of a State working with its Indigenous peoples to develop an action plan that tackles a broad array of educational issues represented in Article 14 of the Declaration. Much of this work tracks increased awareness at the international level of Indigenous peoples' rights, including participation by the Māori in the drafting process of the Declaration.[198] In the 1970s and 1980s, the Māori began concerted efforts to revitalize and strengthen the Māori language ('*te reo Māori*').[199] These efforts led to the establishment of the first *kura kaupapa Māori*, a language school setting for the teaching of Māori language and culture. It also led to the passage of the Māori Language Act in 1987, which made *te reo Māori* one of the three current official languages of New Zealand. This was consistent with the Treaty of Waitangi, which recognizes *te reo Māori* as *taonga*, a valued Māori treasure.[200] In 1998,

of a larger effort on the part of the State of Montana and the Indigenous peoples of that area to implement Art X, s 1(2) of the Montana Constitution, which states that: 'The state recognizes the distinct and unique cultural heritage of American Indians and is committed in its educational goals to the preservation of their cultural integrity.' For more information, see <http://www.montanatribes.org/files/IEFA-Law.pdf> accessed 18 October 2017.

[198] See NZ HR Deb 20 April 2010 vol 662, 10229 (S Power, 'Ministerial Statements—UN Declaration on the Rights of Indigenous Peoples—Government Support') <https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20100420_00000071/ministerial-statements-un-declaration-on-the-rights-of> accessed 7 November 2017; see also P Sharples, 'Supporting UN Declaration Restores NZ's Mana', *beehive.govt.nz* (20 April 2010), <http://www.beehive.govt.nz/release/supporting-un-declaration-restores-nz039s-mana> accessed 18 October 2017.

[199] See 'Part 3: Historical and Current Context for Māori Education' (Controller and Auditor General, New Zealand, 2012). See also Waitangi Tribunal, Wananga Capital Establishment Report (1999) ch 2, <https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68595986/Wai718.pdf> accessed 7 November 2017. Like other Indigenous peoples throughout the world, the Māori of New Zealand have come through a long history of being subjected to educational practices aimed at assimilating them into European culture and language and at maintaining their status at the outer fringes of society.

[200] See Māori Language Act (n 188). See also 'Historical and Current Context for Māori Education' (n 199).

the Ministry of Education in New Zealand began 'extensive consultation' with the Māori peoples to develop a 'Māori Education Strategy'.[201] The new education strategy of New Zealand, released in 1999, focused on 'rais[ing] the quality of ... education for Māori [students]' at both *kaupapa Māori* and non-Māori schools[202] and on 'support[ing] greater Māori involvement and authority in education'.[203] In 2005, this strategy was reaffirmed and updated to ensure continuity of commitment to Māori education.[204] In 2006, New Zealand sought feedback from leading Māori academics on further steps that could be taken.[205] In 2007, the year that the UN Declaration was adopted, a draft of the revised strategy, '*Ka Hikitia*—Managing for Success', was released, at which time the government began broader consultation through community meetings, presentations to educators, and written submissions.[206] The final *Ka Hikitia* strategy was released for implementation from 2008 to 2012, with a mid-term review scheduled half way through.[207] New Zealand is currently in the process of consulting members of the Māori community (including Māori learners) and educational professionals as it redevelops the *Ka Hikitia* strategy for another five years (through 2017).[208]

As part of its comprehensive strategy, concerted efforts have been made throughout to recognize, preserve, and strengthen the Māori language as a national treasure.[209] Efforts have also been made to support and strengthen Māori schools where Māori language and culture are taught,[210] to increase student achievement, to increase student access to Māori teaching, to increase community involvement in education, and to increase the number of Māori language teachers and teaching materials.[211] New Zealand has also made efforts to increase Māori presence at tertiary institutions,[212] and to increase awareness and acceptance of Māori culture, language, and issues among the general population.[213]

[201] *Managing for Success* (n 158) 12.

[202] In New Zealand, schools that are not Māori-immersion schools are known as 'English-medium' schools. The learning of *te reo Māori* also occurs at 'English-medium' schools. See *Managing for Success* (n 158) 24.

[203] ibid 12. Expert Mechanism, Lessons Learned (n 13) fn 14 lists *Ka Hikita* as a positive example of some good goals to set. The Expert Mechanism, Lessons Learned specific examples of some good goals to set are 'greater participation, improved literacy skills, lower truancy rates, and the gaining of meaningful qualifications' (para 57). See also Report of the Special Rapporteur on the Rights of Indigenous Peoples, The Situation of Māori People in New Zealand, UN Doc A/HRC/18/35/Add.4 (31 May 2011) (by S James Anaya) para 58.

[204] *Managing for Success* (n 158) 12.

[205] See 'Education for Māori: Context for Our Proposed Audit Work Until 2017, Part 2: Historical and Current Context for Māori Education' (New Zealand Controller and Auditor-General, August 2012), <http://www.oag.govt.nz/2012/education-for-maori/part3.htm> accessed 8 November 2017.

[206] For a general overview on how consultation was conducted, see 'Ka Hikitia Timeline' (Ministry of Education/Te Tāhuhu o Te Mātauranga, 22 August 2015), <http://www.education.govt.nz/ministry-of-education/overall-strategies-and-policies/the-maori-education-strategy-ka-hikitia-accelerating-success-20132017/history/ka-hikitia-timeline/> accessed 8 November 2017.

[207] See *Managing for Success* (n 158) 39.

[208] *Me Kōrero—Let's Talk!* (n 158).

[209] Māori Language Act (n 188).

[210] See 'ILO Convention Manual' (n 67) 66. See also WGIP 16th Sess Report (n 14) para 63 (explaining in further detail a portion of New Zealand's Māori language programme, which is directed at both children and adults).

[211] *Managing for Success* (n 158) 12, 19, 24, 34.

[212] M Durie, 'Indigenous Higher Education: Māori Experience in New Zealand: An Address to the Australian Indigenous Higher Education Advisory Council 7' (1 November 2005), <http://www.massey.ac.nz/massey/fms/Te%20Mata%20O%20Te%20Tau/Publications%20-%20Mason/Indigenous%20Higher%20Education%20M&_257ori%20Experience%20in%20New%20Zealand.pdf> accessed 18 October 2017.

[213] *Managing for Success* (n 158) 19, 25.

Finally, New Zealand has created a 'measurable gains framework' to measure the success of its Māori education programme.[214]

Other examples exist as well. For instance, pursuant to consultation efforts with Indigenous groups, Bolivia began in 2013 to implement a new national curriculum and to revamp its entire national education system. Under the new system, the different Indigenous communities are writing their own 'regional curricula' to be used in the schools serving these communities.[215] The national government is also committing to publishing Indigenous language alphabets and teaching materials.[216] Special programmes will be implemented to increase Indigenous access to teacher-training programmes too.[217] Finally, the government of Bolivia has helped establish three new Indigenous universities that are being operated with input and representation from the surrounding Indigenous communities.[218] This is in addition to a scholarship programme for Indigenous students who want to study at non-Indigenous universities.[219]

With the aim of developing a comprehensive strategy to 'preserve, revitalize and promote Aboriginal languages and cultures', Canada conducted a national study.[220] This study resulted in a 2005 report informed by discussions with elders, community groups, First Nations, and Inuit and Metis organizations, as well as scholarly research and writings.[221] However, severe funding cuts have impeded the full implementation of these efforts.[222] Since the 1970s, the United States has conducted several national studies

[214] See 'Teacher Appraisal for Māori Learners' Success / Inquiry Cycle / Identifying Priorities for Māori Students / What to Use / Helpful Rubrics, Ministry of Education / Te Tahuhu o Te Matauranga' (Ministry of Education/Te Tāhuhu o Te Mātauranga), <http://appraisal.ruia.educationalleaders.govt.nz/Inquiry-cycle/Identifying-priorities-for-Maori-students/What-to-use/Helpful-rubrics> accessed 8 November 2017. For gains and challenges presented in New Zealand on the issue of Indigenous education, see The Situation of Māori People in New Zealand (n 203) para 59. See also Tertiary Education Commission, '2010 Tertiary Education Performance Report', 18. See generally S May, R Hill, and S Tiakiwai, 'Bilingual/Immersion Education: Indicators of Good Practice, Final Report to the Ministry of Education' (NZ Ministry of Education 2004) 91 (Executive Summary): 'despite the significant advances made on its behalf in recent years, bilingualism in Māori and English is still viewed as subtractive by many—perhaps still, the majority—of the wider Aotearoa/New Zealand community.'

[215] See Bolivia's Response to the UN Expert Mechanism's 2011–2012 UNDRIP Questionnaire (January 2012) 17, <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/QuestionnaireDeclaration.aspx> accessed 18 October 2017. See also 'Bolivia: Encuentro Pedagógico determina implementar nuevo currículo educativo desde 2013' ['Bolivia: Pedagogical Conference Determines that New Educational Curriculum will be Implemented Starting in 2013'] (Organizacion de Estados Iberoamericanos, 24 December 2012), <http://www.oei.es/noticias/spip.php?article11583> accessed 18 October 2017 (indicating that 2013 is the start date for Bolivia's new national curriculum). See also, eg, 'Bolivia: Consejo Educativo del Pueblo Indígena Mojeño entrega currículo regionalizado' (Organizacion de Estados Iberoamericanos, 16 October 2012), <http://www.oei.es/noticias/spip.php?article11245> accessed 18 October 2017 (announcing that the Education Council of the Mojeño Indigenous people has completed and submitted to the Bolivian government its own 'regional' curricula); 'Ministerio de Educación recibe Currículo Regionalizado de la nación Tacana' (Ministerio de Educacion, 25 January 2013), <http://www.minedu.gob.bo/index.php?option=com_content&view=article&id=443:ministerio-de-educacion-recibe-curriculo-regionalizado-de-la-nacion-tacana&catid=53:noticias-pasadas> accessed 18 October 2017 (announcing that the Tacana Nation has also completed and submitted to the Bolivian government its own 'regional' curricula).

[216] See Bolivia's Response (n 215) 18. [217] ibid 19.

[218] ibid 20. [219] ibid.

[220] 'The Task Force on Aboriginal Languages and Cultures, Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Metis Languages and Cultures' (June 2005), <http://www.afn.ca/uploads/files/education2/towardanewbeginning.pdf> accessed 18 October 2017 (full report that resulted from this national study).

[221] Towards a New Beginning (n 220) 2.

[222] See V Galley, 'Reconciliation and the Revitalization of Indigenous Languages' in G Younging, J Dewar, and M DeGagné (eds), *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey*

on Indigenous education relating to its domestic policy of promoting Indigenous self-determination.[223] In 2005, the US government began undertaking a systematic biannual 'National Indian Education Study' to assess the condition of Indigenous education nationwide.[224] And most recently in November 2011, the US Department of Education released a report detailing the challenges and concerns regarding education that tribal leaders and educators had expressed during the Department's nationwide consultation efforts.[225] All of these efforts culminated in a 2011 Executive Order that calls for the creation of a comprehensive plan of action that addresses issues in Indigenous education at all levels and that is based on direct consultation with Indigenous groups.[226] The Australian government likewise has begun to undertake annual surveys to determine the level of effort that is going into improving outcomes for Indigenous students.[227]

Although comprehensive planning is best, there are many examples worldwide of smaller, more specific efforts that serve to illustrate some of the challenges that States are commonly facing, such as the ongoing shortage of qualified teachers and adequate teaching materials, lack of access to schools, and discrimination in the classroom. Thus, for instance, in order to increase the number of well-trained bilingual and bicultural teachers, the United States has made special grants available for the training of teachers of Indigenous children in both public and reservation schools.[228] In Mexico, in order to overcome a social stigma attached to bilingual teaching, the country has offered bilingual teachers higher pay than monolingual teachers.[229] Also, in Mexico, to address the need

(Aboriginal Healing Foundation 2009) 253; Assembly of First Nations, 'National First Nations Language Strategy' (5 July 2007) 4, <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyLanguages/AssemblyFirstNations4.pdf> accessed 18 October 2017.

[223] See 1966 Presidential Task Force on Indian Affairs, 'A Free Choice Program for American Indians' (23 December 1966, Final Report); Senate Special Subcommittee on Indian Education, Committee on Labor and Public Welfare, 'Indian Education: A National Tragedy—A National Challenge', S Rep No 91-501 (1969); US Department of Education, 'Indian Nations at Risk: An Educational Strategy for Action: Final Report of the Indian Nations at Risk Task Force' (1991) iii, <https://www2.ed.gov/rschstat/research/pubs/oieresearch/research/natatrisk/report.pdf> accessed 8 November 2017. Prior to the early 1970s, the general policy of the federal government towards Indigenous education was one of forced assimilation into the dominant society. See J Reyhner and J Eder, *A History of Indian Education* (Eastern Montana College 1989). In many cases, Indigenous languages, cultures, and histories were forbidden at federally sponsored schools.

[224] See National Center for Education Statistics, 'National Assessment of Educational Progress (NAEP): National Indian Education Study' (7 June 2012), <http://nces.ed.gov/nationsreportcard/nies/> accessed 18 October 2017 (covers June 2005, 2007, 2009, 2011).

[225] US Department of Education, Office of Elementary and Secondary Education, Office of Indian Education, White House Initiative on Tribal Colleges and Universities, 'Tribal Leaders Speak: The State of American Indian Education, 2010; Report of the Consultations with Tribal Leaders in Indian Country' (2011), <http://www2.ed.gov/about/inits/ed/indianed/consultations-report.pdf> accessed 8 November 2017.

[226] See 'Tribal Colleges and Universities' (White House Initiative on American Indian and Alaska Native Education), <https://sites.ed.gov/whiaiane/tribes-tcus/tribal-colleges-and-universities/> accessed 8 November 2017; Exec Order No 13592, Fed Reg 76603 (3 December 2011); 'Tribal Leaders Briefing Book' (n 146) 32.

[227] See ACIL Allen Consulting, 'Evaluation of the Aboriginal and Torres Strait Islander Education Plan 2010–2014 (Report to The Aboriginal and Torres Strait Islander Education Advisory Group of the Education Council)' (November 2014) 1–6.

[228] Indian Education Act of 1972 PL 93-380; 'The Indian Education Act of 1972: Office of Indian Education, Answers to Your Questions, Revised' (1980); A Glogower, 'The Indian Education Act of 1972. EDSE 500: Principles of Secondary Classroom Instruction' (28 June 2005) Mississippi Teacher Corps, Prof Ann Monroe.

[229] C Paciotto, 'The Tarahumara of Mexico' in G Cantoni (ed), *Stabilizing Indigenous Languages* (rev edn, Northern Arizona University 2007) 155, 160; 'Ministerio de Educación crea Bono Específico por Bilingüismo',

for teaching materials in Indigenous languages for the Tarahumara people of Chihuahua, a standardized written form was created from the five different dialects of the Tarahumara language, and this in turn was used to develop standardized materials and a basic vocabulary.[230] The State of Chihuahua, Mexico, is also attempting to help rural children avoid having to attend boarding school by allowing funding for day schools with a minimum of eight students.[231] Regional governments in Russia are similarly experimenting with providing a boarding school alternative in the form of 'itinerant schools, which travel with reindeer herders'.[232] Finland offers financial incentives to schools in the Saami homeland area that teach in Saami.[233] At the university level, many of Colombia's State-run universities provide affirmative action programmes for ethnic minorities (Indigenous peoples and Afro-Colombians).[234]

Perhaps one of the biggest challenges for countries is in the development of educational strategies that are directly tied to the varying needs of Indigenous communities. In the United States, for example, Indigenous educators have shown frustration at the achievement measures imposed by a national set of standards known as 'No Child Left Behind' (NCLB), because it precludes the possibility of applying different methods of measuring achievement to different methods of knowing and learning.[235] Similar to the United States, Australia's 'Closing the Gap' campaign focuses on comparing Indigenous

deGUATE.com (14 August 2007), <http://www.deguate.com/artman/publish/educa_noticias/Ministerio_de_Educaci_n_crea_Bono_Espec_fico_por_B_10986.shtml> accessed 18 October 2017. See also 'Right to Education' (n 116) 90.

[230] Paciotto (n 229) 155, 159. [231] ibid 155, 160.

[232] See Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Situation of Indigenous Peoples in the Russian Federation, UN Doc A/HRC/15/37/Add.5 (23 June 2010) (by S James Anaya) para 67. For a critique of what additional steps Russia needs to take, see paras 66–73, 92–94.

[233] Act on the Financing of Education and Culture (1705/2009); see 'Answers by the Government of Finland, Questionnaire to Governments for Preparing Pre-Sessional Submissions to the United Nations Permanent Forum on Indigenous Issues', <http://www.un.org/esa/socdev/unpfii/documents/session_10_finland.pdf> accessed 18 October 2017. 'However, there is no legislation or policy that guarantees education in the Sami language outside the core Sami area, where the majority of Sami students live, even though for years the Sami Parliament has proposed to extend the provisions of the Act on the Financing of Education and Culture throughout the whole country.' 'The Situation of the Sami People' (n 155) para 70.

[234] eg the National University in Bogotá reserves 2 per cent of its admissions per field of study for members of these groups. The required entrance exam score is lower for ethnic minorities, and student loans are available to them that can be pardoned in whole or in part depending on if the student returns to serve her community after graduation and for how long. 'Programa Especial para la Admisión de Bachilleres Miembros de Comunidades Indígenas' (Universidad Nacional de Colombia), <http://www.admisiones.unal.edu.co/pregrado/comunidades-indigenas/> accessed 8 November 2012. Colombia's Constitutional Court has upheld this type of affirmative action as constitutional. *Action for Protection Against Santander Industrial University, Ministry of Education and ICETEX*, Judgment T-110/10 (Constitutional Court, 16 February 2010) (Colombia).

[235] J Reyhner, 'Promoting Human Rights through Indigenous Language Revitalization' (2008) 3 Intercultural Human Rights L Rev 151, 184. Recently, the federal government sought to add flexibility to the requirements of NCLB, by allowing States and the Bureau of Indian Education to apply for waivers of certain NCLB requirements in exchange for comprehensive plans for improving educational outcomes that are created in consultation with tribes as well as teachers, schools, parents, and other community stakeholders. See 'ESEA Flexibility' (US Department of Education), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> accessed 18 October 2017. Some tribes have chosen either not to participate in the BIE's flexibility request or to request variations to the BIE's request. Bureau of Indian Education, 'BIE ESEA Flexibility Request', OBM No 1810-0581 (7 June 2012), <https://www.bie.edu/cs/groups/mywcsp/documents/text/idc-021471.pdf> accessed 8 November 2017.

students with non-Indigenous students, which may not promote measures specifically tailored to Indigenous students.[236] One way to ensure a better educational match is for States to collaborate and work with Indigenous communities on setting standards, consistent with the idea of self-determination in education.[237] New Zealand is undertaking such an approach by setting learning goals that are born from a Māori perspective.[238]

Some of the examples above represent comprehensive efforts, and others suggest a more piecemeal approach. In all cases, implementation remains a challenge for States and Indigenous peoples. Examples under factors 4 and 5 suggest some progress on this front, as well as ways for addressing these shortcomings.

4.2.1.4 Indigenous-Controlled Educational Systems, Programmes, and Initiatives

One of the primary aims of Article 14 is to promote Indigenous self-determination in education through Indigenous-controlled systems and initiatives. The examples below show that countries are beginning to embrace these ideas. Yet, the rights articulated in Article 14 encompass more than mere administrative control. It involves Indigenous cultures and values serving as 'the point of departure for knowledge generation and learning'.[239] As discussed in Section 2, a culturally pertinent education is crucial to strengthening the identity of Indigenous students, stimulating their curiosity, and preserving and protecting their cultural heritage for future generations. However, in many parts of the world, incorporating Indigenous cultures into the classroom requires a significant pedagogical shift after long periods of assimilative practices.

Some examples of these shifts are found in educational initiatives of the Saami Parliaments and Nordic States. For instance, in Sweden, they have established six State/public schools, operated by a Saami school board, which go from the pre-school level to upper secondary and offer a curriculum that incorporates Saami language and culture.[240] Moreover, the Saami school board not only oversees the Saami schools and the Saami educational programmes, but also has been active in providing guidance on how to include the Saami perspective in a wide variety of subjects, such as science, art, mathematics, social studies, and sports.[241] Initiatives established by the government of

[236] 'Indigenous Education: The Challenge of Change' (Early Childhood Australia), <http://www.earlychildhoodaustralia.org.au/every_child_magazine/every_child_index/indigenous_education_the_challenge_of_change.html> accessed 18 October 2017. For general information on the goals of the Closing the Gap Campaign, see 'Closing the Gap in Indigenous Disadvantage' (Indigenous Australia Education Providers), <http://indigicate.com.au/closing-the-gap-in-indigenous-disadvantage-council-of-australian-governments-coag/> accessed 8 November 2017.

[237] Situation of Indigenous Peoples in Australia (n 163) paras 53–55, 62, 95.

[238] *Managing for Success* (n 158) 19. For further information on the background research behind New Zealand's choice to create a more Māori-focused approach, see 'Overview' (Ministry of Education/Te Tahuhu o Te Matauranga), <http://www.education.govt.nz/ministry-of-education/overall-strategies-and-policies/the-maori-education-strategy-ka-hikitia-accelerating-success-20132017/key-evidence/overview/> accessed 8 November 2017.

[239] 'UNESCO's Work on Indigenous Education' (n 60) 9. See also 'Right to Education' (n 116) 104.

[240] National Sami Information Centre (attached to the Sami Parliament) and Ministry of Agriculture, Food and Consumer Affairs, 'The Sami: An Indigenous People in Sweden' (Edita Västra Aros 2005) 18, 40, 42, 43, 47, 52, <http://www.samer.se/2137> accessed 18 October 2017. The Swedish Saami have also established a Saami library that 'has a large collection of literature in Sami, as well as literature about the Sami and Sami affairs ... The Sami Library not only has non-fiction, but also works of fiction by Sami writers' (ibid 55).

[241] A van der Schaaf (ed), 'Sami: The Sami Language in Education in Sweden' (Mercator-Education, 2001) 8–9. For a current critique of where Sweden is in terms of meeting its obligations with regard to Indigenous education, see 'The Situation of the Sami People' (n 155) para 69.

Nunavut, in Canada, provide another example of self-determination in education. As a self-governing territory, Nunavut is able to create a holistic approach to knowledge generation and learning by, among other things, incorporating 'Inuit values and beliefs' into its governing structure, using Inuktitut as its working language,[242] and offering curriculum and school programmes that likewise reflect Inuit language and culture.[243]

An example of a school that is effectively integrating Indigenous knowledge, culture, and language into its curricula is the Oneida Nation School in the United States. The elementary and secondary school's philosophy involves 'revitaliz[ing] ... Oneida language and culture by using Oneida ideas and materials throughout the school building wherever learning can be made most meaningful to Oneida Students'.[244] The Ahkwesahsne Mohawk School—located on Cornwall Island in the middle of the St Lawrence River in Ontario, Canada—has been recognized as one of the most successful First Nations programmes of its kind.[245] This is a public school that offers courses in the Mohawk (Kanienketha) language, from primary through secondary levels, and a course in native culture, 'cover[ing] everything from the creation story to contemporary times'.[246] Diné College, formally the Navajo Community College, is a great example of an institution of higher education that applies traditional Navajo educational principles to advanced learning through the study of Diné language, history, and culture.[247] In Norway, there is a Saami University (Sámi Allaskuvla) that attracts students from all corners of the Saami territory (Norway, Finland, Sweden, and Russia).[248] The university offers courses in teaching, journalism, Saami language and literature, and Saami traditional and applied arts; all taught from a 'Sámi or indigenous perspective'.[249]

In Australia, Indigenous groups have developed aboriginal language centres that seek to preserve and promote local languages.[250] Bolivia has also successfully supported a Bilingual Intercultural Education Project that was largely designed by the Guarani

[242] Government of Nunavut (n 194).

[243] Education Act, S Nu 2008, c 15 (Can). For a discussion of the NLCA's potential to benefit Inuit educational needs, see generally TR Berger, 'Conciliator's Final Report: The Nunavut Project, Nunavut Land Claims Agreement Implementation Contract Negotiations for the Second Planning Period, 2003–2013' (1 March 2006), <http://www.tunngavik.com/documents/publications/2006-03-01%20Thomas%20Berger%20Final%20Report%20ENG.pdf> accessed 8 November 2017.

[244] Oneida Nation School System, 'Executive Summary: Oneida Nation Elementary School' (22 February 2013) 3, <http://www.advanc-ed.org/oasis2/u/par/accreditation/summary/pdf;jsessionid=4FDAB7340769DE1280F8641D40DCE54F?institutionId=22362> accessed 8 November 2017. For a full description of the fundamental Oneida values that the school hopes to instil in its students, see Oneida Nation School System, 'Executive Summary: Oneida Nation High School' (22 February 2013) 4, <http://www.advanc-ed.org/oasis2/u/par/accreditation/summary/pdf?institutionId=33132> accessed 8 November 2017.

[245] See GT Fulford et al, Sharing Our Success: More Case Studies in Aboriginal Schooling (SAEE 2007) 40–42, 48–51.

[246] S Burns, 'Mohawk Educator Praised for Promoting Cultural Awareness, Pride', *Indian Country Today* (5 March 2008), <http://indiancountrytodaymedianetwork.com/ictarchives/2008/03/04/mohawk-educator-praised-for-promoting-cultural-awareness-pride-3-92281> accessed 2 March 2013.

[247] Diné College (website), <http://www.dinecollege.edu> accessed 18 October 2017.

[248] Sápmi (website of the Saami Parliament), <https://www.sametinget.se/english> accessed 9 November 2017.

[249] Sámi allaskuvla/Sámi University of Applied Sciences (website), <http://samas.no/en> accessed 9 November 2017.

[250] For instance, the Wangka Maya Pilbara Aboriginal Language Centre focuses on preserving, analysing, and recording local languages. See Wangka Maya Pilbara Aboriginal Language Centre, <http://www.wangkamaya.org.au/news> accessed 9 November 2017; Australian Human Rights Commission, <http://www.humanrights.gov.au/Social_Justice/PFII/languages.html> accessed 18 October 2017.

people themselves.[251] The project promotes literacy in Spanish and Guarani, as well as incorporating Guarani history and culture.[252] The Kadazan people in the island of Borneo, Malaysia, have likewise worked to develop the Kadazandusun Language Foundation, which has, among other things, helped local schools and teachers draft a Kadazandusun language curriculum.[253] In Chad, where many schools are run by the communities that they serve, the government supports community input on the curriculum, as well as providing funds that enable parents' associations to appoint community teachers.[254] Finally, Uganda has created a programme for the Karamajong people that encourages community participation in creating a curriculum that adapts to a nomadic lifestyle, is taught by members of the community, and includes 'areas of study that are directly relevant to the Karamajong way of life such as crop production, livestock, health and peace and security'.[255]

These are just some of the many examples that Indigenous peoples are pursuing in an attempt to promote the right to education for their children. State support for these types of initiatives is a crucial part of their success along with factor 6, mentioned in the introduction to these factors, which focuses on creating awareness in the larger society as to the value and importance of Indigenous knowledge and information.

4.2.1.5 Regional and International Expertise and Resources

It can be both financially and logistically difficult for States and Indigenous peoples to accomplish all that is encompassed in Article 14 of the Declaration on their own. Hence, it is important that they be willing to seek out regional and international partnerships that can assist them in creating and implementing educational reforms. A notable example is an international partnership between Guatemala, Indigenous language and education organizations, and UNESCO in the creation of the Mayan Bilingual and Intercultural Education for Elementary School project, which incorporates Mayan language and culture.[256] This programme of study is complemented by an extensive Mayan bilingual intercultural teacher-training programme. According to UNESCO: 'The project has been successful because it adopted an educational approach taking ancestral culture and values, as well as present indigenous practices in different regions of Guatemala, as the point of departure for knowledge generation and learning.'[257] UNESCO has worked with local

[251] Contreras and Talavera Simoni (n 152). [252] ibid.

[253] Lasimbang and Kinajil (n 159). See also Kadazandusun Language Foundation, <https://www.facebook.com/klf6392g/> accessed 9 November 2017; Lasimbang (n 159).

[254] Although community schools are not exclusive to Indigenous communities, the autonomy that communities have in the operation of these schools resonates with the vision behind Art 14 of the Declaration. See 'Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries' (2009) 83, <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_115929.pdf> accessed 18 October 2017.

[255] ibid 83.

[256] Components of the programme include learning and the use of the mother language and the predominant language, learning and use of Mayan Vigesimal Mathematical System and Western Decimal Mathematical System, learning and experiencing a complementary system of Indigenous Mayan values and universal values, learning about different Mayan Indigenous art expressions and those of different cultures, and learning to identify and analyse the world based on Mayan knowledge and universal principles. 'UNESCO's Work on Indigenous Education' (n 60) 9. See generally UNESCO, 'Final Report of Project "Mobilization for Mayan Education" (PROMEM): Final Report (Systemization of Project's Outcomes) 1994–2004' (Guatemala 2004).

[257] 'UNESCO's Work on Indigenous Education' (n 60) 9. See also 'Right to Education' (n 116) 104.

communities on a number of other successful bilingual education programmes.[258] Studies conducted by UNESCO and others suggest that bilingual programmes in Guatemala have improved the schooling outcomes of Indigenous children and 'led to a reduction in repetition rates, with cost savings estimated at US $5 million a year'.[259]

Similarly, Namibia has collaborated with Ju/'hoan community leaders and NGOs to open and obtain teaching materials for the Baraka School in Nyae Nyae, which teaches San learners in their Ju/'hoan language in grades one through three.[260] In the case of the San, international attention helped to secure resources and assistance from outside of Namibia as well as within. Between 1991 and 1998, the number of San students enrolled in schools doubled.[261] Yet, Namibia acknowledges what is true in many parts of the world, the ongoing challenges in the implementation of these programmes.[262] Another example of successful partnership is the country of Chad, which has established nomadic schools for Indigenous peoples with the support of the UN International Children's Emergency Fund (UNICEF) and Gesellschaft für Technische Zusammenarbeit (GTZ—German Technical Cooperation Agency).[263] These nomadic schools are run by the communities themselves.[264] An example at the university level involves collaboration among UNESCO, a Swedish University, a Bolivian university, and Indigenous groups, in which university-level courses have been offered to Indigenous peoples in the Andean region of Bolivia.[265] Additional examples can be found in various UNESCO documents outlining its collaborative efforts with State educational ministries and local partners.[266]

4.2.2 Issues and Challenges

In addition to the factors explored above, our exploration of domestic practices has helped us to identify some of the roadblocks to meaningful implementation. Some of the most common issues that arose include: (1) inadequate funding in terms of educational reform

[258] UNESCO has also worked with local educational groups to develop the Project for the Mobilization for Support of Mayan Education (PRONEM/UNESCO). PRONEM was developed in response to the 1994 First Congress on Mayan Education. See UNESCO, 'Mobilization for Mayan Education' (n 256) 21. The fundamental objectives of the programme involve 'promoting the development of bilingual and multicultural education, particularly Mayan education, as a catalyst for the integral development of the peoples that make up the Guatemalan population'. See main document of Mobilization Project to Support Mayan Education, Netherlands, 519/GUA/12 (cited in UNESCO, 'Mobilization for Mayan Education' (n 256) 24).

[259] UNESCO, The EFA Global Monitoring Report Team, 'Education for All by 2015: Will We Make It?' (Oxford University Press 2008) 120. See also E Porta and JR Laguna, 'Guatemala Country Case Study', UNESCO 2008/ED/EFA/MRT/PI/58/REV (2007) (paper commissioned for the EFA Global Monitoring Report 2008), <http://unesdoc.unesco.org/images/0015/001555/155575e.pdf> accessed 18 October 2017.

[260] J Suzman, 'An Assessment of the Status of the San in Namibia' (Legal Assistance Centre 2001) 128.

[261] ibid 125.

[262] These challenges include extreme poverty, racial discrimination, lack of consistent education in the mother tongue, and low literacy rates among parents, to name a few. See ibid 217.

[263] ILO Overview Report (n 254) 84. [264] ibid.

[265] University website: <http://www.kawsay-bolivia.org/>. For further information, see UN Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Mission to Bolivia, UN Doc A/HRC/11/11 (18 February 2009) (by Rodolfo Stavenhagen) para 61; CA Leonel, 'La experiencia de la Universidad Indígena Intercultural Kawsay (UNIK)' in D Mato (ed), *Instituciones Interculturales de Educación Superior en América Latina. Procesos de construcción, logros, innovaciones y desafíos* (Instituto Internacional de la UNESCO para la Educación Superior en América Latina y el Caribe (UNESCO-IESALC 2007) 123–54.

[266] See, eg, 'UNESCO's Work on Indigenous Education' (n 60).

and poverty-related initiatives; (2) lack of available technical and other such expertise in the areas of Indigenous educational reform, especially in terms of linguistic and cultural implementation; (3) logistical obstacles in reaching certain segments of the population; and (4) an inability to ensure that the mandates and goals of the State are being met at various levels of authority, particularly in local areas where entrenched views regarding Indigenous peoples often hamper even the most well-intentioned and well-thought-out initiatives. (5) The studies also suggest a need for a cohesive mechanism to ensure that Indigenous peoples are not only consulted in the reform process, but are actively leading the charge with regard to these reforms. Similar issues were identified in a recent UN study on Indigenous education, and included, among other things, lack of consultation and control by Indigenous peoples over educational initiatives.[267]

A more detailed inspection of country practices, which is beyond the scope of this chapter, will offer States and Indigenous peoples the best insight on ways forward with regard to these Article 14 issues. For instance, while many States are hampered by inadequate funding, our analysis of country practices suggests that there are a number of important steps that can be taken that require little to no funding, such as providing official recognition of language and cultural rights or consulting with and utilizing the expertise found within and among Indigenous communities, as the Māori example demonstrates. In terms of infrastructure and development needs, our analysis suggests that international and regional involvement, as well as creating networks among and between States and Indigenous peoples, such as in the case of Saami, can be useful tools. These are just a few of the many lessons that can be learned by exploring more thoroughly the educational practices of States, regional bodies, and Indigenous peoples.

5. Conclusion: Measuring Success and Other Implementation Questions

Article 14 represents well-established legal obligations under international law. Conventional and customary law guarantees not only the right to education for Indigenous peoples, but the rights to self-determination, non-discrimination, and cultural and linguistic integrity in education as well. The settled nature of these rights is being impacted further by the fact that regions and countries have begun to incorporate portions of Article 14's approach to eliminating discrimination and promoting self-determination in education, most notably through cultural and linguistic measures. Section 4 offers a sampling of these efforts. However, many questions remain on the implementation of these norms. Further guidance from regional and international bodies on this issue of implementation will be needed in the years to come, and some of those efforts are already underway.[268]

There are several normative tools that States and Indigenous peoples might look to in order to assist them in measuring successful implementation of the right to Indigenous education. The first is the '4-A Scheme' referenced earlier in our discussion of non-discrimination in education.[269] According to the CESCR, 'education in all its forms and at all levels shall exhibit the following interrelated and essential features': availability,

[267] Expert Mechanism, Lessons Learned (n 13) para 86.
[268] ibid.
[269] Tomasevski, *The 4-A Scheme* (n 62).

accessibility, acceptability, and adaptability.[270] *Availability* refers to '[sufficient quantity of] functioning educational institutions and programmes'; *accessibility* refers to 'institutions and programmes' that are 'physically' and 'economically' 'accessible to everyone, without discrimination' of any kind; *acceptability* includes 'the form and substance of education' that is 'relevant, culturally appropriate', and otherwise acceptable to students and parents (subject to minimum governmental standards); *adaptability* refers to education that is 'flexible' and adaptable to the 'changing needs' of societies, communities, and students, particularly with regard to their 'diverse social and cultural settings'.[271] In 'considering the ... application of these "interrelated and essential" ' aspects of the right to education, 'the best interests of the student' are of primary concern.[272] Thus, the 4-A scheme could serve as a useful framework for both establishing and evaluating State initiatives relating to Indigenous education.

However, this framework is by no means the only avenue of measuring how well a State is doing in terms of meeting its international obligations relating to Indigenous education. Earlier, we mentioned the UNESCO 'Education for All' strategy, which is designed to promote certain educational needs of students by 2015. The six goals relevant to that movement[273] align well with the aims articulated in Article 14 of the UN Declaration and thus can serve as a useful tool in achieving success in the implementation of this provision. Additionally, the Office of the UN High Commissioner for Human Rights has recently put forth an important document entitled 'Human Rights Indicators: A Guide to Measurement and Implementation'.[274] The document is aimed at assisting those engaged in 'identifying, collecting, and using indicators to promote the implementation of human rights nationally' and thus could serve as a guide to developing, as well as assessing, domestic laws and programmes.[275]

One final question that arises in the context of implementing the right to education for Indigenous peoples, is the concern articulated by some countries regarding the potential effects of Article 14 on non-Indigenous populations. For instance, some States may fear that adapting education to the particular needs of Indigenous peoples will negatively affect their nation's unity. Others may be concerned about the effect that changing curricula to meet Indigenous students' needs may have on non-Indigenous students who are attending the same schools. Some of these concerns are dealt with in the implementation of Article 15 of the Declaration, which speaks to, among other things, the role of diversity in education in the promotion of tolerance, understanding, and good relations. Additionally, as the CESCR notes, non-discrimination in education means that 'education must be accessible to all, especially the most vulnerable groups, in law and fact'.[276] Thus, the concept of equality in education takes into consideration the need for specially designed programmes or institutions that ensure that quality education is accessible to Indigenous students as a matter of fact. In other words, while the instruction or programmes or institutions may not look the same in all cases, they ensure

[270] CESCR, General Comment 13 (n 48) para 6; Tomasevski, *The 4-A Scheme* (n 62).

[271] CESCR, General Comment 13 (n 48) para 6(d). [272] ibid para 7.

[273] 'Education for All Goals' (n 58). See also 'UNESCO's Work on Indigenous Education' (n 60); UNESCO, 'Indigenous Education' (n 60); UNESCO, 'Local and Indigenous Knowledge Systems' (n 60).

[274] See OHCHR, 'Human Rights Indicators: A Guide to Measurement and Implementation' (2012) HR/PUB/12/5, 4, <http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf> accessed 18 October 2017.

[275] ibid (see in particular, Table 6, Illustrative Indicators on the Right to Education).

[276] CESCR, General Comment 13 (n 48) para 6(b)(1).

the same educational aims and objectives, most notably the 'full development of the human personality'.[277] On the question of impact, State programmes that 'integrate indigenous perspectives and languages into mainstream education' are not only benefitting Indigenous students and their teachers in terms of 'enhance[d] educational effectiveness', but also creating 'greater awareness, respect for and appreciation of other cultural realities' for 'non-indigenous students and teachers'.[278]

On the larger question of national unity, José Martínez Cobo, author of the first UN study on discrimination against Indigenous populations, perhaps stated it best when he explained that

> national unity does not necessarily imply cultural uniformity and the disappearance of different cultures, which can in fact enrich this unity by giving it many different shades and facets and strengthened and deepened contributions since each individual and each group would participate on the basis of his or its own identity and cultural patterns. It is therefore desirable, and even necessary, to respect and strengthen ... indigenous culture[s] simultaneously with the efforts to provide a better knowledge of the dominant culture.[279]

The recognition and support for cultural diversity and tolerance within a State's educational structure, as required under Article 14 (and 15) of the Declaration, is thus not only consistent with basic human rights precepts, it also enhances the learning and understanding of all students who are being served by that system.

[277] Universal Declaration (n 1) Art 26(2); ICESCR (n 1) Art 13(1); CESCR, General Comment 13 (n 48) para 4.

[278] Expert Mechanism, Lessons Learned (n 13) paras 51–52.

[279] See Martínez Cobo vol III (n 6) ch XIII, para 234.

PART IV

RIGHTS TO LAND AND TERRITORY, NATURAL RESOURCES, AND ENVIRONMENT

Chapter 14. Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP

Articles 10, 25, 26, and 27

Claire Charters

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the Indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 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.

Article 27

States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

1. Introduction

This chapter examines Articles 10 and 25 to 27 on Indigenous peoples' rights to their lands, territories, and resources in the UN Declaration on the Rights of Indigenous Peoples (the Declaration or UNDRIP). Articles 10 and 25 to 27 are set out above in full. The chapter is structured as follows. In an introductory section, I first set out the relevance and importance of the Declaration on Indigenous peoples' rights to their lands, territories, and resources, followed by the historical development of the law in this area and an overview of the relationship between the Declaration and provisions

in other instruments on lands, territories, and resources. Second, I generally outline the drafting history of the Declaration's Articles on lands, territories, and resources. Third, in the most comprehensive part of the chapter, I analyse the substance of the Articles on lands, territories, and resources thematically, focusing on specific issues that are raised by Articles 10 and 25 to 27. Finally, I draw some conclusions about the persuasiveness, reception, and impact of the Declaration's Articles on lands, territories, and resources.

2. Importance and Development of the Rights to Lands, Territories, and Resources in the Declaration, and Their Relationship to Other International Legal Instruments

2.1 Relevance and Importance of Indigenous Peoples' Rights to Lands, Territories, and Resources

The importance to Indigenous peoples of their lands, territories and resources is difficult to overstate. It formed the basis of Indigenous peoples' arguments and justifications for strong Articles on lands, territories, and resources in the Declaration, which have been accurately described as its 'heart and soul'.[1]

The Inter-American Court of Human Rights (IACtHR) said:

> the close ties of Indigenous peoples with the land must be recognized and understood as the fundamental basis for their cultures, their spiritual life, their integrity, and their economic survival. For Indigenous communities [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy ... to preserve their cultural legacy and transmit it to future generations.[2]

Similarly, UN documentation on the negotiations on the Declaration records Indigenous peoples' understanding of their rights to lands, territories, and resources as follows:

> All indigenous organizations underlined the critical importance of Part VI, especially with regard to the right of self-determination, for the survival of indigenous peoples because of the spiritual relationship indigenous peoples have with their land. Indigenous organizations stated that the ownership and control of their lands, territories and resources are essential to the exercise of self-determination and continued health of their communities. Many highlighted the profound spiritual, cultural, traditional and economic relationship indigenous peoples have to their total environment, which required that they have certain rights to the land on which they live. Without explicit recognition of their land rights, indigenous peoples would remain vulnerable to more powerful political and economic forces. Explicit recognition of the lands, territories and resources that 'they have traditionally owned, occupied or used' was necessary because of the long history of illegal or unjust dispossession. Several indigenous organizations commented on the important principle of compensation and restitution. In addition, several indigenous organizations considered their rights to the land as treaty rights which they had never ceded to the States in which they live.[3]

[1] UN Commission on Human Rights (UNCHR), Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, UN Doc E/CN.4/1996/84 (4 January 1996).

[2] *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR Series C No 79 (21 August 2001) para 149.

[3] UNCHR, Report of the Working Group (4 January 1996) (n 1) para 84.

As these quotes illustrate, Indigenous peoples' lands, territories, and resources are integral to their cultures, spirituality, and economies and are, also, self-determination-enhancing.

However, more than that, lands, territories, and resources go to the very identity of Indigenous peoples as peoples.[4] In many cases, Indigenous peoples' territories are considered to be the 'mother' from whom Indigenous peoples spring, at least in Indigenous mythologies. The International Indian Treaty Council stated that, 'without their traditional lands [Indigenous peoples] are denied their very identity as peoples'.[5] The centrality of lands, territories, and resources to the identity of Indigenous peoples has been accepted by States and international institutions. The oft-cited definition of Indigenous peoples by UN Special Rapporteur Martínez Cobo specifically includes their 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 ...' and the continued occupation of their traditional lands.[6]

Functional justifications for the rights to lands, territories, and resources also included their importance to enable Indigenous peoples to develop economically, socially and culturally, especially in the light of Indigenous peoples' relative poverty and the historical and ongoing threats to their cultures. Lands, territories, and resources were also considered necessary for the practice of other rights, especially self-determination, including to provide a space for Indigenous peoples to exercise jurisdiction free from State interference.

Finally, the injustice associated with Indigenous peoples' loss of their lands, territories, and resources drove many Indigenous peoples' efforts to seek a Declaration, and specific and strong rights with regard to lands, territories, and resources, at the international level, reflected in the quote below:

> Several Indigenous representatives referred to their specific experiences including colonialism, the enduring legacy of discriminatory land and resources law and the absence of participation of indigenous peoples in the settlement of their land and territory claims. Many indigenous representatives also referred to numerous instances of forced resettlement and of forced appropriation of their lands, territories and resources, without their free, prior and informed consent.[7]

2.2 Historical Development of Provisions Relating to Lands, Territories, and Resources in the Declaration

The Articles in the Declaration detailing Indigenous peoples' rights in relation to their lands, territories, and resources are 'progressive' in that, prior to its adoption, international human rights instruments did not provide for such extensive, clearly expressed, and robust rights.[8] In saying that, the Declaration builds upon, and is largely consistent

[4] UNCHR, Indigenous Open-Ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples 'Information Received from Non-Governmental and Indigenous Organizations', UN Doc E/CN.4/1995/WG.15/4 (10 October 1995).

[5] ibid.

[6] J Martínez Cobo, Study of the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1986/7/Add.4 (1986/1987) paras 379–80. See also B Kingsbury, 'Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 AJIL 141.

[7] UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2002/98 (6 March 2002) para 40.

[8] ILA Committee on the Rights of Indigenous Peoples, The Hague Conference 2010 (The Hague 2010); ILA Committee on the Rights of Indigenous Peoples, 'The Final Report' (Sofia 2012).

with, Indigenous peoples' rights to lands, territories, and resources set out in the 1989 International Labour Organization Convention 169 on Indigenous and Tribal Peoples (ILO Convention 169) and developing human rights law in relation to rights to property, non-discrimination, culture, and self-determination at that time.

ILO Convention 169's Articles with regard to Indigenous peoples' lands, territories, and resources were especially relevant given that they are binding on States that have ratified it, and they were, before the adoption of the Declaration, the clearest expression of Indigenous peoples' rights to lands, territories, and resources under international law. Indigenous peoples especially argued that ILO Convention 169 set standards beneath which the Declaration should not fall.[9] The ILO Convention 169's Articles on lands, territories, and resources require governmental respect for the 'special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories ... which they occupy or otherwise use';[10] recognition of Indigenous peoples' rights of ownership and possession 'over the lands which they traditionally occupy'; use of lands not exclusively occupied by Indigenous peoples but to which they have traditionally had access;[11] and a prohibition on removal of Indigenous peoples from lands they occupy unless certain criteria are met.[12]

Equally, the Declaration draws on the interpretation of many human rights included in binding human rights conventions and, especially, the Committee on the Elimination of Racial Discrimination's (CERD) interpretation of freedom from racial discrimination as expressed in its General Recommendation 23:

> The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[13]

The CERD has for some time called on States to recognize Indigenous peoples' rights to lands, territories, and resources, for example, calling on Indonesia to 'ensure [its laws] respect the rights of Indigenous peoples to possess, develop, control and use their communal lands'.[14] It also, especially from the late 1990s, reviewed domestic legal developments involving Indigenous peoples' rights to lands, territories, and resources—for example, under Australia's Native Title Amendment Act—frequently finding violations of the right to freedom from discrimination.[15] Indigenous representatives,

> stated that the finding of the Committee on the Elimination of Racial Discrimination that the 1998 amendments to the Native Title Act were in breach of Australia's international obligations

[9] F McKay, 'A Guide to Indigenous Peoples Rights in the International Labour Organization' (Forest Peoples Programme, 2002).

[10] ILO Convention 169, 27 June 1989, entry into force 5 September 1991, Art 13.

[11] ibid Art 14. [12] ibid Art 16.

[13] CERD, General Recommendation 23: Rights of Indigenous Peoples, UN Doc A/52/18 (18 August 1997) para 5.

[14] Letter from the Chairperson of the UN Committee on the Elimination of Racial Discrimination to the Ambassador of Indonesia to the United Nations in Geneva, I Gusti Agung Wesaka Puja (13 March 2009), <http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia130309.pdf> accessed 19 October 2017.

[15] CERD, Decision 2(54) on Australia, UN Doc A/54/18 (18 March 1999); CERD, Decision on Foreshore and Seabed Act 2004, UN Doc CERD/C/DEC/NZL/1 (11 March 2005).

demonstrated the critical importance international standards played in protecting the rights of Indigenous peoples. The representatives believed that, for that reason, the land and resource provisions of the draft declaration should be adopted in their current form.[16]

Similarly, the Human Rights Committee (HRComm), with regard to Article 27 of the International Covenant on Civil and Political Rights (ICCPR), on the right to culture, has clarified in a General Comment that

> culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live on reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[17]

Protection of Indigenous peoples' land rights has frequently been stressed in HRComm comments on States' reports.[18] For example, the HRComm recommended that Mexico respect Indigenous peoples' 'customs and culture and their traditional patterns of living, enabling them to enjoy the usufruct of their lands'.[19] The HRComm has been most progressive on Indigenous rights to land in decisions on communications brought by Indigenous peoples.[20] In the *Lubicon Lake* communication, Chief Ominayak, on behalf of his Band, alleged that the Canadian government allowed the Alberta provincial government to expropriate its territory for the benefit of private corporate interests.[21] The HRComm found Canada in breach of Article 27 of the ICCPR.

Rather consistently with Article 10 of the Declaration, the Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment 4 with regard to forced removal and displacement, states: 'instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.'[22]

[16] UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2000/84 (6 December 1999) para 106.

[17] 16 December 1966, 999 UNTS 171; HRComm, General Comment 23: Article 27: Rights of Minorities, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) para 7.

[18] The relative weakness of the HRComm jurisprudence, when compared to that of the IACtHR or even the CERD, has been explained by Martin Scheinin thus: 'compared to certain other treaty regimes, notably ILO Convention 169, the weakness of ICCPR Art 27 as a basis for Indigenous land rights lies in the absence of any reference to the right of property in article 27 or elsewhere in the ICCPR': M Scheinin, 'Indigenous Peoples' Land Rights under the International Covenant on Civil and Political Rights' (Torkel Oppsahls Miniseminar, Norwegian Centre for Human Rights, University of Oslo, 28 April 2004) 6.

[19] HRComm, Concluding Observations on Mexico's Fourth Periodic Report, UN Doc CCPR/C/79/Add.109 (27 July 1999) para 19. The HRComm similarly recommended to Canada that 'extinguishing aboriginal rights be abandoned as incompatible with Article 1 of the Covenant': HRComm, Concluding Observations of the Human Rights Committee: Canada, UN Doc CCPR/C/79/Add.105 (7 April 1999) para 8.

[20] See P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002) 122–81; SJ Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004). For example, the HRComm has recognized Indigenous peoples' non-traditional economic cultural rights: see *Lansmann and Others v Finland No 1*, Comm No 511/1992, UN Doc CCPR/C/52/D/511/1992 (views adopted 26 October 1994); UNGA, Report of the Human Rights Committee Vol II, 50th Session Supp No 40, UN Doc A/50/40, 66–76; *Apirana Mahuika and Others v New Zealand*, Comm No 547/1993 (views adopted 27 October 2000); UNGA, Report of the Human Rights Committee Vol II, 56th Session Supp No 40, UN Doc A/56/40.

[21] Report of the Human Rights Committee, *Lubicon Lake Band v Canada*, Comm No 167/1984, UN Doc Supp No 40 A/45/40 (26 March 1990) 1, para 2.3.

[22] CESCR, General Comment 4: The Right to Adequate Housing, UN Doc E/1992/23 (13 December 1991) Annex III, 114.

The jurisprudence of the IACtHR and Inter-American Commission on Human Rights (IACHR), especially since the Court's ground-breaking 2001 decision in *Awas Tingni v Nicaragua*, also set a benchmark below which, it was argued, the Declaration could not fall.[23] In that case, the Court stated that 'the close ties the members of Indigenous communities have with their traditional lands and natural resources associated with their culture thereof, as well as the incorporeal elements deriving there from, must be secured under Article 21 [the right to property] of the American Convention.' Moreover, as a result, States had an obligation to legally demarcate and delimit Indigenous peoples' rights to their lands, territories, and resources. The right of Indigenous peoples to their lands, territories, and resources was subsequently strengthened by a number of decisions, including *Yakye Axa v Paraguay* and *Sawhoyamaxa v Paraguay*,[24] which upheld the Indigenous peoples' rights to lands, territories, and resources titled to third parties under Paraguayan law, realizing an Indigenous peoples' right to lands, territories and resources 'lost' by the Indigenous peoples in question. There was, thus, a strong argument to be made in Declaration negotiations that the Declaration should explicitly recognize Indigenous peoples' rights to their territories currently held as well as those owned, occupied, or used in the past.

2.3 Overlap between Other International Jurisprudence on Lands, Territories, and Resources and the Declaration

Given that the negotiations on the Declaration were informed by the international jurisprudence that preceded it, it is not surprising that the Declaration's provisions overlap with other international instruments, especially ILO Convention 169, as well as a number of human rights, especially rights to property, culture, and non-discrimination.[25] For example, broadly, Articles 13, 14, and 16 of ILO Convention 169 are substantively similar to, if a little weaker than, Articles 25, 26, and 10 of the Declaration.

The overlap between the Declaration and other international instruments and jurisprudence has grown as the Declaration, post adoption, has itself informed developments in, and interpretations of, human rights, especially with regard to Indigenous peoples' rights to their lands, territories, and resources. By way of a general example of this phenomenon, the CESCR cites the Declaration a number of times as authority for its interpretation of the right to culture in its 2009 General Comment on Article 15 of the International Covenant on Economic, Social and Cultural Rights. It states:

> The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent

[23] *Awas Tingni* (n 2). See also *Case of the Indigenous Community Sawhoyamaxa v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No 146 (29 March 2006); *Case of the Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No 125 (17 June 2005).

[24] *Sawhoyamaxa* and *Yakye Axa* (both n 23).

[25] For an excellent analysis of the overlaps between Declaration Articles and Articles in universally applicable human rights treaties and ILO Convention 169, see L Rodriguez-Piñero, 'Where Appropriate?: Monitoring/Implementing Indigenous Peoples' Rights in the Declaration' in C Charters and R Stavenhagen (eds), *Making the Declaration Work: The UN Declaration on the Rights of Indigenous Peoples* (IWGIA 2009).

the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.[26]

The above statement is consistent with, and refers in the footnotes to, Article 26(1) of the Declaration.

Similarly, the IACtHR has referred to the Declaration post 2007 as support for its continuing jurisprudence on the right to property, under which it has required States to protect and recognize Indigenous peoples' interests in their traditionally owned, occupied, and used lands, territories, and resources.[27] Moreover, the African Commission on Human and Peoples' Rights (ACommHPR), when applying Article 14 of the African Charter on Human and Peoples' Rights to the right to property, upheld the Indigenous peoples' rights to lands, territories, and resources in its 2010 decision in *Endorois Welfare Council v Kenya*, relying in part on the Declaration.[28]

As a result of the international jurisprudential activity identifying the synergies between Declaration rights and human rights, Indigenous peoples' rights to their lands, territories and resources are increasingly given effect via the application of human rights in binding human rights treaties.

The Supreme Court of Belize, with Belize a common law jurisdiction, found relevant international law related to Indigenous peoples persuasive 'where appropriate and cogent' in a decision upholding Mayan land rights. The Belize Chief Justice stated that the international obligations owed to Indigenous peoples 'weighed heavily with me', including the Declaration.[29]

3. The Drafting History of the Declaration's Articles 10 and 25 to 27

The rights to lands, territories, and resources were some of the most contentious during negotiations on the Declaration. I outline here the general and overriding tensions that underpinned the drafting of the Declaration before then addressing the specificities of those tensions as they played out in the negotiations of the particular language chosen in Section 4.

The importance and extent of contest over the Declaration's Articles related to lands, territories, and resources can be partially explained by the divergent factors and interests behind Indigenous peoples' and States' positions during the drafting of the Declaration.[30]

[26] CESCR, General Comment 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1(a), of the ICESCR), UN Doc E/C.12/GC/21 (21 December 2009) para 36.

[27] *Case of the Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR Series C No 185 (28 November 2007) para 131.

[28] *Centre of Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (4 February 2010) ACommHPR 276/2003. Other relevant African Commission cases include *The Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria* (2001) ACommHPR 155/96; and *Katangese Peoples' Congress v Zaire* (Merits) (1995) ACommHPR 75/92. See, eg, para 204.

[29] *Cal and Others v Attorney General of Belize* (18 October 2007) Claim Nos 171/2007, 172/2007.

[30] B Kingsbury 'Reconciling Five Conceptual Approaches to Indigenous Peoples' Claims in International and Comparative Law' (2001) 34 NYU J Int'l L & Pol 189.

As indicated above, for Indigenous peoples, such factors included the cultural, spiritual, economic, self-determination-enhancing, and identity-forming value of lands, territories, and resources to Indigenous peoples and by the degree of profound deprivation felt by Indigenous peoples who lost their lands, territories, and resources as a result of colonial and other dispossessing laws and policies. On the other hand, many States sought to protect their and non-Indigenous majorities' interests in the very same lands, territories, and resources by, for example, limiting their obligations to provide restitution to Indigenous peoples, as well as the State's economic interests in such lands, territories, and resources. They were especially concerned that the Declaration not express an entitlement for Indigenous peoples to reclaim lands, territories, and resources where they were now legally owned, occupied, or used by others, including the State,[31] afraid it might amount to 'preferential treatment' of Indigenous peoples.[32] This was extremely problematic, however, given that Indigenous peoples had lost much of their lands, territories, and resources in unfair circumstances.[33]

States were also concerned to ensure that the Declaration was consistent with domestic law in relation to Indigenous peoples' rights to their lands, territories, and resources. In contrast, Indigenous peoples did not want their rights constrained by domestic laws and policies that they considered to be unfair and inconsistent with emerging international doctrine, such as the jurisprudence from the IACtHR and the CERD, discussed above.[34] As we have seen, emergent jurisprudence on Indigenous peoples' rights to their lands, territories, and resources informed the substance of the Declaration.

Surprisingly, however, there was significant agreement on the text of the Declaration's lands, territories, and resource rights in the end. To some extent, the consensus reflects more 'constructive ambiguity' than a real meeting of minds as to the exact meaning of every relevant word. States and Indigenous peoples deliberately both chose language that could accommodate their respective, and divergent, interpretations of it. This means that the meaning of the specific rights to lands, territories, and resources included in the Declaration is still a work in progress, and there is no shortage of international, regional, domestic, and even local institutions engaged in their determination.

As indicated above, the most difficult issue in relation to lands, territories, and resources was that of the precise nature of Indigenous peoples' rights in relation to lands, territories, and resources traditionally owned, occupied, or used by Indigenous peoples but now held by third parties, including the State, which animated debate in relation to each of the Articles 10 and 25 to 27. Generally, the compromise reflected in the final version of the Declaration was imprecise language on the exact nature of Indigenous peoples' rights to lands, territories, and resources traditionally owned or otherwise occupied and used (Article 26(1)) in exchange for an Article introduced in the final

[31] The United States asserted that 'the intention of article 26 to cover all the many different situations involving Indigenous land claims in every part of the world was overly broad.' For example, the United States could not agree with the blanket authorization of ownership of all lands 'traditionally owned or otherwise occupied or used'. UNCHR, Report of the Working Group (4 January 1996) (n 1) para 252.

[32] Ukraine, ibid para 187: 'The delegation was of the opinion that claims for preferential treatment for Indigenous peoples would not contribute to inter-ethnic peace and understanding in any society.'

[33] eg in Aotearoa, New Zealand, Māori own less than 5 per cent of land.

[34] UNCHR, Report of the Working Group (6 December 1999) (n 16). A Erueti, 'The Demarcation of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law' (2006) 23(3) Arizona J Int'l & Comparative L 543–612.

few years of negotiations requiring States to establish a process to recognize and adjudicate Indigenous peoples' rights to their lands, territories, and resources (Article 27). Put another way, the Declaration avoids exacting language in relation to States' obligations vis-à-vis lands no longer owned, occupied, or used by them, a feature of the 1994 Sub-Commission draft, by requiring States, together with Indigenous peoples, to establish a process to determine them.

A closer analysis of the drafting of the Articles on lands, territories, and resources illuminates how they came to look as they did and how they should be interpreted. Some of the first incarnations of the lands, territories, and resources Articles are found in the 'principles' submitted to the Working Group on Indigenous Populations in the early 1980s by Indigenous peoples' organizations. The 'Declaration of Principles Adopted by the Fourth General Assembly of the World Council of Indigenous Peoples in Panama, September 1984' included the following:[35]

Principle 9: Indigenous people shall have exclusive rights to their traditional lands and its resources; where the lands and resources of the Indigenous peoples have been taken away without their free and informed consent such lands and resources should be returned.

Principle 10: The land rights of an Indigenous people include surface and subsurface rights, full rights to interior and coastal waters and rights to adequate and exclusive coastal economic zones within the limits of international law.

Similarly, the Declaration of Principles Adopted by Indigenous Peoples at the Working Group on Indigenous Populations in July 1985 included:[36]

Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. This includes surface and subsurface rights, inland and coastal waters, renewable and non-renewable resources, and the economies based on these resources.

The above-mentioned principles illustrate the full recognition and protection of lands, territories, and resources sought by Indigenous peoples, including those taken without their consent, which are to be returned with compensation for the period during which they lost use of them. Moreover, the understanding of Indigenous peoples' lands, territories, and resources was broad to include, for example, all resources on them as well as waters. The text submitted by the Working Group on Indigenous Populations to the Sub-Commission on the Protection and Promotion of Human Rights in 1993, adopted by the Sub-Commission (the 'Sub-Commission Text') relating to lands, territories, and resources was more legalistic and exacting in nature, but fundamentally similar to the above principles put forward by Indigenous peoples.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the Indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

[35] Report of the Working Group on Indigenous Populations on Its Fourth Session, UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985) 1–2.

[36] Submitted to the fourth session of the WGIP by the Indian Law Resource Center, the Four Directions Council, the National Aboriginal and Islander Legal Service, the National Indian Youth Council, the Inuit Circumpolar Conference, and the International Indian Treaty Council. ibid.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

The Commission on Human Rights established another working group in 1994 to examine the Declaration as adopted by the Sub-Commission, which met until the Chair submitted a draft of the Declaration to the Human Rights Council in 2006. Indigenous peoples were united in their opposition to changes to the Sub-Commission Text until the early 2000s, meaning that, from 1995 until then, the negotiations focused on, on the one hand, a defence of the lands, territories, and resources provisions in the Sub-Commission Text by Indigenous peoples and, on the other, attempts to rationalize changes to them by States.

Proposed textual changes to the Sub-Commission Text began to gain traction once some Indigenous peoples' organizations indicated a willingness to accept changes. However, it should also be borne in mind that some Indigenous peoples remained extremely reluctant to accept any changes throughout, highlighting that Indigenous peoples' organizations had differing priorities in the negotiations. For example, for nomadic peoples, it was especially important to secure access to lands for subsistence activities, including hunting and fishing. For more sedentary Indigenous peoples, it was important to secure recognition to the lands, territories, and resources they had a historical connection with.

The suggested amendments to the Articles on lands, territories, and resources, from the early 2000s, focused on:[37] Article 10—providing for limited exceptions to the prohibition on relocations of Indigenous peoples from their lands, territories, and resources; Article 25—deleting a reference to Indigenous peoples' *material* relationship with their traditionally owned, occupied, and used lands and specifically stating that Indigenous peoples would only have an undefined right of access to such lands; Article 26—confining Indigenous peoples' rights to lands, territories, and resources to those that they currently possess or hold; and adding a new Article 27 requiring States to establish processes to adjudicate Indigenous peoples' rights to lands traditionally owned, occupied, and used in the past.

As is evident from the text of the Declaration as adopted, and discussed in more detail below, some of the proposed amendments became part of the final text of the Declaration, including the deletion of a reference to Indigenous peoples' material relationship with their lands in Article 25 and the addition of a new Article 27. However, as mentioned, States failed in their attempts to remove references to Indigenous peoples' rights to their traditionally owned, occupied, and used lands even if the ultimate language is somewhat vague.

[37] UNCHR, Report of the Working Group (4 January 1996) (n 1).

A few States, in their explanations of vote, interpreted Article 26 narrowly and with caveats to balance Indigenous peoples' rights to lands, territories, and resources with the interests of non-Indigenous peoples in those same lands. Canada, in its vote against the Declaration in the Human Rights Council, stated that they 'could hinder land claims processes in Canada, which are premised on balancing the rights of Aboriginal peoples with those of other Canadians'.[38] Japan stated that it 'interpreted the rights relating to land and territory contained in the declaration, as well as the exercise of those rights, as restricted within due reason in light of harmonization with third party rights'.[39] In the General Assembly, New Zealand and Canada, who voted against the Declaration, cited the content of Article 26 as part of their reasons for doing so. For example, New Zealand stated:

> The provision on lands and resources simply cannot be implemented in New Zealand ... For New Zealand, the entire country is potentially caught within the scope of [article 26]. The article appears to require recognition of rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous and does not take into account the customs, traditions and land tenure systems of the indigenous peoples concerned. Furthermore, the article implies that indigenous peoples have rights that others do not have.[40]

Even Norway and Mexico, States that very clearly supported the Declaration generally, shepherding the Declaration through adoption by the General Assembly,[41] expressed more restrictive interpretations of them. For example, Norway stated that for State Parties to ILO Convention 169, the 'rights concerned must be understood to refer to the rights specified in the Convention'.[42] Mexico stated that the land rights provisions 'shall not be understood in a way that would undermine or diminish the forms and procedures relating to land ownership and tenancy established in our constitution and laws relating to third-party acquired rights'.[43] Sweden interpreted them to relate to Saami reindeer herding rights.[44]

Other specific issues during the drafting of the Articles on lands, territories, and resources can be summarized as follows: questions about the level and kind of 'possession' Indigenous peoples are required to have to give rise to Article 26(2) type obligations to recognize and protect those lands, territories, and resources as such; questions about the specific types of rights an Indigenous people's spiritual relationship with lands, territories, and resources traditionally owned, occupied, and used might justify, ie including access; whether Indigenous peoples might also exercise jurisdiction over lands, territories, and resources they possess; the relationship between the Articles on lands, territories, and resources and Indigenous peoples' rights under treaties between them and States; the relationship between States' obligations to Indigenous peoples under the rights to lands, territories, and resources and their obligations to comply with international

[38] Canada in its explanation of vote in the Human Rights Council. UNGA 107th Plenary Meeting Thursday 13 September 2007 10am, UN Doc A/ 61/ PV.107, 12 (Canada).

[39] Japan in its explanation of vote in the Human Rights Council. ibid, 20 (Japan).

[40] New Zealand explanation of vote in the UNGA (n 38). See also C Charters, 'The Rights of Indigenous Peoples' [2007] NZLJ 335.

[41] LA de Alba, 'The Human Rights Council's Adoption of the United Nations Declaration on the Rights of Indigenous Peoples' in Charters and Stavenhagen (n 25).

[42] Norway explanation of vote in the UNGA (n 38).

[43] Mexico explanation of vote in the UNGA. Paraguay made a similar explanation of vote (n 38).

[44] Sweden explanation of vote in the UNGA (n 38).

environmental standards; and the types of processes that might satisfy States' obligations under Article 27.[45]

Negotiators drafting the Declaration struggled to express semantically the relationships that Indigenous peoples have with their lands, territories, and resources because Indigenous peoples often conceive of that relationship differently from non-Indigenous peoples.[46] Indigenous peoples' understandings of their lands, territories, and resources are, for the most part, inconsistent with liberal understandings of property, especially private property. Specific words, such as 'territories', were used in an attempt to best reflect Indigenous peoples' understandings of that relationship. As Daes expressed in the explanatory note accompanying the Declaration as presented to the former Sub-Commission on the Prevention of Discrimination and Protection of Minorities:

> the term 'territory' in the above-mentioned paragraphs conveys some notion of the totality of indigenous peoples' relationship to the land and to all of its resources and characteristics. It is fundamental that this relationship be understood as more than simply a matter of 'land ownership', in the usual sense of private ownership by citizens, but a special and comprehensive kind of relationship that is historical, spiritual, cultural and collective.[47]

Some States rejected the use of the term 'territories' 'because of the confusion it might create and the implications it might have with regard to the sovereignty of a State over its territory.[48] By 2006, the UN Special Rapporteur on Indigenous peoples' permanent sovereignty over their natural resources and their relationship to land conveyed that 'the meaning of permanent sovereignty in the context of indigenous peoples signified respect for States' territorial integrity, but included the right of indigenous peoples to own, freely dispose of, manage and control resources'.[49]

4. Specific Issues

4.1 Approach to Interpretation, Fragmentation, and Overlaps between Rights in the Declaration

The approach to interpretation taken in this chapter focuses especially on the language of the particular Articles in the light of the negotiating history behind them, with some attention given also to relevant international jurisprudence, outlined above in brief. In addition, it also adopts the so-called 'realist' approach advanced by S James Anaya, in his academic work, as well as the UN Special Rapporteur on the rights of Indigenous peoples and the IACtHR in *Awas Tingni*.[50] This approach calls for a 'broad, contextual reading of

[45] UNCHR, Report of the Working Group (4 January 1996) (n 1).

[46] Note the comment: 'Indigenous representatives emphasized the unique spiritual nature of that relationship, which was very different from the Western European concept of land ownership and which extended to the surface and subsurface of the earth, inland waters and the sea, renewable and non-renewable resources, and the economies based on these resources.' In UNCHR, Report of the Working Group (6 March 2002) (n 7) para 38.

[47] UN Sub-Commission on the Promotion and Protection of Human Rights, Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples, by E-I Daes, Chairperson of the Working Group on Indigenous Populations, UN Doc E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993).

[48] UNCHR, Report of the Working Group (4 January 1996) (n 1) para 83.

[49] OHCHR, Report on the Expert Seminar on Indigenous Peoples' Permanent Sovereignty over Natural Resources and Their Relationship to Land, UN Doc E/CN.4/Sub.2/AC.4/2006/3 (5 May 2006) para 3.

[50] SJ Anaya, 'Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend' (2005) 16 Colorado J Int'l Env'l L & Policy 237; *Awas Tingni* (n 2).

human rights',[51] based on the 'core values' and principles underpinning norms.[52] It also takes into account possible changes in understandings of the meaning of 'norms'. Anaya describes the approach as such:

> terms in international human rights instruments are to be interpreted (1) keeping in mind the overall context and object of the instrument of which they form part; (2) in light of the larger body of relevant existing or developing human rights standards; and (3) in the manner that is most advantageous to the enjoyment of human rights (the pro homine principle).[53]

The realist approach is distinct from a more positivist formalist approach. The positivist formalist interpretative technique is, as Anaya points out, sometimes associated with State attempts to deny that Indigenous peoples' property rights are property, 'since the right is articulated in individualistic terms and understood to be associated with accepted Western notion of property'.[54]

Moreover, given the significant number of bodies applying human rights to Indigenous peoples in relation to States' reports on their human rights compliance and communications or complaints by Indigenous peoples, as noted above, it is important to seek common understandings of Indigenous peoples' rights. Divergent approaches will lead to a further fragmentation of international law in relation to Indigenous peoples' rights. A synergistic approach is also favoured by international human rights bodies such as the IACtHR in the *Yakye Axa* case.[55]

It is also appropriate to view the Declaration holistically when interpreting individual provisions. The Articles on lands, territories, and resources, like all the Articles in the Declaration, are indivisible from the other Articles, not least the right to self-determination. As Sweden stated in the General Assembly on the Declaration's adoption, speaking of Saami land rights: 'The political discussion on self-determination cannot be separated from the question of land rights. The Saami's relationship to the land is at the heart of the matter.'[56] Similarly, there are overlaps between Articles in the Declaration meaning that more than one might be applicable in any given situation involving Indigenous peoples' rights.

4.2 Removals of Indigenous Peoples from Their Lands, Territories, and Resources: Article 10

Article 10 prohibits the forcible removal of Indigenous peoples from their lands or territories and states that no relocation shall take place without Indigenous peoples' free, prior, and informed consent and agreement on just and fair compensation, including, where possible, the option of return.

4.2.1 Application to Removals of Indigenous Peoples from Their Lands, Territories, and Resources in the Past?

A textual and purposive interpretation of Article 10 suggests some ambiguity as to whether it relates only to recent, contemporaneous, and future situations involving proposals to remove or relocate Indigenous peoples from their lands or territories or whether it applies retrospectively to removals and relocations in the past. The text of Article 10, in contrast to Articles 25 and 26(1) of the Declaration, is expressed in the present and future tense: 'shall not be removed', 'no relocation', and 'their lands and territories'.

[51] Anaya (n 50) 240. [52] ibid 253. [53] ibid 257. [54] ibid 245.
[55] *Yakye Axa* (n 23) para 128. [56] Sweden in the UNGA on adoption of Declaration (n 38).

The uncertainty about the application of Article 10 to removals and relocations in the past is apparent from the negotiating history behind Article 10.[57] The secretariat to the Working Group on Indigenous Populations in its note on the Sub-Commission Text highlighted the use of the present tense in Article 10 in 1994 compared to the language used in the then Articles 25 to 27, stating that:

> It appears that article 10 as currently drafted is open to interpretation. It is not clear whether the provision only applies to lands and territories for which indigenous peoples have obtained a legal title or whether it applies to lands and territories which have traditionally been owned, occupied or used by them.[58]

On balance, it seems that Article 10 clearly applies to present and future removals and relocations of Indigenous peoples,[59] although it could, potentially, apply to past removals and relocations, albeit in more limited circumstances. The retention of present tense language suggests a deliberate attempt to confine Article 10 to present and future removals and relocations, ie post the General Assembly's adoption of the Declaration in 2007. Alternative language suggested for Article 10 during negotiations does not suggest any serious consideration by States and Indigenous peoples that the prohibition on removal and relocation should apply retrospectively, despite negotiators' clear knowledge that retrospective application was a question raised by the Sub-Commission Text.[60] Further, Articles 8, 27, and 28 clearly provide for the possibility of redress for historical removals and relocations of Indigenous peoples from their lands and territories.

International human rights tribunals have tended to conceive of Indigenous peoples' claims to lands, territories, and resources from which they have been relocated as contemporary and continuing claims to their lands, territories, and resources 'lost' rather than claims based on illegal removals in the past, as outlined in more detail below.[61]

[57] This issue was identified by Norway in the 1996 negotiations. UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/1997/102 (10 December 1996) para 177.

[58] UNCHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, Note by the Secretariat, UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994).

[59] eg Australia supported the right of Indigenous peoples not to be forcibly removed from their lands. UNCHR, Report of the Working Group (10 December 1996) (n 57) para 185.

[60] Both below paras come from UNCHR, Report of the Working Group (6 March 2002) (n 7) para 82, Annex I, 82. The Chairperson-Rapporteur summarized the debate on Art 10, indicating that, in his opinion, there was general agreement on including a provision to prevent the removal of Indigenous peoples from their lands. However, he said, there were still questions on the meaning of 'lands or territories', 'forcibly', 'consent', and 'compensation'. He observed that proposals to strengthen the text using the word 'redress' instead of 'compensation' had received positive support from many participants. Concern had been expressed about the use of the word 'forcibly', since it could prevent the relocation of Indigenous peoples for reasons of public health, disaster, or other exceptional cause.

(Alternate language)

Indigenous [peoples] [[and] individuals] should/shall not be [forcibly][arbitrarily] removed [or relocated] from [their][the] lands [or territories][which they traditionally own, occupy or otherwise use]. No such relocation [or removal] should/shall take place [without the free and informed consent of the Indigenous peoples concerned][except on at least the same basis as applies to other members of the national community][after agreement [consultation] on][and on the basis of] [including] just and fair compensation and [should/shall take place], where possible, with the option of return.

[61] See, eg, UN Committee on the Elimination of All Forms of Racial Discrimination, Decision 1(68): United States of America, UN Doc CERD/C/USA/DEC/1 (10 March 2006); IACHR, *Mary and Carrie Dann v United States*, Case 11.140, Report No 75/02, Doc 5 rev 1 (2002) paras 114–20; *Endorois* (n 28); *Yakye Axa*

4.2.2 An Absolute Prohibition?

One of the more contentious issues during negotiations on Article 10 related to the 'absolute' nature of the prohibition on removals and relocations. Article 10 as included in the Declaration does not express any permissible exceptions to the prohibition on removals and relocations, despite States' concerns that this might be too demanding in practice. Indigenous peoples supported the absolute prohibition, often citing their experience of forced removal and relocation from their lands, territories, and resources in the past. In contrast, States were reluctant. For example, Malaysia

> expressed the view that an absolute prohibition on relocation from lands and territories would not be acceptable ... and that the provision therefore should be elaborated further. It was said that the wording 'forcibly removed' should, therefore, be narrowly defined. With regard to article 11, in periods of armed conflict indigenous people should be treated like any other citizens.[62]

Equally:

> Other Governments stated that land alienation for the common good or legitimate sale should be recognized but added that in such cases compensation or other forms of reasonable redress should be provided to indigenous people. Some indigenous organizations stated in this regard that the term 'common good' was too broad and open to abuse.[63]

Moreover:

> The representative of Brazil said that his Government was ready to accept the general thrust of articles 10 and 11(c); however, those provisions should recognize that displacements of communities might be necessary for their own safety in cases of war or catastrophe. Just and fair compensation had to be assured to displaced Indigenous peoples.[64]

The discussion around appropriate exceptions to the prohibition on removal and relocation must be considered, also, in the light of Article 16 of ILO Convention 169 and, for example, the CESCR General Comment on forced removals, mentioned earlier. One interpretation of Article 16 of ILO Convention 169 would permit, unlike Article 10 of the Declaration, relocation of Indigenous peoples without their consent, albeit only as an 'exceptional measure' and 'following appropriate procedures established by national laws and regulations', including public inquiries that allow for the effective representation of the peoples concerned. That Article 10 of the Declaration did not expressly include similar exceptions to those in Article 16 of ILO Convention 169 suggests a deliberate intention to retain a strong, blanket prohibition. Nonetheless, Article 16 and States' concerns about the need for limited exceptions to the prohibition may be relevant when consideration is given to any purported justified limitations under Article 46(2).

There is some overlap between Articles 10 and 8 which requires that States provide effective mechanisms for prevention of, and redress for, both '[a]ny action which has the aim or effect of dispossessing [Indigenous peoples] of their lands, territories or resources' (Article 8(2)(b)) and '[a]ny form of forced populations transfer which has the aim or effect of violating or undermining any of their rights' (Article 8(2)(c)). On its face, Article 8 might appear inconsistent with Article 10 in that it appears to be premised on the possibility of a separation of Indigenous peoples from their lands, given the requirement

(n 23); *Alexkor Ltd and Another v Richtersveld Community and Others* (14 October 2003) (CCT19/03) [2003] ZACC 18, 2004 (5) SA 460 (CC); *Sawhoyamaxa* (n 23).

[62] UNCHR, Report of the Working Group (4 January 1996) (n 1). [63] ibid. [64] ibid.

for redress, whereas Article 10 expressly prohibits such separation. However, if one reads Article 8 consistently with Article 10, it is most appropriately interpreted subject to the caveat that any separation of Indigenous peoples from their land is permissible only with Indigenous peoples' free, prior, and informed consent.

The CERD's General Comment 23 on Indigenous Peoples is similar to Article 10 in that it requires States to return territories where Indigenous peoples have been deprived of them without their free, prior, and informed consent. However, one could argue that in providing for redress where Indigenous peoples have had their territories taken from them, it implicitly permits taking of lands without Indigenous peoples' consent, providing the lands are returned to them at some later point. A Declaration-consistent reading of the CERD's General Comment, in line with Article 10, would make such an interpretation implausible; instead, it suggests that the provision for redress applies to situations where they have been relocated from their lands, territories, and resources in the past.

4.2.3 Removal from 'Their Lands and Territories'

An interpretation of 'their lands and territories' in Article 10 should include those lands and territories that Indigenous peoples 'possess', but do not have any State-registered title to, consistently with Article 26, discussed below.

4.3 Indigenous Peoples' Spiritual Relationship with Their Traditionally Owned, Occupied, and Used Lands, Territories, and Resources: Article 25

Article 25 of the Declaration sets out the right of Indigenous peoples to maintain and strengthen their distinctive *spiritual* relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas, and other resources and to uphold their responsibilities to future generations in this regard.

4.3.1 Spiritual Relationship

The key to Article 25 is the *spiritual* relationship Indigenous peoples have with their lands, territories, and resources and the need for its protection. It signals a broad consensus that Indigenous peoples' spiritual relationship with their lands, territories, and resources is important and should be protected and strengthened as a matter of international law and policy.

Article 25 builds on Article 13(1) of ILO Convention 169 with regard to the protection of Indigenous peoples' spiritual relationship with their lands and territories. Article 13(1) of ILO Convention 169 is an instrumental provision in that it requires that governments, *in applying the Articles related to lands and territories*, 'shall respect the special importance for the cultures and spiritual values' of Indigenous peoples of 'their relationship with the lands and territories' that they occupy and use. Article 25 of the Declaration, in contrast, instead conceives of Indigenous peoples' spiritual relationship as a stand-alone right, not just as an interpretative gloss on other rights to lands, territories, and resources.

There is no reference to the cultural value of lands, territories, and resources in Article 25 of the Declaration similar to the above-mentioned reference in Article 13(1) of ILO Convention 169. However, little significance attaches to this omission: clearly the Declaration, as a whole and in specific Articles, is focused on strengthening Indigenous peoples' cultures, especially with regard to their lands, territories, and resources.[65]

[65] See, eg, the preambular paragraphs in the Declaration.

A preambular paragraph states that control by Indigenous peoples over their lands, territories, and resources 'will enable them to maintain and strengthen their ... cultures and traditions'. An appropriate interpretation of 'spiritual relationship' would therefore include the 'cultural relationship' between Indigenous peoples and their lands, territories, and resources. Moreover, the 'spiritual relationship' between Indigenous peoples and their lands, territories, and resources should be understood through a cultural lens: what constitutes a 'spiritual relationship' is coloured by Indigenous peoples' cultural understandings, philosophies, and practices rather than, for example, non-Indigenous or colonial comprehension of 'religion'.

Indigenous peoples' spiritual relationships with lands, territories, and resources can be expressed in a myriad of ways. A broad interpretation of Article 25 would extend to including all practices and traditions associated with their spiritual relationship, subject only to any limitations justified through Article 46(2). In some cases, exclusive possession of lands, territories, and resources may be necessary for Indigenous peoples to fully realize their spiritual relationship with lands, territories, and resources, which may compete with others' claims to those same lands, territories, and resources.

4.3.2 Application to Lands, Territories, and Resources No Longer in Indigenous Peoples' Possession or Control

It is clear that under Article 25 Indigenous peoples have the right to maintain and strengthen their spiritual relationship with lands, territories, and resources *no longer in their possession, but which they owned, occupied, and used in the past*, even where those lands, territories, and resources are now owned, occupied, or used by others. The text of Article 25 is expressed in the past tense, ie to 'traditionally owned or otherwise occupied' lands, territories, and resources. In contrast, and discussed in more depth below, Article 26(2) refers to specific Indigenous peoples' rights to lands, territories, and resources 'that they possess', in the present tense. Similarly, negotiations were clearly focused on, in the context of Article 25, the nature of Indigenous peoples' rights in relation to lands lost in the past by Indigenous peoples. It was largely *because* the Article focuses on lands potentially now owned, occupied, or used by others that States sought to delete the reference to 'material'. Finally, a contextual interpretation, taking into account existing international standards, especially ILO Convention 169, suggests likewise. Article 13 refers not only to lands occupied by Indigenous peoples currently, but also to lands which they otherwise use; the Declaration's standards should not fall below the level of obligation set out in ILO Convention 169.

4.3.3 Possession

The most significant difference between Article 25 in the Declaration as adopted and the earlier drafts is the deletion of 'and material' after spiritual. The deletion reflects some States' reluctance to accede to provisions that might extend to a blanket right for Indigenous peoples to acquire physical possession of lands, territories, and resources that are now possessed or owned by others as a result of their spiritual connection.[66]

[66] eg Australia, Canada, New Zealand, and the United States 'raised the question of third party interests' with regard to Art 25. However, Indigenous peoples and a number of States were comfortable with the inclusion of 'material' in the text of Art 25. UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2003/92 (6 January 2003) paras 28, 29.

4.3.4 Access to Lands, Territories, and Resources

It is likely that there are many examples where access to lands, territories, and resources, not necessarily currently in Indigenous peoples' possession or control, is necessary to enjoy a spiritual relationship with them. Access to lands, territories, and resources no longer under Indigenous peoples' control is certainly covered by Article 25 based on the negotiating history behind it. Claims that Indigenous peoples were being denied access to their spiritually significant sites animated negotiation on Article 25.[67]

A 2003 proposal for an amendment to Article 25 from Mexico and Greece is enlightening, expressly encapsulating, as it does, the intention that Article 25 cover access to lands, territories, and resources. It states:[68]

> The State shall, in conjunction with Indigenous peoples, take measures to facilitate the *access* of Indigenous peoples concerned to lands or territories not exclusively occupied or used by them, for carrying out their spiritual traditional activities. In this respect, particular attention shall be paid to the situation of nomadic peoples and shifting cultivators.[69]

The proposal was offered as an attempt to find language to bridge the positions of Indigenous peoples and some States over Indigenous peoples' rights to take back control and possession of lands, territories, and resources not currently under their control. The focus on 'access' was seen as a compromise between these positions.

Contemporary human rights jurisprudence is equally supportive of Indigenous peoples' rights to access lands, territories, and resources with which they have a strong spiritual relationship. The African Commission found in *Endorois* that Endorois' traditional lands and territories 'are central to the Endorois' way of life and without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors'.[70] It further found that denying the Endorois access to their traditional lands and territories, by means of forced eviction, breached their freedom to practise their religion and their rights to culture.[71]

Development of lands, territories, and resources with which Indigenous peoples enjoy a spiritual relationship may threaten that relationship and have to be balanced with the State's duty to ensure that relationship is maintained and strengthened.

4.3.5 A Positive Obligation

The use of the term 'strengthen' in Article 25 of the Declaration indicates that the State duty required by Article 25 is a positive one requiring active measures. The positive nature of duties owed to Indigenous peoples in relation to their cultures was also expressed by the ACommHPR.[72]

4.3.6 Spiritual Relationship with Which Resources?

In contrast to other Articles setting out Indigenous peoples' rights with regard to their lands, territories, and resources, Article 25 makes specific reference to 'waters', 'coastal seas', and 'other' resources. The other Articles refer only to resources without any qualifier of 'waters' and 'coastal seas'. This raises the question of whether Article 25 is more restricted in its application than other Articles where there is only a generic reference

[67] UNCHR, Report of the Working Group (6 December 1999) (n 16) para 91.

[68] UN, United Nations Declaration on the Rights of Indigenous Peoples: Annex to Human Rights Council Resolution 2006/2 (Chair's Text), adopted by Human Rights Council (29 June 2006).

[69] Emphasis added. [70] *Endorois* (n 28) para 156. [71] ibid para 173. [72] ibid.

to resources. For example, do the explicit additions of 'waters' and 'coastal seas' colour the interpretation of 'other' resources in Article 25 such that 'other' resources are limited to like resources such as, possibly, lakes and rivers? The alternative may also be possible, that the references to 'resources' in other Articles may not include 'waters' and 'coastal seas'. The better interpretation, based on the earlier drafts of the Declaration, is that the Indigenous peoples' right to maintain and strengthen their spiritual relationship extends to all resources, including waters and coastal seas, without prejudice to a broad interpretation of resources in other Articles.[73] Such an interpretation would be consistent with the broad interpretation of 'lands' required under Article 13(2) of ILO Convention 169, which states 'the use of the term "lands" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.' It would also be consistent with the positions taken during negotiations that resources in Article 25 include surface and sub-surface resources.[74]

4.4 Indigenous Peoples' Rights to Their Lands, Territories, and Resources: Article 26

Article 26 is the principal provision in the Declaration addressing Indigenous peoples' rights to own, use, develop, and control their lands, territories, and resources.

Article 26(1) sets out the general right of Indigenous peoples to the lands, territories, and resources which they have traditionally owned, occupied, or otherwise used, including in the past, or acquired. There is some uncertainty about how that right, so generally expressed, might be appropriately interpreted in practice, discussed in more depth below.

Article 26(2) specifically relates to the lands, territories, and resources which Indigenous peoples 'possess', currently, by reason of their traditional occupation or use, as well as those which they have otherwise acquired. In such cases, Indigenous peoples have the right to 'own, use, develop and control' those lands, territories, and resources.

Article 26(3) obliges States to give legal recognition and protection to 'these' lands, territories, and resources, mentioned in Article 26(1) and (2). That recognition is to be 'conducted with due respect to the customs, traditions and land tenure systems' of the Indigenous peoples concerned.

The text of Article 26 in the Sub-Commission Text was considerably different. It stated:

> Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

[73] eg note the comment that, in relation to Art 25: 'Additionally, regarding the aspects over which Indigenous peoples have a right to maintain and strengthen their own spiritual and material relationship, there was a proposal to include the phrase "among others", in order to indicate that it is an illustrative and not a limitative list.' UNCHR, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, International Workshop on the Draft United Nations Declaration on the Rights of Indigenous Peoples: Patzcuaro, Michoacan, Mexico 26–30 September 2005, UN Doc E/CN.4/2005/WG.15/CRP.1 (29 November 2005).

[74] UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2004/81 (7 January 2004) para 112.

Article 26 was one of the Articles that the Working Group on the Draft Declaration Chairperson finalized because consensus in the Working Group on the Draft Declaration on it could not be reached for reasons discussed below. Notably, the 'package' to replace Article 26 of the Sub-Commission Text included what is now Article 27 of the Declaration. In those final months, before the text was submitted to the Human Rights Council in 2006, the Chairperson changed the order of the Article 26 paragraphs to give priority to Indigenous peoples' rights to the lands they traditionally owned, occupied, or otherwise used or acquired.

4.4.1 Rights to Lands, Territories, and Resources No Longer in Indigenous Peoples' Possession: Article 26(1)

As mentioned, the central tension underlying Article 26, reflected in the substantive and substantial changes to it during negotiations, was difference in views held by Indigenous peoples and many States on the extent to which the Declaration should recognize Indigenous peoples' claims to a strong interest in their traditional lands, territories, and resources now in third-party control, possession, and ownership. It is this tension that still animates some uncertainty about those rights as expressed in the Declaration today, especially Article 26(1).

4.4.2 A Textual Interpretation of Article 26(1)

The extent of Indigenous peoples' rights to lands, territories, and resources used by them in the past but now in third-party ownership is not immediately apparent from the text of Article 26(1) being, as it is, so generally expressed. A textual interpretation suggests that the nature of that right must at a minimum require more than access to such lands, territories, and resources for the purposes of maintaining and strengthening their spiritual relationship with them, which is already specified in Article 25, discussed above; if not, Article 26(1) would be largely redundant.

Similarly, the rights secured by Article 26(1) should not fall below Article 14 of ILO Convention 169, which states that 'measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.' S James Anaya interpreted ILO Convention 169 as also relating to lands and territories no longer in Indigenous peoples' possession, based on the interpretative gloss that Article 13 requires governments to 'respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands and territories'. He states that 'a sufficient present connection with lost lands may be established by continuing cultural attachment to them, particularly if dispossession occurred recently.'[75]

Moreover, Article 26(1) must enshrine something more than an obligation on States to establish a process to recognize and adjudicate the rights of Indigenous peoples, including those traditionally owned in the past, which is guaranteed by Article 27.

Despite these clarifications, it remains unclear whether Indigenous peoples' rights to their traditional lands now in third-party ownership extend to a right to own, use, develop, and control such lands under Article 26(1). Article 26(2) only guarantees such strong and

[75] Anaya (n 20).

extensive rights in relation to lands, territories, and resources still in Indigenous peoples' possession.

As a human rights instrument, the Declaration should also be interpreted consistently with principles of equality and non-discrimination and, as mentioned above, from a realist approach. As such, Article 26(1) should be interpreted to minimize inequality that could eventuate from denying Indigenous peoples who lost their lands, territories, and resources a claim to those lands, while at the same time enabling those who have the comparative fortune to retain their lands, territories, and resources robust future legal protection of them (Article 26(2)).

On the basis of a textual analysis alone, then, under Article 26(1), Indigenous peoples' rights to lands, territories, and resources now held by third parties fall somewhere between access, where a spiritual relationship with them exists, and ownership, use, development, and control. It also requires something in addition to a process for the recognition and adjudication of Indigenous peoples' rights to their lands, territories, and resources traditionally owned or otherwise occupied or used.

4.4.3 A Purposive Interpretation of Article 26(1)

The negotiating history in relation to Article 26(1) is revealing in that it illustrates more vividly the reasons for the ambiguity in the text, thereby shedding light on the appropriate approach to interpretation of it.

Some States, especially Canada, Australia, New Zealand, and the United States (CANZUS), argued consistently and persistently during negotiations that Indigenous peoples' rights to lands, territories, and resources were limited by third-party rights, even while recognizing the underlying principle of the special relationship that Indigenous peoples have with their lands, territories, and resources, as well as its collective nature.[76] They also expressed concern about the potential 'retrospective' nature of the provisions with regard to lands, territories, and resources lost in the past.[77] As illustrated above, in their explanations of vote on the adoption of the Declaration, CANZUS, and other States, interpreted Article 26 narrowly and with caveats to balance Indigenous peoples' rights to lands, territories, and resources with the property interests of non-Indigenous peoples in those same lands.

That the Declaration retained a robust, if general, provision in relation to lands, territories, and resources no longer in their 'possession', despite such strong objections from States, reflects Indigenous peoples' refusal to give up on their claims to such lands, territories, and resources.

The earlier incarnations of the Declaration all included strong rights to lands, territories, and resources 'lost' by Indigenous peoples. For example, the 1987 draft principles, which formed the basis of earlier versions of the Declaration, included that governments 'guarantee to the Indigenous peoples rights to their traditional territories and natural resources. In cases where land has been taken away without their informed consent, it should be returned or adequately compensated for.'[78] During the most part of the negotiations from the mid-1990s to early 2000s, Indigenous peoples supported, vociferously, the text of Article 26 as set out in the Sub-Commission Text above. That

[76] UNCHR, Report of the Working Group (6 January 2003) (n 66). [77] ibid.

[78] UNCHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Fifth Session, UN Doc E/CN.4/Sub.2/1987/22 (24 August 1987) Annex IV.

text was more explicit than the one adopted in expressing Indigenous peoples' right to own, control, use, and develop their traditionally owned, in the past, lands, territories, and resources.

4.4.4 A Contextual Interpretation of Article 26(1)

International jurisprudence on rights to lands, territories, and resources sheds further light on the appropriate interpretation of Article 26(1) of the Declaration.

The IACtHR in its twin decisions *Yakye Axa v Paraguay* and *Sawhoyamaxa v Paraguay* has undertaken a sustained analysis of the human rights of Indigenous peoples to their lands, territories, and resources now in third-party ownership.[79] Both cases involved Indigenous peoples who had maintained a connection with their lands, territories, and resources despite their being in third-party legal title for over a century; both the Yakye Axa and Sawhoyamaxa peoples had occupied the areas for most of the time that the lands had been titled to others.

Paraguay's Constitution recognizes the rights of Indigenous peoples to their lands and requires the State to 'provide these lands to them free of cost, and [that] these will be non-encumberable, untransferable, inextinguishable'. However, as the titled owners did not wish to sell and the lands were deemed to be in rational use, the administrative processes in place to have the respective territories returned to Yakye Axa and Sawhoyamaxa were unsuccessful. Efforts to have the territories returned to them via legislation were also unsuccessful.[80]

In *Sawhoyamaxa*, the IACtHR held that the right to restitution of lands not possessed by Indigenous peoples continues so long as the spiritual and material basis for Indigenous identity is mainly supported by their unique relationship with their traditional lands: 'As long as said relationship exists, the right to claim lands is enforceable, otherwise, it will lapse.'[81]

To address the conflicts between the private property rights of the titled owners and communal rights of Indigenous peoples the Court took an approach requiring an assessment of the justifications for limitations on the communal rights of Indigenous peoples. It stated:[82]

> the American Convention itself and the jurisprudence of the Court provide guidelines to establish admissible restrictions to the enjoyment and exercise of those rights, that is (a) they must be established by law; (b) they must be necessary; (c) they must be proportional, and (d) their purpose must be to attain a legitimate goal in a democratic society.

As a starting point to the justificatory assessment, the IACtHR stressed the unique and considerable significance of Indigenous peoples' territories to them, stating that they relate to 'the collective right to survival ... with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.'[83]

On the other hand, the Court also stated: 'When states are unable, for concrete and justified reasons, to adopt measures to return the traditional territory and communal resources to indigenous populations, the compensation granted must be guided primarily

[79] *Yakye Axa* (n 23); *Sawhoyamaxa* (n 23). [80] *Yakye Axa* (n 23); *Sawhoyamaxa* (n 23).
[81] *Sawhoyamaxa* (n 23) para 132. [82] *Yakye Axa* (n 23) para 144. [83] ibid para 146.

by the meaning of the land for them.'[84] Moreover, it is for the State to undertake the balancing exercise between the rights of the Indigenous peoples and those of the third parties 'since the Court is not a domestic judicial authority with jurisdiction to decide disputes among private parties'.[85]

The Court found that the protracted delay in returning territories to the Yakye Axa and Sawhoyamaxa peoples and the ineffectiveness of the established procedures fell short of the Convention's rights to fair trial and judicial protection because 'when the private owners refuse to sell the land and prove that it is under rational use, the members of the indigenous communities have no effective administrative recourse available to them.' In so doing, the Court rejected the State's argument that indigenous peoples had to be in possession of their lands, territories, and resources to obtain a legal title to them. The IACtHR ordered Paraguay to delimit, grant title deed, and transfer appropriate land to the Yakye Axa free of cost.

The important points of the IACtHR's decisions in each case include the following: Indigenous peoples have rights to their traditional lands and territories now 'lost', including those now in private ownership; an Indigenous peoples' right to their traditional lands and territories now in private ownership can amount to a right to have those lands and territories returned to them, providing the fact of private ownership does not constitute a 'justified limitation' on the Indigenous peoples' right; and when assessing whether private ownership of lands and territories traditionally owned, occupied, and used by Indigenous peoples amounts to a justified limitation on the Indigenous peoples' rights to those lands, the starting point is a consideration of the value of lands and territories to Indigenous peoples, including for their survival.

Similarly, in *Endorois*, the ACommHPR found that the Endorois' right to property had been breached in circumstances where the Endorois no longer legally possessed their ancestral lands, territories, and resources, having been evicted from them almost two and a half decades earlier.[86] After reviewing relevant international human rights jurisprudence, including that from the IACtHR, the Commission concluded:

> In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights. The instant case of the Endorois is categorised under this last conclusion. The African Commission thus agrees that the land of the Endorois has been encroached upon.[87]

South Africa has provided a statutory regime for the restitution of land to original owners who lost rights in lands after 1913 as a result of past racially discriminatory laws or practices.[88] The Constitutional Court of South Africa determined that the provision applied equally to rights in land under Indigenous law at 1913 and, thus, an Indigenous

[84] ibid para 149. [85] *Sawhoyamaxa* (n 23) para 136. [86] *Endorois* (n 28) paras 174–238.
[87] ibid para 209. [88] Restitution of Land Rights Act s 2(1).

community was entitled to restitution of lands lost many decades earlier.[89] Moreover, as the evidence showed that the Nama people had mined the land, their right in land extended to communal ownership of the minerals and precious stones.[90]

4.4.5 Article 26(1) and (3)

Article 26(3), obliging States to legally recognize and protect Indigenous peoples' lands, territories, and resources, applies to Indigenous peoples' interests in their traditionally owned, occupied, and used lands under Article 26(1).

4.5 Rights to Lands, Territories, and Resources Possessed by Indigenous Peoples: Article 26(2)

Compared to the contention around Indigenous peoples' rights to 'take back' lands, territories, and resources lost at some point in the past, it is now settled that Indigenous peoples have rights to the lands, territories, and resources that they currently possess, expressed in Article 26(2) of the Declaration.

As illustrated above, Indigenous peoples' rights to the lands they currently possess are confirmed in, and reflect, a vast range of other international instruments and developed jurisprudence, including that of the IACHR and IACtHR and the UN human rights treaty bodies. Somewhat similar to Article 26, in *Sawhoyamaxa*, the IACtHR set out the above basic summary of its jurisprudence on Indigenous peoples' rights to the lands, territories, and resources they possess, cited in *Endorois*, with (1) and (2), resonating especially with Article 26(2).[91]

The jurisprudence of the IACtHR, reflected in the above quote, and the African Commission, also makes it clear that Indigenous peoples do not require a State-recognized title to lands, territories, and resources for their interests in the lands, territories, and resources to be recognized.[92] In fact, under Article 26(3) of the Declaration and that same jurisprudence, States are required to give legal recognition to such possession.[93]

4.5.1 Degree of Indigenous 'Possession' Required to Give Rise to a State Obligation to Legally Recognize Indigenous Peoples' Rights to Lands, Territories, and Resources: Article 26(2) and (3)

The cases of *Awas Tingni* and the Supreme Court of Belize with regard to Mayan land rights both raised a question about the extent of possession or control required by Indigenous peoples to establish a robust right to international human rights legal recognition and protection under the right to property. The same question arises in relation to Article 26(2): do Indigenous peoples have the benefit of Article 26(2) rights where they use the lands less intensively or intermittently, for example, not for dwelling but for hunting and fishing?

Notably, in *Awas Tingni*, Indigenous peoples only had to show 'traditional, ancestral patterns of use and occupation'[94] of lands, territories, and resources to successfully claim a title to them. They are not required to prove, in contrast to common law tests under the aboriginal title doctrine, an intensive continuity with territories for an extended length of time back to since the moment of sovereignty transfer.[95] Thus, the fact that the Awas

[89] *Alexhor* (n 61). [90] ibid. [91] *Sawhoyamaxa* (n 23) para 128.
[92] *Endorois* (n 28) para 186. [93] ibid. [94] *Awas Tingni* (n 2) paras 138, 164.
[95] Erueti (n 34).

Tingni were migratory and had not possessed the lands in question in a manner consistent with a sedentary lifestyle since prior to the Nicaraguan assertion of sovereignty did not prevent their claim to title.[96] Similarly, the IACHR in *Belize* did not require the Mayan peoples to show continuity in their possession of the lands, territories, and resources because they could not be expected to have resided within fixed territories since colonial times.[97]

Article 26(2) also raises the potential issue as to the exact areas that must be recognized and demarcated, especially where the Indigenous peoples have traditionally occupied and used lands to varying degrees of intensity. It is up to the State to demarcate the exact territories, under Article 26(3), but 'the extent of territory to be demarcated is that area of land occupied and used by the indigenous peoples in accordance with their unique traditions and perspectives.'[98] Erueti sums up the doctrine as follows:[99]

> the lands to be demarcated would not be limited to only those areas of land occupied on a regular basis, such as principal habitations, but would extend to other surrounding areas occupied on a traditional basis.

4.5.2 Practical Difficulties in Recognizing Indigenous Peoples' Rights to Their Lands, Territories, and Resources

Practical problems in implementing international law on Indigenous peoples' land rights can impede their realization, such as the cost of seeking demarcation and delimitation.[100] During the UN Expert Seminar on Indigenous peoples' permanent sovereignty over their natural resources, an African Indigenous person stated that Indigenous peoples there faced problems 'accessing' their rights 'given the lack of access to the justice system by Indigenous peoples'.[101]

4.5.3 Domestic Law Consistent with the Right of Indigenous Peoples to Their Lands, Territories, and Resources

There is growing domestic jurisprudence consistent with the Declaration's Article 26(2) requiring recognition of their title to lands, territories, and resources they currently possess. One example is the above-mentioned Supreme Court of Belize case involving Mayan land rights, which drew on the Declaration.[102] Likewise, the Philippines' Indigenous Peoples' Rights Act (IPRA), adopted in 1997, is unique in Asia in its strong recognition of Indigenous peoples' rights to their lands, territories, and resources, inspired by the Declaration. It includes processes for delineating ancestral lands.[103] However, Tauli Corpuz has explained that there are obstacles to the full implementation of the IPRA, including constitutional doctrine 'which gave the State rights over lands and resources classified as part of the public domain'. Moreover, the Mining Act of 1995 provides incentives to mining companies to exploit Indigenous peoples' lands.[104]

[96] *Awas Tingni* (n 2) para 141.

[97] Erueti (n 34) citing *Belize* (n 29) paras 127–30. For cases where a similar underlying approach to recognition of Indigenous peoples' rights to lands, territories, and resources is apparent, see also CERD, Decision 2(54) on Australia (n 15); CERD, Early Warning and Urgent Action Procedure, Decision 1(68) United States of America (Western Shoshone), UN Doc CERD/C/USA/DEC/1 (2006); CERD, Decision on Foreshore and Seabed Act 2004 (n 15).

[98] Erueti (n 34) 603, citing *Awas Tingni* (n 2) para 164. [99] ibid.

[100] OHCHR, Report on the Expert Seminar (n 49) para 22. [101] ibid para 28.

[102] *Belize* (n 29). [103] OHCHR, Report on the Expert Seminar (n 49) para 19. [104] ibid.

In Anglo-legal jurisdictions, such as Australia, Canada, and New Zealand, it is possible for Indigenous peoples to obtain title to their traditionally owned lands, territories, and resources now under the common law doctrine of aboriginal title.[105] However, in practice, in each State that potential has been restricted by legal tests imposed by statutes and courts on Indigenous claimants to prove such rights, such as continuity of connection with the lands and territories since the transfer of sovereignty.[106] However, it is hoped that the 2014 Supreme Court of Canada decision in *Tsilhqot'in*, the first case to award aboriginal title in Canada, will mark a general loosening of such tests.[107] Further, the NZ Supreme Court in late 2014 found Māori owned all NZ land prior to colonization and the cession of sovereignty did not affect the property rights of Māori, which continued and were held under tribal custom.[108] As a result, and also given specific Māori land legislation, it suggests that the Māori land ownership continues under custom unless a legal transfer to the Crown can be shown. Claims to lands now vested in fee simple in private persons and bodies do not succeed as such vestings are deemed to have extinguished any Indigenous peoples' aboriginal title.[109] Similarly, in Australia and New Zealand, sub-surface minerals are deemed to be vested in the Crown as a matter of common law and statute. Scholars have highlighted the inconsistency between aspects of the common law doctrine of aboriginal title and human rights law.[110] As Erueti states:

> International law recognises that to accord rights of ownership in only those cases where Indigenous land practices strictly conform to state standards of ownership would be to penalise Indigenous peoples for normative divergence and perpetuate the historical discrimination suffered by them.[111]

As the above-mentioned example of Paraguayan law illustrates,[112] there is some legal recognition of Indigenous peoples' rights to their lands, territories, and resources in Latin America. Other examples include Colombia,[113] Brazil,[114] Bolivia,[115] Venezuela,[116] Chile,[117] Nicaragua,[118] and Mexico.[119]

[105] See, eg, foundational cases such as, in Australia, *Mabo v Queensland (No 2)* ('*Mabo* case') [1992] HCA 23, (1992) 175 CLR 1; in Canada, *Delgamuukw v British Columbia* [1997] 3 SCR 1010; New Zealand, *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682 (HC); *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

[106] Cases include, eg, in Australia, *Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, (2002) 214 CLR 422; *Western Australia v Ward* [2002] HCA 28, (2002) 213 CLR 1; and in Canada, *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220. See Erueti (n 34).

[107] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

[108] *Paki v Attorney General* [2014] NZSC 118, [2015] 1 NZLR 67, paras 22, 68.

[109] K McNeil, 'The Vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42 Osgoode Hall LJ 271.

[110] CERD, Decision 2(54) on Australia (n 15); CERD, Early Warning and Urgent Action Procedure, Decision 1(68) United States of America (Western Shoshone), UN Doc CERD/C/USA/DEC/1 (2006); CERD, Decision on Foreshore and Seabed Act 2004 (n 15); Erueti (n 34); McNeil (n 109).

[111] Erueti (n 34) 546.

[112] Constitution of 1992 Art 62.

[113] Special Decree 2164 (7 December 1995); R Roldán Ortega, *Manual para la Formación de Derechos Indígenas* (2nd edn, Abya-Yala 2005) 122.

[114] Brazilian Constitution of 1988 Art 231.

[115] Constitution of 1994 Art 171; Constitution of 2009 Art 30.

[116] Constitution of 1999 Art 119.

[117] Indigenous Law No 19.253 (1993).

[118] Constitution of 1987 Art 89.

[119] Constitution of 2001 Art 2.

4.5.4 Resources

As is explained in more detail in Chapter 15 the Declaration reflects a tension between the States' interests in resources and Indigenous peoples' rights to own their resources. During negotiations, many States sought to protect their rights to resources vested in them as a matter of domestic law, a proposition accepted to some extent in an earlier Chair's proposal in relation to resources:

> In situations where minerals or other resources existing on or under such lands are the property of the State, or the State otherwise controls their use or exploitation, the Indigenous peoples concerned should:
>
> (a) be consulted on the impact on the use and enjoyment of such lands of any proposed use or exploitation of these resources on their lands;
> (b) have the opportunity to benefit from such use or exploitation; and
> (c) where appropriate, receive fair and reasonable compensation for any adverse impact on their use and enjoyment of the lands arising from such use or exploitation.[120]

The compromise evident in the Declaration is that Indigenous peoples have the right to own and use their resources in the same way that they have the right to own their lands and territories, explained herein. However, under Article 32, it is envisaged that States might also have an interest in Indigenous peoples' resources for development purposes, although Indigenous peoples' consent is required for any project that affects their resources. The Special Rapporteur on the rights of Indigenous peoples has expressed the balance between State and Indigenous peoples' interests in resources found in Indigenous peoples' lands and territories:

> In cases in which indigenous peoples retain ownership of all the resources, including mineral and other subsurface resources, within their lands, ownership of the resources naturally includes the right to extract and develop them. But even where the State claims ownership of subsurface or other resources under domestic law, indigenous peoples have the right to pursue their own initiatives for extraction and development of natural resources within their territories, at least under the terms generally permitted by the State for others.[121]

Anaya has also stated, in academic writing, that despite not upholding rights to mineral or sub-surface resources in cases in which the State generally retains ownership: 'Pursuant to the norm of non-discrimination, however, Indigenous peoples must not be denied subsurface and mineral rights where such rights are otherwise accorded landowners.'[122]

The general thrust of the approach to resources reflected in the Declaration is mirrored in jurisprudence with regard to Indigenous peoples' rights to their resources, also explained in Chapter 15, although the Declaration is arguably stronger that ILO Convention 169 in this respect.[123] In *Saramaka*, the IACtHR held that, despite the Suriname Constitution

[120] UNCHR, Report of the Working Group (7 January 2004) (n 74) Annex: Chairperson's Summary of Proposals.

[121] HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples, S James Anaya: Extractive Industries and Indigenous Peoples, UN Doc A/HRC/24/41 (1 July 2013) para 9.

[122] SJ Anaya, 'Indigenous Peoples' Participatory Rights in relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 Arizona J Int'l & Comp L 7, 10.

[123] Article 15 states: '1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or

and a mining decree vesting all natural resources in the State, Indigenous peoples have rights to their natural resources related to their culture and found on their lands and territories, in other words, 'the right to own the natural resources that they have traditionally used within their territory' and 'without them the very physical and cultural survival of such peoples is at stake'.[124] However, the right was not absolute such that the State cannot grant any concessions over such resources, in other words, the right to natural resource is subject to 'justified limitations'. Such limitations must, however, be '(a) previously established by law; (b) necessary; (c) proportional; and (d) with the aim of achieving a legitimate objective in a democratic society'.[125] In addition, Suriname was required to abide by three safeguards:

> First, the State must ensure the effective participation of the members of the Saramaka community, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan ... within Saramaka territory; Second, the State must guarantee that the Saramakas will receive a legitimate benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within the Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.

The African Convention on Human and Peoples' Rights includes the right to free disposition of natural resources, which the African Commission has interpreted to vest in Indigenous peoples in relation to resources contained in their traditional lands.[126] It has adopted an approach consistent with that of the IACtHR in *Saramaka*.[127]

4.5.5 Processes to Recognize and Adjudicate Indigenous Peoples' Rights to Their Lands, Territories, and Resources: Article 27

Article 27 requires States to:

> Establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. indigenous peoples shall have the right to participate in this process.

Article 27 did not have a predecessor Article in the Sub-Commission Text, being introduced relatively late in the negotiations in the Working Group on the Draft Declaration negotiations and in the context of the discussion on the extent of Indigenous peoples' rights in relation to traditionally owned lands, territories, and resources no longer possessed by them. Indeed, Article 27 is a partial trade-off for the decision not to

sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.'

[124] *Saramaka* (n 27) para 121 (relying on *Yakye Axa* and *Sawhoyamaxa* (n 23)).

[125] ibid para 127.

[126] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (The Ogoni Case)* (2001) ACommHPR Comm No 155/96, as affirmed in *Endorois* (n 28).

[127] *Endorois* (n 28).

include express and specific rights to lands, territories, and resources lost in the past in the Declaration.

Alternative suggestions for a new Article put forward as a potential trade-off for the deletion of an express right to lands 'lost' included:[128]

In addition, effective measures shall be taken in appropriate cases to safeguard and legally recognize the right of the peoples concerned to use lands, territories and resources not exclusively owned, occupied, used or otherwise acquired by them, but to which they have traditionally had access for their subsistence and traditional activities.

Source: Norway

States shall take measures, as appropriate, to increase Indigenous peoples' ownership of or access to lands and resources, taking into account present and historical circumstances and their traditional use of land.

Source: Canada

Like Article 27, these proposals illustrate the intention to impose an obligation on States to take action to recognize legally Indigenous peoples' interests in lands, territories, and resources traditionally owned, occupied, or used in the past, but now out of their possession.

There is a similar provision in Article 14(3) of ILO Convention 169, which states that 'adequate measures shall be established within the national legal systems to resolve land claims by the peoples concerned', not specifying whether those claims can relate to lands, territories, and resources now 'lost', although clearly capable of that interpretation.

A comparison between Articles 14(3), 16(2), and 16(4) of ILO Convention 169 and Article 27 of the Declaration highlights the extent to which Article 27 broadens international law requirements to establish processes for redress, by applying generally 'to recognize and adjudicate the rights of Indigenous peoples pertaining their lands, territories and resources'. Unlike the ILO Convention, Article 27 is not confined to circumstances of removal and situations where return of lands, territories, and resources is not possible. The Declaration also explicitly requires that the processes recognize and adjudicate on issues relating to Indigenous peoples' interests in lands, territories, and resources that were traditionally owned or otherwise occupied or used, not only with regard to those they currently possess.

The Declaration provision is also, in contrast, more demanding and exacting in its requirements of the 'processes'. Article 27 requires them to be 'fair, independent, impartial, open and transparent', 'giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems'. In addition, there is a requirement that Indigenous peoples have a right to participate in adjudicatory processes rather than, in Article 16(2) (confined to relocation), an 'opportunity for effective representation of the peoples concerned'.

The IACHR sheds some light on appropriate international standards for processes to recognize and adjudicate Indigenous peoples' rights to their lands, territories, and resources in its decision in *Mary and Carrie Dann v United States*.[129] In that case, the Commission found that decisions by the US Indian Claims Commission, which had determined the Indigenous land interests extinguished, did not conform to human rights law governing Indigenous peoples' land rights today. Moreover, the Indian Claims

[128] Chair's Text (n 68). [129] *Mary and Carrie Dann v United States* (n 61).

Commission was not a process that had received the consent of the Indigenous peoples whose lands and territories were considered by it.

Domestic processes to adjudicate upon Indigenous peoples' land rights include New Zealand's Waitangi Tribunal, which assesses Crown acts contrary to the Treaty of Waitangi both historically and today.[130]

5. Conclusion

In conclusion, Indigenous peoples' rights to their lands, territories, and resources as expressed in the Declaration, supported by a purposive, contextual interpretation and taking into account jurisprudence at the international and domestic levels, include: the right not to be relocated from their lands, territories, and resources without their free, prior, and informed consent; rights to enjoy their spiritual relationships with lands, territories, and resources traditionally owned, occupied, and used; a generic right to those lands, territories, and resources traditionally owned, occupied, and used subject only to justified limitations on them, which may relate to the interests that 'third parties' have acquired in them; and the right to a process to have their interests in lands, territories, and resources adjudicated.

In articulating Indigenous peoples' rights to their lands, territories and resources the Declaration is the most comprehensive of international instruments in this area, both confirming and developing international law. As the cases discussed in this chapter illustrate, the Declaration is being used by Indigenous peoples and tribunals, especially international tribunals, as a lever to support the recognition and protection of Indigenous peoples' lands, territories, and resources on the ground, even where domestic law is less accommodating of Indigenous peoples' rights.

Ultimately, the Declaration provides a sound legal platform for Indigenous peoples' claims to the cultural, spiritual, and tangible relationships they maintain with their lands, territories, and resources. As a result, the Declaration goes some way to reversing international law's historical role as a colonial tool for the dispossession of Indigenous peoples' lands, territories, and resources.

[130] Treaty of Waitangi Act 1975.

Chapter 15. Control over Natural Resources and Protection of the Environment of Indigenous Territories

Articles 29, 30, and 32

Stefania Errico[*]

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

1. Introduction

When the Working Group on Indigenous Populations (Working Group or WGIP) first met in 1982, the attention of its members was drawn, virtually from the very start, to

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issues concerning the protection of Indigenous peoples' lands and the role that Indigenous peoples should play in the process of national development, particularly as regards the control over the natural resources of their territories.[1] Participants shared their experiences and voiced their concerns regarding the dispossession of their lands as a result of development projects and the impact that this was having on the integrity of their cultures, societies, and ways of life. They pointed at the pollution of land, air, and water and the destruction of the natural environment, lands, wildlife, and other resources which, in too many cases, they were witnessing and suffering from. Military and paramilitary abuses committed against Indigenous peoples were also referred to during the debates.[2] A representative of one Indigenous organization highlighted, in particular, that the rights of Indigenous peoples to self-determination and to freely dispose of their lands and their natural resources were essential for their survival.[3] Others stressed that: 'Development projects within the areas settled by indigenous populations should also be initiated only with their consent and they should be given their rightful share in the profits obtained through such projects.'[4]

Eventually, it became clear that the rights to lands, territories, and natural resources and the control thereon were one of those 'areas of concern' on which the development of new standards by the Working Group should focus. In fact, it proved to be one of the most difficult areas on which to reach a final agreement. Articles 29 (environment), 30 (military activities), and 32 (development and use of Indigenous land, territories, and resources), which will be presented in this chapter, captured the final compromise reached by the parties in seeking a balance between State sovereignty and the recognition of Indigenous peoples' rights.

The drafting of the Declaration took place almost in parallel with the revision of ILO Indigenous and Tribal Populations Convention, 1957 (No 107),[5] which led to the adoption of the Indigenous and Tribal Peoples Convention, 1989 (No 169) in 1989.[6] The fundamental shift in focus of the latter compared to the first instrument and the basic principles that it enshrined regarding Indigenous peoples' rights to decide their own priorities for development, to be consulted, and to participate in decisions concerning them certainly helped set the ground-level of the negotiations. At the same time, specific principles regarding Indigenous peoples' rights to natural resources and related obligations of States were progressively being developed when applying general human rights provisions to Indigenous peoples, including by the UN Treaty Bodies and the Inter-American human rights institutions, and they were also to influence the process.

More broadly, it is interesting to recall that the negotiations of the Articles examined in this chapter took place against the backdrop of the change in the approach to development

[1] Please note that unless otherwise specified, for the purpose of this chapter we will use the term 'territory' to encompass 'lands or territories and other resources'.

[2] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its First Session, UN Doc E/CN.4/Sub.2/1982/33 (25 August 1982).

[3] ibid para 69. [4] ibid para 98.

[5] ILO, Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Convention 107), adopted 26 June 1957, entered into force 2 June 1959. The Convention has been revised by ILO Convention 169 and is no longer open to ratification.

[6] ILO, Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169), adopted 27 June 1989, entered into force 5 September 1991.

which occurred during those years and which placed greater emphasis on the respect for human rights and the participation of rights-bearers in the planning and implementation of development projects.[7] As described below, the context of the negotiations was further characterized by an increasing attention to the protection of the environment and the impact that its deterioration has on the enjoyment of human rights, a topic which is particularly crucial for Indigenous peoples given the special relationship they have with their territories.

This chapter will look at the control and use of Indigenous peoples' lands, territories, and resources, particularly with regard to the definition of priorities and strategies for development and the implementation of development projects in Indigenous territories. It will try to shed some light on Indigenous peoples' rights and State powers in this area by juxtaposing the language finally adopted in Articles 29, 30, and 32 of the Declaration, in the light of their drafting history, with current international, regional, and national practice regarding this issue.

As we shall see, the set of Articles presented in this chapter are of particular importance to Indigenous peoples, as well as to national societies and States more generally. In a recent report, the UN Special Rapporteur on the Rights of Indigenous Peoples has pointed out that the implementation of natural resource extraction and other development projects on or near Indigenous territories has possibly become 'one of the most pervasive sources of the challenges to the full exercise of [indigenous peoples'] rights'.[8]

The following sections will first provide an overview of the drafting history of these provisions, highlighting the main elements of the negotiation between government and Indigenous representatives. We will then consider the question of the control over the natural resources pertaining to Indigenous territories, examining Indigenous peoples' right to natural resources vis-à-vis States' power to dispose, in particular, of subsoil resources. After clarifying certain key principles, we will examine the restrictions on States' freedom to dispose of natural resources, particularly in the light of Indigenous peoples' rights to consultation and to determine and develop priorities and strategies for the development and use of their land or territories and other resources, which are provided in Article 32 of the Declaration. The question of the participation in the benefits originating from the activities carried out in their territories will also be presented. Next, we will turn to the conservation and protection of the environment of Indigenous peoples' territories and the storage or disposal of hazardous materials. Before concluding with some final remarks, the chapter will further refer to the use of Indigenous territories for military activities.

2. The Overall Drafting History of the Provisions

During the negotiations of the Declaration in the WGIP, a number of Indigenous representatives highlighted that '[i]n order for land rights to be meaningful, they ought

[7] In 1987, the Brundtland Report, referring to the situation of marginalized communities, highlighted that 'a more careful and sensitive consideration of their interests is a touchstone of a sustainable development policy'. The Brundtland Report was released in 1987 by the World Commission on Environment and Development. See S Jentoft, H Minde, and R Nilsen, *Indigenous Peoples, Resource Management and Global Rights* (Eburon Publishers 2003) 22.

[8] See UN Doc A/HRC/18/35 (11 July 2011) para 57.

to include indigenous *control* of natural resources, subsoil as well as surface.'[9] More generally, it was suggested that the discussion on the rights to land and other natural resources should encompass, among others, 'the relationship between the control of natural resources and the preservation of the land' and 'environmental protection'.[10]

In 1985, the drafting process of the new instrument commenced with some draft principles presented by the Working Group and some proposals put forward by Indigenous non-governmental organizations. These latter included specific language on Indigenous peoples' rights to land and natural resources, as well as on economic exploitation and military use of Indigenous peoples' territories.[11] As is known, in 1987, the Chairperson of the Working Group was then entrusted with the preparation of a full draft.

Part III of the Draft Universal Declaration on Indigenous Rights submitted by the Chairperson in 1988 contained a set of provisions concerning land rights and 'control' over natural resources. In particular, its paragraph 16—which then led to final Article 29—provided for:

> The right to protection against any action or course of conduct which may result in the destruction, deterioration or pollution of their lands, air, water, sea ice, wildlife or other resources without free and informed consent of the indigenous peoples affected. The right to just and fair compensation for any such action or course of conduct.

The following paragraph—which formed the basis for the drafting of final Article 32—moreover, stated:

> The duty of States to seek and obtain their consent, through appropriate mechanisms, before undertaking or permitting any programmes for the exploration or exploitation of mineral and other subsoil resources pertaining to their traditional territories. Just and fair compensation should be provided for any such activities undertaken.[12]

Upon reviewing it, Indigenous peoples' representatives commented that the draft should also address the rights to a safe and healthy environment and to development and cover more extensively the importance of both surface and sub-surface resources. One Indigenous observer pointed out that 'the subsurface resources of his people ... were managed and controlled by the State and it was becoming increasingly difficult to have funds released for ... carrying out its own development projects.'[13] Others suggested adding a clause providing that 'State military and police forces should not be permitted to enter areas of indigenous peoples and that the maintenance of law and order should be entirely in indigenous hands', to which one government observer reacted by underscoring that this responsibility rested with central governments.[14] Generally on Part III, governments found that the provisions included in this Part could pose some difficulties because of

[9] Emphasis added. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Third Session, UN Doc E/CN.4/Sub.2/1984/20 (8 August 1984) para 114.

[10] ibid para 117.

[11] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Third Session, UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985) Annexes III, IV.

[12] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Third Session, UN Doc E/CN.4/Sub.2/1988/24 (24 August 1988) Annex II.

[13] ibid paras 79 and 82. [14] ibid para 90.

the likely conflict with existing national norms, particularly with regard to sub-surface resources and compensation.[15]

As a result of the comments received, the first revised draft of the Declaration proposed a different formulation for paragraph 17, calling upon States to *consult* with Indigenous peoples 'prior of the commencement of new *large-scale projects* ... in order to enhance the projects' benefits and to mitigate any adverse economic, social, environmental and cultural effect'.[16] The same Article went on providing for fair and just compensation for 'any such activity or adverse consequence undertaken'.[17]

Indigenous peoples, however, considered that a requirement for 'consultation' was not sufficient and rather asked that 'negotiations to obtain full and informed consent must be completed with authentic, defined and chosen representatives of indigenous governments.'[18] They also suggested including a provision on States' duty to restore and rehabilitate Indigenous territories used for mineral resource exploitation.

The discussions began to get to the heart of the matter. In 1990, the Working Group decided to establish an informal drafting group to examine the provisions on land and resources contained in the Preamble and Parts III and IV of the draft with the aim of facilitating the elaboration of the Declaration.[19] At the end of the session, the group suggested alternative formulations also for paragraphs 16 and 17, which encompassed the recognition of Indigenous peoples' right to a safe and healthy environment and to restitution in the event of destruction, deterioration, or pollution of their territories, as well as the requirement for the 'free and genuine consent' of Indigenous peoples prior to the implementation of any project affecting their territories.[20]

During the debate, a participant reserved its position on this set of proposals because it 'appears to give indigenous peoples veto power over development projects';[21] others pointed out that a right to veto over State measures of expropriation would be unacceptable and emphasized that 'in their countries subsoil resources were owned by the

[15] ibid para 86. [16] Emphasis added.

[17] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Third Session, UN Doc E/CN.4/Sub.2/1989/36 (25 August 1989) Annex II.

[18] ibid para 62.

[19] At the same time, two other informal drafting groups were set up to discuss, respectively, the provisions on political rights and autonomy and the remaining Articles.

[20] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Third Session, UN Doc E/CN.4/Sub.2/1990/42 (27 August 1990) Annex III. The provisions in question read as follows: 'Paragraph 16. The right to a safe and healthy environment and the right to the protection of the environmental integrity of the land and other territories and resources traditionally occupied or otherwise used by indigenous peoples. Where any destruction, deterioration or pollution occurs, the right to full and effective restitution, including compensation for damages of a collective and/or individual nature'; 'Paragraph 17. The right to require that non-indigenous authorities and other parties, including transnational corporations, request and obtain the free and genuine consent of the indigenous peoples concerned prior to the commencement of any project directly related to the indigenous lands and other territories and resources. Preliminary studies must be undertaken in collaboration with the indigenous peoples concerned to assess the environmental, social, cultural and economic impact of these activities. The terms of the economic and other benefits that are to accrue to indigenous peoples as a result of said projects must be established with their free and genuine consent, as witnessed by a treaty, agreement or any other mutually-agreed legally-binding instrument. It also includes the right to seek and obtain just and fair compensation for damages sustained by indigenous peoples after the initiation of said mutually-agreed projects and caused by acts or omissions for which non-indigenous parties are subject to administrative, civil or criminal responsibility.'

[21] ibid para 85.

State and could not be included within the provisions guaranteeing ownership of land and territories.'[22] From the Indigenous representatives' side, it was rather remarked that paragraph 17 did not go far enough in guaranteeing Indigenous peoples' right to determine their priorities for development, as Article 7 of ILO Convention 169 had in the meanwhile recognized.[23]

As the discussion on these subjects went on, a new revised text was submitted for discussion during the 1991 session of the Working Group. References to rights to land and resources were included in the Preamble, along with the 'endorsing' of 'efforts to consolidate and strengthen the societies, cultures and traditions of indigenous peoples through their *control over development affecting them or their lands, territories and resources*'.[24] Likewise, emphasis was placed on the need to demilitarize the lands and territories of Indigenous peoples, which was seen as instrumental to 'peace, understanding and friendly relations among all peoples of the world'.[25] In the operative paragraphs of the draft, the dispossession of Indigenous peoples' lands, territories, or resources was presented among the acts which could amount to 'cultural genocide', a concept bound to disappear throughout the negotiations that followed, although the idea that those acts could result in the destruction of Indigenous peoples' culture remains in the text of the Declaration as approved by the UN General Assembly in 2007.[26] The cluster of provisions on land rights now incorporated the recognition of Indigenous peoples' 'laws and customs, land-tenure systems and institutions for the management of resources' and called for effective State measures to prevent any interference or encroachment on these rights. The provision on the protection of the environment was also reworked to encompass the right to adequate assistance to this end and the prohibition of military activities and storage or disposal of hazardous materials unless grounded on the agreement with the peoples concerned.[27]

As discussions continued in the next session, government representatives pointed out that some elements of the draft remained extremely controversial and insisted that the final draft should be a 'balanced and realistic' one.[28] More particularly, they requested that the Draft Declaration address 'in a clear and realistic manner the question of the relationship between national law and the control by indigenous peoples over lands and resources, and define in which cases the latter may be limited by the former'.[29] In parallel, they held that it was essential that the language used in the text be sufficiently flexible to apply to the different situation of Indigenous peoples as well as the different national legal and social systems.[30] In their turn, Indigenous peoples' representatives underscored once

[22] ibid para 115. [23] ibid para 92.

[24] Emphasis added. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Third Session, UN Doc E/CN.4/Sub.2/1991/40 (15 August 1991) Annex II.

[25] ibid. [26] For more on this, see Chapter 6 in this volume.

[27] Paragraph 17 of the draft stated: 'Indigenous peoples have the right to the protection of their environment and productivity of their lands and territories, and the right to adequate assistance including international co-operation to this end. Unless otherwise freely agreed upon by the people concerned, military activities and the storage or disposal of hazardous materials shall not take place in their land and territories' (UN Doc E/CN.4/Sub.2/1991/40 (15 August 1991) Annex II).

[28] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Third Session, UN Doc E/CN.4/Sub.2/1992/33 (20 August 1992) paras 45, 48.

[29] ibid para 52. [30] ibid para 57.

more the importance of self-determination, indicating that the latter included, among other things, the right of Indigenous peoples to use and control their land and natural resources.[31]

The operative paragraphs included in the draft agreed by the members of the Working Group at first reading in 1992 then contemplated the right to rehabilitation of 'their total environment', where appropriate, in order to respond to concerns about the pollution and contamination of their territories resulting from various initiatives undertaken by governments that had consistently been voiced by Indigenous representatives. Furthermore, the requirement for free, prior, and informed consent (FPIC) was again associated with large-scale projects. After further discussions at its following session (eleventh), the Working Group, however, agreed on a different wording for the provisions on the protection of the environment and the realization of projects affecting Indigenous peoples' territories. The latter was set against the recognition of Indigenous peoples' right to determine and develop priorities and strategies for the development or use of their territories. The relevant provisions read as follows:

Article 28 [in the Next Draft, Articles 29 and 30]

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

...

Article 30 [in the Next Draft, Article 32]

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[32]

[31] ibid para 68.

[32] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Third Session, UN Doc E/CN.4/Sub.2/1993/29 (23 August 1993) Annex I. Among others, the following paragraphs in the Preamble were also reformulated and then read: 'Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs'; 'Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world'.

This is the text that was then submitted to and endorsed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1994 and eventually presented to the Commission on Human Rights for consideration and adoption by the UN General Assembly. The negotiations which would subsequently take place in the Working Group on the Draft Declaration (WGDD) had as a basis this draft (hereinafter, '1994 draft').

It was actually the need to accommodate the issue of the control over the natural resources existing in Indigenous peoples' territories, along with other questions, which led to the creation in 1995 of this specific forum—the WGDD—where further negotiations between States and Indigenous representatives took place.[33] One of the participants recalls that, in fact, the provisions on land, territories, and resources proved to be, from the very outset, those on which reaching agreement was most difficult and the WGDD did not address those provisions in depth until the final week of its eleventh and final session.[34]

In the next sections, we will refer to this additional phase of the negotiations of the Declaration when examining in more detail key aspects of its Articles 29, 30, and 32. We will start precisely with the question of the control over the natural resources pertaining to Indigenous peoples' territories.

3. Control and Use of Natural Resources

Broadly speaking, Article 32 of the Declaration, as approved by the UN General Assembly, can be said to represent the compromise reached between Indigenous peoples and States with regard to the control and use of natural resources existing in Indigenous territories. It is, therefore, a key provision to address especially those cases where Indigenous customary law and national legislation differ as to the regime of these resources. As will be seen, this is the case, in particular, of subsoil resources. Article 32 also has profound linkages with the provisions on self-determination.

It should be recalled that the Declaration recognizes the right of Indigenous peoples to own, use, develop, and control the land, 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'.[35] Prior to the adoption of the Declaration, ILO Convention 169 had already recognized the right of Indigenous peoples to the natural resources pertaining to their lands,[36] including the rights to participate in the use, management, and conservation of these resources. The Guide to the Convention acknowledges that '[t]his is an especially difficult provision, and it is drafted in terms which are not always specific because it has to apply to many different national situations.'[37] It goes on to explain that '[e]xactly what this right consists of will have to be defined within each

[33] The Working Group on the Draft Declaration was established by the UN Commission on Human Rights in 1995 by Res 1995/32.

[34] M Åhrén, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction' in C Charters and R Stavenhagen (eds), *Making the Declaration Work: The UN Declaration on the Rights of Indigenous Peoples* (IWGIA 2009) 206.

[35] Art 26. Please note that this Article along with other provisions of the Declaration dealing specifically with Indigenous peoples' rights to land will be addressed in more detail in Chapter 14, this volume.

[36] According to Art 13(2) of the Convention, the term 'lands' in Art 15 includes the concept of territories.

[37] M Tomei and L Swepson, *Indigenous and Tribal Peoples: A Guide to ILO Convention No 169* (International Labour Office 1996) 19.

national legal system, within the *land rights* that these peoples have, and within their capacity to exercise their rights.'[38]

Clearly, Indigenous peoples must be entitled to the same rights over the natural resources existing in their lands as any other owner would be entitled under the national laws regulating property regimes.[39] Recommendation 104 that accompanies ILO Convention 107, the 'predecessor' of ILO Convention 169, had already stipulated that: 'Members of the populations concerned should receive the same treatment as other members of the national population in relation to the ownership of underground wealth or to preference rights in the development of such wealth.'[40] However, in the case of Indigenous peoples, the disposal of natural resources carries an additional dimension in the light of the profound cultural and spiritual relationship that Indigenous peoples have with their territory. In its decision in the case of *Saramaka People v Suriname*, the Inter-American Court of Human Rights (IACtHR) highlighted that 'the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land.'[41] The Court's reading is explained precisely in the light of the implications of Indigenous peoples' relationship with their land and territories and so are, as we shall see, the Court's considerations concerning States' power to restrict the enjoyment and exercise of Indigenous peoples' property rights.[42]

It is thus useful to recall here that the protection of Indigenous peoples' rights of ownership and use of their traditional lands, territories, and resources is closely related to the need to preserve the social, cultural, and economic integrity of these peoples.[43] In fact, the

[38] ibid (emphasis added).

[39] In this sense, see SJ Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction' (2005) 22 Arizona J Int'l & Comparative L 17.

[40] ILO, Recommendation concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted 26 June 1957, 40th ILC Session, para 4.

[41] *Case of the Saramaka People v Suriname*, IACtHR Series C No 172 (28 November 2007) para 122. The Court held that 'the natural resources found on and within indigenous and tribal peoples' territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life' (ibid). See also *Case of Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR Series C No 245 (27 June 2012) para 146.

[42] In the case of *Yakye Axa Indigenous Community v Paraguay*, after stating that, generally speaking, admissible restrictions to property rights are those (1) established by law; (2) necessary; (3) proportional; and (4) the purpose of which must be to attain a legitimate goal in a democratic society, the Court also indicated that in the case of Indigenous peoples 'the States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.' See *Case of the Yakye Axa Indigenous Community v Paraguay*, IACtHR Series C No 125 (17 June 2005) paras 144–46. The Court also held that '[d]isregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members' (para 147). See further the considerations developed in *Saramaka People* (n 41).

[43] As emphasized by the former UN Special Rapporteur, José Martínez Cobo, there exists a deeply spiritual special relationship between Indigenous peoples and their lands as basic to their existence as such and to all their beliefs, customs, traditions, and culture. See J Martínez Cobo, Study of the Problem of Discrimination against Indigenous Populations: Vol.V, Conclusions, Proposals and Recommendations, UN Doc E/CN.4/Sub.2/1986/7/Add.4. On the relationship of Indigenous peoples to their lands, see also E-I Daes, Indigenous Peoples and Their Relationship to Land—Final Working Paper Prepared by the Special Rapporteur, Sub-Commission for the Promotion and Protection of Human Rights, UN Doc E/CN.4/Sub.2/2001/21 (11 June 2001). The UN Declaration itself recognizes, in Art 25, that Indigenous peoples have a 'distinctive spiritual relationship' with both their traditional lands and resources. In addition, Art 20 of the Declaration states that

UN Human Rights Committee (HRComm) has acknowledged that 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.'[44] The same approach has been embraced by the UN Committee on Economic, Social and Cultural Rights (CESCR), according to which Indigenous peoples' cultural life encompasses 'the right to the lands, territories and resources'. The Committee has accordingly called upon States to protect Indigenous peoples' lands, territories, and resources from illegal or unjust exploitation.[45]

The considerations above suggest that the recognition of a 'right to natural resources' in favour of Indigenous peoples has implications that go beyond the mere application of common principles regulating property regimes, and this has a bearing on the comprehension of the provisions set out in Article 32 of the Declaration and, consequently, of the power of States to dispose of those resources.

Article 26(3) of the Declaration affirms that the recognition of Indigenous peoples' right to their traditional lands, territories, and resources 'shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned'.[46] This entails the recognition of rights over natural resources in favour of indigenous peoples whenever their traditional land tenure systems and customs include such rights. Indigenous peoples are accordingly entitled 'to own, use, develop and control'[47] these resources.[48]

However, as was already pointed out by governments within the WGIP, there may exist a conflict between the provisions concerning the use of resources incorporated into Indigenous customs and those included in national laws. As described in the previous

Indigenous peoples have the right 'to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities'.

[44] HRComm, General Comment 23: Article 27: Rights of Minorities, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) para 7.

[45] CESCR, General Comment 21: The Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1(a) of the ICESCR), UN Doc E/C.12/GC/21 (20 November 2009) paras 13, 36, 50.

[46] The Preamble to the Declaration stresses the urgent need to respect and promote the *inherent* rights of Indigenous peoples, 'especially their rights to their lands, territories and resources' as they derive from 'their political, economic and social structures and from their cultures'. On this point the case law of the IACtHR and of the Inter-American Commission on Human Rights (IACHR) is again interesting. In the case of the *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, the Court affirmed that '[i]ndigenous peoples' customary law must be especially taken into account for the purpose of this analysis' (IACtHR Series C No 79 (31 August 2001) para 151). As for the Commission, it declared that 'the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition.' See *Maya Indigenous Community of the Toledo District v Belize*, Case 12.053, Report No 40/04, Doc OEA/Ser.L/V/II.122, doc 5 rev, para 117.

[47] See Art 26 of the UN Declaration.

[48] This line of reasoning seems to be reflected in the decision of the Constitutional Court of South Africa in the *Richtersveld Community* case. In this case, the Court found that the Richtersveld community had a right of communal ownership *under indigenous law* over the land in dispute. It then specified that '[t]he content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and *to exploit its natural resources, above and beneath the surface*.' Accordingly, the Court concluded that the Ritchtersveld community 'held ownership of the subject land *under indigenous law*, which *included the rights to minerals* and precious stones', and it thus ordered that the right to ownership of the land in dispute, including its minerals and precious stones, should be reinstituted to the Richtersveld Community. See *Alexkor Ltd and the Republic of South Africa v The Richtersveld Community*, Constitutional Court of South Africa, CCT 19/03 (14 October 2003) paras 62, 102, 103(1)(a) (emphasis added). Similarly, in *Delgamuukw v British Columbia*, the Supreme Court of Canada considered that aboriginal title encompasses natural resources, including mineral resources. *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 122.

section, this concern was raised by States since the very beginning of the negotiations on the Draft Declaration.

The decision of the Supreme Court of Belize in the conjoined cases of *Maya Village of Conejo* and *Maya Village of Santa Cruz v Belize* is interesting in this context.[49] In these cases, the Court, on the one hand, declared that Maya Indigenous peoples 'hold, respectively, collective and individual rights in the lands and *resources* that they have used and occupied *according to Maya customary practices*'.[50] On the other, it acknowledged that the government could issue concessions for resource exploitation, including mining, provided that various conditions were met.[51]

In her study on Indigenous Peoples' Permanent Sovereignty over Natural Resources, former UN Special Rapporteur Erica-Irene Daes affirmed that:

> the developments during the past two decades in international law and human rights norms in particular demonstrate that there now exists a developed legal principle that indigenous peoples have a collective right to the lands and territories they traditionally use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories.[52]

As to the kinds of resources to which this right would extend, she spelled out that:

> These resources can include air, coastal seas, and sea ice as well as timber, minerals, oil and gas, genetic resources, and all other material resources pertaining to indigenous lands and territories.[53]

Nevertheless, she promptly admitted that the issue concerning sub-surface resources was an extremely contentious one. Indeed, Indigenous customs and national laws may diverge considerably when it comes to subsoil resources. In many cases, national legislation reserves the ownership of certain natural resources, particularly minerals and other subsoil resources, to the State and, in practice, this poses a limit to Indigenous peoples' right to 'own, use, develop and control' the resources located in their lands. During the second phase of the negotiations of the Declaration in the WGDD, the issue was again raised.

Australia, for example, made it clear that 'ownership of minerals, petroleum and certain other resources was vested in the Crown and the exploitation and use of such resources was governed by legislation', while acknowledging, at the same time, that native title could include a range of rights also relating to the enjoyment of natural resources.[54] New Zealand stressed that Indigenous peoples' right to maintain their special relationship with their traditional lands and resources 'must be balanced by the need for the Government to own and regulate resources in the interests of all citizens'.[55] Similarly, the representative of Canada stated that it was 'critical to find a language which reconciles the interests of indigenous peoples in land and resources, and the rights of States'.[56] The governmental delegate of Venezuela underlined that 'natural resources are under the control of the State'.[57]

[49] *Aurelio Cal and the Maya Village of Santa Cruz v Attorney General of Belize; and Manuel Coy and Maya Village of Conejo v Attorney General of Belize*, (Consolidated) Claim Nos 171 and 172, 2007, Supreme Court of Belize (18 October 2007).

[50] ibid para 136(a) (emphasis added). [51] ibid para 136(d)(iv).

[52] Commission on Human Rights, Indigenous Peoples' Permanent Sovereignty over Natural Resources, Final Report of the Special Rapporteur (Erica-Irene Daes), UN Doc E/CN.4/Sub.2/2004/30 (13 July 2004) para 39.

[53] ibid para 42. [54] UN Doc E/CN.4/2000/84 (6 December 1999) para 92.

[55] ibid para 93. [56] UN Doc E/CN.4/2001/85 (6 February 2001) para 108.

[57] ibid para 110.

On the other hand, Indigenous representatives made various attempts at introducing into the text of the Declaration an express reference to subsoil resources.[58] None of these attempts succeeded, however, as many governmental delegations were strongly opposed to keeping this language in the text.[59] Nor did attempts at retaining in the final text the adjective 'material' before the reference to the relationship with lands, territories, and resources prove victorious.[60]

Major changes, on the contrary, were brought in the text of Article 32(2) of the Declaration, as approved in 2007, to accommodate governments' concerns over the ultimate control of lands and strategic resources. Some governmental delegations proposed to replace the requirement for States to 'obtain' Indigenous peoples' free, prior, and informed consent prior to any project affecting their lands or territories and other resources that figured in the 1994 draft, with the requirement to 'seek' such consent,[61] explaining that the latter formulation was understood as affirming the 'principle of obtaining consent as far as possible'.[62]

At what would then become the last session of the WGDD, the Chairperson acknowledged that the Article still presented outstanding issues[63] and proposed an alternative formulation which laid down that:

> States shall *consult and cooperate in good faith* with the indigenous peoples concerned through their own representative institutions *in order to obtain their free and informed consent* prior to the approval of any projects affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources.[64]

The further negotiations in the General Assembly left the provision essentially unchanged.[65] Article 32 of the Declaration thus acknowledges the possibility that the State will undertake extractive activities in Indigenous lands and territories, but, at the same time, establishes various conditions that must be fulfilled, ie Indigenous peoples must be consulted through their representative institutions in order to obtain their free and informed consent prior to these initiatives being approved. States' obligations in this regard will apply whether or not the peoples concerned hold a land title deed,

[58] At a certain point during the negotiations a new Art 25 circulated, stipulating that: 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and *material* relationship with the lands[,] [or] territories, waters and coastal seas and other resources [including the total environment of the lands, air, waters, coastal seas, sea ice, flora and fauna and other *surface and subsurface resources*]' (UN Doc E/CN.4/2004/81 (17 January 2004) (emphasis added)). See also UN Doc E/CN.4/2004/WG.15/CRP.4 (12 October 2004) para 32. Likewise, a new paragraph was suggested within Art 30 of the 1994 draft—current Art 32—which read: 'Indigenous peoples have rights to the possession, ownership and control of *surface and subsurface* resources within their traditional lands and territories' (ibid para 37).

[59] See UN Doc E/CN.4/2005/89 (28 February 2005) para 33.

[60] cf the text of Art 25 in UN Doc E/CN.4/2005/89/Add.2 with the text finally approved. Note that the adjective 'material' was included in the 1994 draft.

[61] UN Doc E/CN.4/2004/WG.15/CRP.1 (6 September 2004).

[62] UN Doc E/CN.4/2004/WG.15/CRP.2 (6 September 2004). At the same time, the suggestion was also made to remove the reference to the 'agreement with the indigenous peoples concerned' which appeared in the last part of the Article. Furthermore, it was proposed that the provision should refer to 'their' mineral, water, or other resources 'to clarify that the right applies only to resources owned by indigenous peoples' (ibid). For more on the issue of free, prior, and informed consent, see Chapter 9.

[63] UN Doc E/CN.4/2005/WG.15/CRP.1 (22 March 2006) para 24.

[64] UN Doc E/CN.4/2006/79 (22 March 2006) (emphasis added).

[65] The only change was the deletion of the adjective 'their' before resources.

because, as we have seen, their rights to land and resources arise out of their own customary law.[66]

These obligations seem to be perfectly in line with the modern development of international law, which, in the context of natural resources, underlines that the principle of States' sovereignty over them[67] has to be reconciled with various specific duties that States hold towards their citizens.[68]

In this connection, the HRComm has pointed out that if, on the one hand, '[a] State may understandably wish to encourage development or allow economic activity by enterprises', on the other hand, the scope of its freedom is to be assessed in light of the obligations it has undertaken with regard to human rights, including the right to enjoy one's culture under Article 27 of the International Covenant on Civil and Political Rights (ICCPR).[69] A similar concern is echoed in the practice of the UN Committee on the Elimination of Racial Discrimination (CERD)[70] and CESCR.[71]

Likewise, the IACHR in the case of the *Maya Indigenous Communities of the Toledo District v Belize*[72] recognized that 'development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities.'[73] In addition, the African Commission on Human and Peoples' Rights (ACommHPR) in the *Ogoni* case,[74] referring to certain activities carried out by multinational corporations in the territory of Nigeria, underscored that

[66] The same reading is given to Art 15 of ILO Convention 169. Furthermore, it is worth noting that with regard to this provision, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has pointed out that it covers not just the case of a project being implemented in the traditional lands of Indigenous peoples, but also the case of a project having an impact on the 'life' of the community. It has thus affirmed that 'a project for exploration or exploitation in the immediate vicinity of lands occupied or otherwise used by indigenous peoples, or which directly affects the interests of such peoples, would fall within the scope of the Convention.' See CEACR, Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No 169) Guatemala (ratification: 1996, published: 2007) para 5.

[67] See Declaration on Permanent Sovereignty over Natural Resources, GA Res 1803 (XVII), 14 December 1962.

[68] See generally N Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997). See also S Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart 2011).

[69] UN Committee on Human Rights, *Ilmari Lansman v Finland*, UN Doc CCPR/C/52/D/511/1992 (26 October 1994) para 9(4).

[70] In its concluding observations on Nigeria in 2005, for instance, the CERD, concerned about the adverse effects on local communities flowing from large-scale exploitation of natural resources in the Delta Region, spelled out that 'along with the right [of the State] to exploit natural resources there are specific, concomitant obligations towards the local populations, including effective and meaningful consultations' (see CERD, Concluding Observations on Nigeria, UN Doc CERD/C/NGA/CO/18 (1 November 2005) para 19). On another occasion, noting the complaints made by Indigenous and tribal peoples of Suriname about the deleterious effects of natural-resource exploitation on their environment, health, and culture, the Committee clarified that 'development objectives are no justification for encroachments on human rights' (see CERD, Concluding Observations on Suriname, UN Doc CERD/C/64/CO/9 (12 March 2004) para 15). On the contrary, respect for human rights should guide development processes. Accordingly, the Committee has thus recommended that the State 'investigate and monitor the impact of the work of mining companies, including foreign ones' on the enjoyment of fundamental human rights (see CERD, Concluding Observations on Panama, UN Doc CERD/C/304/Add.32 (23 April 1997) para 23).

[71] See, eg, CESCR, Concluding Observations on Ecuador, UN Doc E/C.12/1/Add.100 (7 April 2004) para 35; and Concluding Observations on Cameroon, UN Doc E/C.12/CMR/co/3 (23 January 2012) para 33.

[72] *Belize* (n 46). [73] ibid para 150.

[74] *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*, Comm No 155/96 (2001).

such activities may contribute in a positive way to the State's development solely on condition that the latter is 'mindful of the common good and the sacred rights of individuals and communities'.[75] The Commission held that Article 21 of the African Charter on Human and Peoples' Rights, enshrining the right to dispose of national wealth and natural resources, had been violated precisely because:

> the State party should not act arbitrarily in exercising the right to freely dispose of its wealth and natural resources. The non-participation of the Ogoni people and the absence of any benefit accruable to them in the exploitation of the oil resources by the Nigerian government and the oil companies were undoubtedly contrary to Article 21 of the Charter.[76]

Article 32 of the Declaration is thus of vital importance for Indigenous peoples' cultural and physical survival. In the next section, we will examine in detail the implications of the final formulation as regards States' powers to dispose of natural resources in the context of projects affecting Indigenous peoples.

4. Implementation of Projects Affecting Indigenous Territories

In fact, the negotiators of the Declaration were confronted with a dilemma analogous to the one that the drafters of ILO Convention 169 faced during the negotiations of the provisions on land, environment, and natural resources, concerning the best way to reconcile the interests of national economic development and the rights of Indigenous peoples to their lands, territories, and resources. The ILO Meeting of Experts on the revision of ILO Convention 107, which was held in 1986, considered that 'procedures should be established to negotiate the conditions under which the exploitation of these resources [subsoil and other natural resources] might take place'.[77] In this regard, the Meeting of Experts

> took note of the complexities involved in recognising rights of indigenous and tribal peoples over natural resources exploitation, especially in legal systems where the rights to the subsoil and natural resources are retained by the State. However, it also took note of the damage caused to indigenous lands and lifestyles when States that do retain these rights accord to entities outside these communities the right of exploration and exploitation of subsoil resources within traditional indigenous territories.[78]

The suggestion was therefore made that the Convention should provide for ownership rights to extend to natural resources pertaining to the lands traditionally occupied by Indigenous peoples, including subsoil resources, and that, where under national legal systems land ownership does not encompass the ownership of subsoil resources, 'special measures should be taken to protect the peoples concerned in relation to the exploitation of such resources.'[79] During the discussion eventually leading to the adoption of ILO Convention 169, in spite of the diverging views as to the degree of Indigenous peoples' control over natural resources,

[75] ibid para 69. Equally interesting is the Vienna Declaration (1993) which, once more, highlighted that 'the lack of development may not be invoked to justify the abridgement of internationally recognized human rights' (see UN Doc A/CONF.157/23 (25 June 1993) para 10).

[76] See C Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: *Social and Economic Right Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*' (2005) 1 African J Legal Studies 129.

[77] ILO, Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107), Report VI(1), 75th Session 1988, 46.

[78] ibid 58. [79] ibid 72.

there seemed to be an understanding that 'peoples concerned should be enabled to control wildlife and other resources which pertain to their traditional lands, and which are *fundamental to the continuation of their traditional lifestyles*; and secondly that the consent of the peoples concerned should always be sought before mineral development takes place in their lands, and fair compensation paid for such activities.'[80]

As known, ILO Convention 169 explicitly contemplates the case in which the State retains ownership of mineral or sub-surface resources at Article 15(2), which sets out that:

> governments shall establish or maintain procedures through which they shall *consult* these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible *participate in the benefits of such activities*, and shall *receive fair compensation for any damages* which they may sustain as a result of such activities.[81]

In relation to this provision, the Tripartite Committee of the ILO Governing Body[82] has stated that when 'differing interests and points of view are at stake such as the economic and development interests represented by the hydrocarbon deposits and the cultural, social and economic interests of the indigenous peoples situated in the zones where those deposits are situated', then the principles of consultation and participation which inform this provision of the Convention require that 'the parties involved seek to establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect and full participation'.[83] In this regard, Article 15 of the Convention should be read together with Article 6 establishing the minimum requirements to be met when consulting Indigenous peoples.[84]

Comparing the provisions in the Convention with those in the Declaration, the former UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, S James Anaya, has observed that:

[80] ibid Report VI(2), 53 (emphasis added).

[81] Emphasis added. A similar provision is incorporated in the draft American Declaration on the Rights of Indigenous Peoples. Article XVIII(5), referring to State ownership of natural resources, affirms that:

> In the event that ownership of the minerals or resources of the subsoil pertains to the state or that the state has rights over other resources on the lands, the governments must establish or maintain procedures for the *participation* of the peoples concerned in determining whether the interests of these people would be adversely affected and to what extent, before undertaking or authorizing any program for planning, prospecting or exploiting existing resources on their lands. The peoples concerned shall *participate in the benefits of such activities*, and shall receive *compensation*, on a basis not less favourable than the standard of international law *for any loss* which they may sustain as a result of such activities. (emphasis added)

This provision should be read together with Art XXI on the right to development. Organization of American States (OAS), Proposed American Declaration on the Rights of Indigenous Peoples, adopted by the Inter-American Commission on Human Rights on 26 February 1997, OEA/Ser.L/V/II.95, doc 7, rev.

[82] Under Art 24 of the ILO Constitution (1919), workers' and employers' organizations are entitled to submit 'representations' alleging violations of Articles of an ILO Convention on the part of a State that has ratified it. The representation is examined by a Tripartite Committee, ie a committee composed of one governmental representative, one employers' representative, and one workers' representative, appointed by the ILO Governing Body.

[83] See ILO Governing Body, 282nd Session, November 2001, representation under Art 24 of the ILO Constitution, GB.282/14/2, para 36.

[84] First, such consultations shall take place 'through appropriate procedures and in particular through their representative institutions'. Second, they shall be carried out 'in good faith and in a form appropriate to the circumstances'. Finally, it is specified that these consultations shall be undertaken 'with the objective of achieving agreement or consent to the proposed measures'.

'The somewhat different language of the Declaration suggests a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.'[85]

What the Declaration thus requires is that an authentic dialogue between the parties concerned does take place, in a climate of mutual trust,[86] in order to find an agreed solution prior to the implementation of any project affecting Indigenous territories. Should agreement or consent not be reached, then the State retains the power to make the final decision on the proposal at hand. The shift from a requirement for States to obtain the free and informed consent of Indigenous peoples, which appeared in the 1994 draft, to the provision for States to 'consult and cooperate in good faith ... in order to obtain their free and informed consent' in the final text of Article 32(2), confirms that the Article does not confer on Indigenous peoples the right to veto the undertaking of extractive activities on their lands.[87] However, the significance of the objective of obtaining the free and informed consent of Indigenous peoples should not be overlooked. Nor should the broader framework of rights and related States' obligations stipulated in the Declaration be left aside. The question of free, prior, and informed consent is treated in depth in Chapter 9 of this volume. Therefore, here, we will only develop some key considerations which are essential to illustrate the overall regime concerning the implementation of activities affecting Indigenous territories.

[85] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc A/HRC/12/34 (15 July 2009) para 46. Please also note that the CEACR has emphasized that 'the form and content of consultation procedures and mechanisms need to allow the full expression of the viewpoints of the peoples concerned, in a timely manner and based on their full understanding of the issues involved, so that they may be able to affect the outcome and a consensus could be achieved, and be undertaken in a manner that is acceptable to all parties.' CEACR, General Observation concerning Convention No 169 (published: 2009). The Tripartite Committee of the ILO Governing Body has further clarified that, in order for consultations to be effective, 'sufficient time must be given to allow the country's indigenous peoples to engage *their own decision-making processes* and participate effectively in decisions taken in a manner consistent with their cultural and social traditions' (ILO Governing Body, 282nd Session, November 2001, representation under Art 24 of the ILO Constitution, Colombia, GB.282/14/3, para 79 (emphasis added)). In summarizing the core elements of the consultation process, the Special Rapporteur has underscored that consultations with Indigenous peoples must: 'be distinct from consultations that may involve the general public or ordinary political processes; take place at the earliest possible stage; be a genuine dialogue and more than just the provision of information; be in good faith with the objective of obtaining agreement or consent; be carried out with due regard for indigenous peoples' traditional decision-making institutions in the appropriate languages; provide the time necessary for the indigenous peoples to make decisions, taking into account their customary ways of decision-making; and provide information sufficient to allow indigenous peoples to make decisions that are informed'. See Report of the Special Rapporteur on the Rights of Indigenous Peoples, Addendum, Measures Needed to Secure Indigenous and Tribal Peoples' Land and Related Rights in Suriname, UN Doc A/HRC/18/35/Add.7 (18 August 2011) para 20.

[86] Report of the Special Rapporteur on the Rights of Indigenous Peoples, Addendum, The Situation of the Indigenous Peoples Affected by the El Diquis Hydroelectric Project in Costa Rica, UN Doc A/HRC/18/35/Add.8 (11 July 2011). See also CEACR, Individual Observation concerning Convention 169, Colombia (published: 2009).

[87] The UN Special Rapporteur also underscored that: 'This provision of the Declaration should not be regarded as according indigenous peoples a general "veto power" over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples' (UN Doc A/HRC/12/34 (15 July 2009) para 46). It should be recalled that a similar possibility was denied during the negotiations leading to ILO Convention 169. During the negotiations of the Declaration, the exact meaning to be attached to the expression 'free, prior, and informed consent' was widely debated, especially in relation to the so-called right of veto. For more, see Chapter 9.

First, the obligation to consult Indigenous peoples in relation to projects affecting their territories should not be disconnected from the underlying substantive rights of these peoples. The UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has warned that Indigenous peoples' right to consultation should not be considered as a 'trade-off for or exchangeable with indigenous peoples' substantive rights to their lands, territories and resources'.[88] In his observations on the situation of Guatemala regarding extractive projects in Indigenous territories, the Special Rapporteur has stressed that, in the light of its obligation to respect a series of substantive rights of Indigenous peoples, the State has a 'duty to accommodate' these rights and the demands expressed by Indigenous peoples during the consultation phase. Whenever it is not possible to reach an agreement with the concerned peoples, the State must therefore provide reasonable and objective arguments justifying why an agreement was not possible and indicate the steps taken in order to accommodate Indigenous peoples' requests and concerns.[89] Second, as the Special Rapporteur pointed out, the force of the objective of achieving consent will depend on the specific circumstances of the case. Thus, '[a] significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent.'[90] In this regard, it should be noted that Article 32(2) of the Declaration gives emphasis to the 'development, utilization or exploitation of mineral, water or other resources'.

In fact, it can be argued that in the case of a project which will have a severe impact on Indigenous communities, States' obligations to safeguard cultural diversity,[91] to protect Indigenous peoples' cultural and physical integrity, and to respect their self-determination will come into play as a constraint to the realization of the project.[92] In line with this rationale, the Declaration identifies two specific situations where consent is required, ie relocation and storage or disposal of hazardous materials.[93] In the same vein, as will be examined in more detail in Chapter 9,[94] the IACtHR has maintained that free, prior, and informed consent is required in the case of large-scale development or investment projects that would have a major impact within Indigenous peoples' territories.[95] The Court's line of reasoning has then been echoed in the decision of the

[88] EMRIP, Follow-Up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries, UN Doc A/HRC/EMRIP/2012/2 (30 April 2012) para 36.

[89] UN Doc A/HRC/18/35.Add.3 (7 June 2011) paras 45ff. See also the CESCR's Concluding Observations on the Russian Federation, in which the Committee recommended that the State 'give primary consideration to their [indigenous peoples] special needs prior to granting licences to private companies for economic activities on territories traditionally occupied or used by those communities' (UN Doc E/C.12/RUS/CO/5 (22 May 2011) para 7). See further the Concluding Observations on: Argentina, UN Doc E/C.12/ARG/CO/3 (14 December 2011) para 9; Cameroon, UN Doc E/C.12/CMR/CO/3 (23 January 2012) para 66.

[90] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc A/HRC/12/34 (15 July 2009) para 47.

[91] On this aspect, see in particular the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the 2001 Universal Declaration on Cultural Diversity.

[92] It is worth recalling that the Preamble to the Declaration recognizes that 'the diversity and richness of civilization and cultures' constitute 'the common heritage of mankind'. Accordingly, Art 8 of the Declaration proclaims that States shall prevent 'any action which has the aim or the *effect* of depriving [indigenous peoples] of their integrity as distinct peoples, or of their cultural values' (emphasis added). Additionally, Art 20 affirms Indigenous peoples' right 'to be secure in the enjoyment of their own means of subsistence and development and to engage freely in all their traditional and other economic activities'. See also Errico (n 68) 362 ff.

[93] See, respectively, Arts 10 and 29(2).

[94] For an overview of the approach adopted by the UN Treaty Bodies, please also refer to Chapter 9.

[95] *Saramaka People* (n 41) para 134.

ACommHPR on the case of *Endorois Welfare Council v Kenya*.[96] Some national courts have also upheld this interpretation.[97]

More broadly, however, it should be noted that the issue of the control and use of natural resources within Indigenous territories has also to be addressed in the light of Article 32(1), recognizing, as described below, Indigenous peoples' right to decide their priorities and strategies for development. As the Constitutional Court of Colombia stressed in one of its recent judgments, the question in these cases should not be reduced to one about 'who vetoes whom'.[98] As we shall see, it rather requires participation of Indigenous peoples and engagement at wider levels.

It should be noted here that the former UN Special Rapporteur, Erica-Irene Daes, in her study of Indigenous peoples' permanent sovereignty over natural resources, found that States' power to confiscate resources for public purposes must be exercised 'in a manner that fully respects and protects all the human rights of indigenous peoples'. According to Daes, this entails that the States cannot exercise this power when 'to do so could destroy the future existence of the indigenous culture and society and possibly deprive them of its means of subsistence'.[99] In the case of the *Saramaka People v Suriname*, the IACtHR also maintained that the State could restrict Indigenous peoples' right to use their lands and resources for the purpose of issuing concessions for the exploration and extraction of natural resources only if it did not 'deny their survival as a tribal people', including their cultural identity, social structure, and economic system.[100] The Commission has upheld an identical position.[101]

[96] ACommHPR, Communication No 276/2003, Centre for Minority Rights Development (Kenya) and MRG on Behalf of the *Endorois Welfare Council v Kenya*, adopted in May 2009 and endorsed by the African Union at its January 2010 meeting, para 291.

[97] See, eg, the decisions of the Constitutional Court of Colombia C-366/11 of 11 May 2011, T-769/09 of 29 October 2009, and T-129/11 of 3 March 2011, and the decisions of the Constitutional Court of Bolivia 2003/2010-R of 25 October 2010 and 0300/2012 of 18 June 2012. It should be noted that this approach has recently been mirrored in the EMRIP's Advisory Opinion No 2, according to which under the Declaration the consent of Indigenous peoples is required 'in matters of fundamental importance for their rights, survival, dignity and well-being'. See EMRIP, Advisory Opinion No 2 (2011): Indigenous Peoples and the Right to Participate in Decision Making, UN Doc A/HRC/18/42 (17 August 2011) para 22. See further, Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc A/HRC/21/47 (6 July 2012) para 65, according to which: 'It is generally understood that indigenous peoples' rights over lands and resources in accordance with customary tenure are necessary to their survival. Accordingly, indigenous consent is presumptively a requirement for those aspects of any extractive operation that takes place within officially recognized or customary land use areas of indigenous peoples, or that has a direct bearing on areas of cultural significance, in particular sacred places, or on natural resources that are traditionally used by indigenous peoples in ways that are important to their survival.' See also UN Doc A/HRC/18/35/Add.3 (7 June 2011) para 41.

[98] Decision T-129/11 (n 97), 68.

[99] Indigenous Peoples' Permanent Sovereignty over Natural Resources (n 52) para 61.

[100] *Saramaka People* (n 41) para 128. As further clarified in the interpretative judgment of 12 August 2008, 'survival as a tribal people' refers to the ability of the people to preserve, protect, and guarantee their special relationship with the territory, thereby guaranteeing their distinct cultural identity, social structure, economic system, customs, beliefs, and traditions (para 37). In order to ensure that the exploration or extraction of natural resources in ancestral territories does not imply a negation of the survival of Indigenous people themselves, the Court considers that the State is required to: (1) conduct an appropriate and participatory process that guarantees the right to consultation, particularly with regard to development plans or large-scale investment; (2) conduct an environmental impact assessment; and (3) where applicable, reasonably share the benefits arising from the exploitation of natural resources, with the community itself determining and deciding who the beneficiaries of such compensation should be, according to its customs and traditions (para 129). It is worth noting that in its judgment, the Court refers to Art 32 of the Declaration. See also *Kichwa Indigenous People of Sarayaku* (n 41) para 157.

[101] See, eg, Third Report on the Human Rights Situation in Colombia, ch X, 'The Rights of Indigenous Peoples', OEA/Ser.L/V/II.102 Doc 9 rev 1 (26 February 1999) para 58.4, where the Commission has

In this regard, it is worth recalling that referring to the right to cultural integrity protected by Article 27 of the ICCPR, the HRComm has deemed that the legality of mining and logging activities with regard to Article 27 of the Covenant should be evaluated in light of two different criteria: the 'sustainability' of the culture of Indigenous communities that will be affected by these initiatives;[102] and the 'participation' of the Indigenous communities concerned in the decision-making process with regard to projects to be carried out on their lands.[103] Thus, in the Committee's view, 'the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.'[104] This line of reasoning has been reaffirmed in case of *Poma Poma v Peru*, in which the Committee furthermore highlighted that 'economic development may not undermine the rights protected by article 27.'[105]

At the European level, the advisory committee charged with monitoring the implementation of the European Framework Convention for the Protection of National Minorities (Council of Europe Advisory Committee) has also stressed the existence of a 'clear obligation' to pursue economic activities affecting Indigenous communities' lands and territories in a manner that protects their right to cultural identity and to ensure their participation in decision-making concerning land use.[106]

In the same vein, a number of examples from the national level could be referred to, including both legislation and judicial decisions, which recognize the potentially constraining effect on decisions concerning the exploitation of natural resources which flows from the State's duty to respect and guarantee Indigenous peoples' integrity and

maintained that '[t]he State should also ensure that such exploitation does not cause irreparable harm to the religious, economic or cultural identity and rights of the indigenous communities.'

[102] The Committee has, in fact, considered that '[m]easures whose impact amounts to a denial of the right are incompatible with the obligations under Article 27.' However, 'measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under Article 27.' See *J Lansman v Finland*, CCPR/C/58/D/671/1995 (22 November 1996) para 10.3.

[103] See, eg, *Ilmari Lansman v Finland*, UN Doc CCPR/C/52/D/511/1992 (26 October 1994) paras 9.4ff. See also paras 10.3ff. See generally P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002) 167ff.

[104] See *Apirana Mahuika v New Zealand*, UN Doc CCPR/C/70/D/547/1993 (15 November 2000) para 9.5. See also HRC, Concluding Observations on Chile, UN Doc CCPR/C/79/Add.104 (30 March 1999) para 22; Concluding Observations on Canada, UN Doc CCPR/C/CAN/CO/5 (20 April 2006) para 9; and Concluding Observations on Kenya, UN Doc CCPR/C/KEN/CO/3 (31 August 2012) para 24.

[105] According to the Committee, '[t]he leeway that the State has in this area should be commensurate with the obligations it must assume under article 27.' It furthermore highlighted that effective participation in the decision-making process requires the free, prior, and informed consent of the peoples concerned (UN Doc CCPR/95/D/1457/2006 (24 April 2009) paras 7.4, 7.6).

[106] Council of Europe Advisory Committee, Second Opinion on Finland, ACFC/OP/II(2006)003 (20 April 2006) para 55. To this end, it is of paramount importance that the communities concerned are consulted and can provide their viewpoint on the impact that may potentially flow from the implementation of the project on their culture and life. Consequently, referring to the case of Saami Indigenous peoples, the Committee declared that 'it is essential that Saami are given an effective possibility to participate in the decision-making concerning other types of land-use in the region concerned, including in the territories administered by the State, in order to ensure that initiatives concerning forestry, tourism and other spheres are carried out in a manner that does not threaten the maintenance or development of reindeer herding or other aspects of Saami culture.' See Council of Europe Advisory Committee, First Opinion on Sweden, ACFC/INF/OP/I(2003)006 (25 August 2003) para 32.

points to the fundamental link with the provision recognizing the right of Indigenous peoples to set their developmental priorities.[107]

In recognizing the Crown's duty to consult Indigenous peoples based on the 'need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty',[108] the Supreme Court of Canada has held, for example, that Indigenous peoples should be 'involved' in decisions taken with regard to their lands, underlying that in most cases this will require something 'significantly deeper than mere consultation',[109] and acknowledging that '[i]mplicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.'[110]

Likewise, in the *Nibutani Dam* case,[111] the Sapporo District Court of Japan, confronted with the government's project to build a dam in the southwestern part of Hokkaido, held that the government's decision to expropriate Ainu land was illegal because '[w]hen considering projects with such negative effects on Ainu cultural rights, the Government ought to give the utmost consideration to these rights'.[112]

Confronted with a number of cases concerning the exploration and exploitation of natural resources pertaining to Indigenous territories, the Constitutional Court of Colombia has also highlighted the need to find a balance between the economic development of the country and the preservation of Indigenous peoples' social, cultural, and economic integrity, stressing the importance, to this end, of ensuring Indigenous peoples' effective participation in decisions about the disposal of those natural resources.[113] In this connection, the Court has emphasized the link between Indigenous peoples' right to participation and their right to decide their own priorities for development,[114] as will be described in the following section, or, as sometimes also put by the Court, their 'right to autonomy with their own life plans'.[115] The Court has also affirmed that once all options are explored without the possibility of identifying an alternative which would not be prejudicial to the affected communities and it is found that the intervention would entail their 'annihilation', then the criterion of the protection of these communities has to prevail.[116]

Similarly, in Peru, which recently adopted the Act on the Right of Indigenous Peoples to Prior Consultation[117] and its implementing regulations[118] covering, in particular, the

[107] See, eg, Art 120 of the Constitution of the Bolivarian Republic of Venezuela, according to which 'the exploitation of natural resources located in indigenous habitats by the State shall be carried out without damaging the cultural, social and economic integrity of indigenous peoples, and it is subject to the prior information and consultation of the respective indigenous communities' (author's translation). A similar provision is found in Art 330 of the Constitution of Colombia. See also Panama's Act No 11 of 24 May 2012 establishing a special regime for the protection of mineral, hydric, and environmental resources in the *comarca* Ngäbe-Buglé.

[108] *Haida Nation v British Columbia (Ministry of Forests)*, 2004 SCC 73, para 26.

[109] *Delgamuukw v British Columbia* (n 48) para 168.

[110] ibid para 126.

[111] *Nibutani Dam* case (18 March 1997). The text of this decision is reproduced in T Tsunemoto, 'Rights and Identities of Ethnic Minorities in Japan: Indigenous Ainu and Resident Korean' (2001) 2 Asia-Pacific J Human Rights & L 127–29.

[112] ibid.

[113] See, eg, decision T-769/09 of 29 October 2009, 19ff, 31ff.

[114] ibid 21.

[115] Decision T-129/11 (n 97), 58 (author's translation).

[116] ibid paras 5.1ff. See also Constitutional Court of Bolivia, 00157-2012-01-AIA, 18 June 2012, in particular 35ff; and Constitutional Court of Peru, 06316-2008-AA, paras 14ff.

[117] Ley del Derecho a la Consulta Previa a Los Pueblos Indígenas u Originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo, Act No 29785, 31 August 2011.

[118] Reglamento de la Ley No 29785, Ley del Derecho a la Consulta Previa a Los Pueblos Indígenas u Originarios, reconocido en el Convenio 169 de la Organización Internacional del Trabajo, Supreme Decree No 001-2012-MC, 2 April 2012.

adoption of administrative measures approving development plans, programmes, and projects, the Constitutional Court has examined various cases concerning contracts for the exploitation of natural resources affecting Indigenous peoples. The Court has recognized Indigenous peoples' right to self-determination and has considered consultation as the participation mechanism which would enable Indigenous peoples to decide their own priorities for development and the preservation of their culture.[119]

In the case concerning the constitutionality of a series of Acts affecting the Indigenous Territory and National Park Isiboro Sécure, the Constitutional Court of Bolivia has reaffirmed the obligations of the State with regard to the use of natural resources in Indigenous territories, recalling Article 32 of the Declaration, which, in the Court's view, has specified and broadened existing provisions, including Article 15 of ILO Convention 169.

Furthermore, it is worth mentioning a recent decision concerning a bauxite mine in Orissa by the Supreme Court of India, in which the Court has ruled that the traditional assemblies of the affected communities will have to decide whether 'the mine plans, in any way, affected their religious and cultural rights'.[120] It also restated the government's obligation to ensure that the communities give their consent before using Indigenous peoples' land for mining or other purposes, as provided in the Forest Rights Act of 2006.[121]

In addition to the numerous decisions by national courts, reference should be made to some legislative initiatives from different parts of the globe which recognize Indigenous peoples' rights with regard to the use of natural resources pertaining to their territories and delineate the contours of States' decision-making power in this regard.

The Procedures for Consultations between State Authorities and the Saami Parliament of Norway are particularly interesting in this regard, given that, besides laying down the procedure for consultation between the two parties before the adoption of measures that may directly affect Saami interests, the Procedures also aim to 'facilitate the development of a *partnership* perspective'[122] between the government and the Saami Parliament with a view to strengthening Saami culture and society and to 'develop a common understanding of the situation and development needs of the Sami society',[123] thus inserting consultation with Indigenous peoples in the broader framework of institutionalized participation and engagement mentioned above.

Another example is the Philippines' Indigenous Peoples Rights Act (IPRA).[124] The Act calls on the government to respect and protect Indigenous peoples' cultural integrity, particularly when it comes to the formulation and application of national plans and policies, and sets out specific provisions governing the use of natural resources by non-Indigenous parties, recognizing, among others, Indigenous peoples' right to manage and conserve natural resources within their territories, to negotiate the terms and conditions for the exploration of these resources, and to participate in the formulation and implementation of any project affecting their lands. As we shall see below, the IPRA also

[119] See, eg, Constitutional Court of Peru, decision 06316-2008-AA of 11 November 2009, para 20.

[120] 'India: Landmark Supreme Court Ruling a Great Victory for Indigenous Rights', available at <http://www.amnesty.org/en/news> accessed 24 November 2017.

[121] ibid.

[122] Procedures for Consultations between State Authorities and the Sami Parliament (11 May 2005) para 1 (emphasis added).

[123] ibid. [124] Act No 8371 of 1997.

recognizes Indigenous peoples' right to freely pursue their economic, social, and cultural development.

Finally, the Congolese Act on the promotion and protection of the rights of Indigenous populations, promulgated in the aftermath of the adoption of the Declaration and echoing its provisions, deserves a mention.[125] The Act calls on the State to consult Indigenous peoples before consideration is given to legislative or administrative measures, or to development programmes or projects which may affect them, directly or indirectly, with the objective of obtaining their free, prior, and informed consent.[126] It further recognizes the right of Indigenous peoples to define the priorities and strategies for the use and control of their lands and resources,[127] as well as to conserve and develop their socio-economic systems and to enjoy their means of subsistence.[128]

Before concluding this section, it is also worth noting that the Inter-American Development Bank's policy on Indigenous peoples states that in the case of projects relating to natural resource extraction, 'prior consultation mechanisms to safeguard the physical, cultural, and economic integrity of the affected people' should be set up. Similarly, the Asian Development Bank's Safeguard Policy Statement on Indigenous Peoples requires the ascertainment of affected Indigenous communities' consent in the case, among other things, of 'commercial development of natural resources within customary lands under use which would impact on the livelihoods or the cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples'.[129]

In the next section, we will examine Article 32(1), which recognizes the right of Indigenous peoples to determine and develop priorities and strategies for development. As highlighted above, this Article is particularly important to address the question of control and use of natural resources in Indigenous territories.

5. Defining Priorities and Strategies for Development

Article 32(1) of the Declaration, recognizing Indigenous peoples' right 'to determine and develop priorities and strategies for the development and use of their lands, territories and resources', is closely linked to the right to self-determination of Indigenous peoples, enshrined in Articles 3 and 4.[130] In fact, the relationship between Indigenous peoples' disposal and control of the natural resources of their territories and the realization of their right to self-determination was highlighted throughout the negotiation process of the

[125] Republic of Congo, Loi No 5-2011 portant promotion et protection des droits des populations autochtones, 25 February 2011.

[126] ibid Art 3. See also Art 38. [127] ibid Art 36. [128] ibid Art 37.

[129] See Inter-American Development Bank, 'Operational Policy on Indigenous Peoples', 22 February 2006, OP-765; and Asian Development Bank's Safeguard Policy Statement on Indigenous Peoples of 2009 replacing the former safeguard policies on the environment, involuntary resettlement, and Indigenous peoples. The document is available at <http://www.adb.org/documents/safeguard-policy-statement> accessed 15 March 2013. Please note that in the ADB's Statement, consent is understood as 'broad community support'. In this connection, see also World Bank, Operational Policy on Indigenous Peoples (OP4.10), July 2005, which, among other things, spells out that '[i]n deciding whether to proceed with the project, the borrower ascertains, on the basis of the social assessment ... and the free, prior, and informed consultation ... whether the affected Indigenous Peoples' communities provide their broad support to the project' (para 11). See further the International Finance Corporation's Performance Standard 7 on Indigenous Peoples, para 13.

[130] It may be useful to recall that the 1994 draft once indicated explicitly that Indigenous peoples' autonomy would encompass economic activities, land, and resource management. On self-determination, see Chapter 5. See also Art 23 of the Declaration.

Declaration.[131] The provision in Article 32(2), which has been referred to above, must also be read in conjunction with this right, as it is pivotal to enabling Indigenous peoples to set and pursue their own development path. Borrowing the words of the Special Rapporteur, Article 32 is ultimately intended to 'reverse historical patterns of imposed decisions and conditions of life that have threatened the survival of indigenous peoples'.[132] Together, the two provisions delimit States' power to dispose of natural resources and are aligned with the current shift from top-down approaches towards participatory forms of development. Actually, Article 32(1) echoes the UN Declaration on the Right to Development, which recognizes the right of all people 'to participate in, contribute to, and enjoy economic, social, cultural and political development'.[133]

Both ILO Convention 169[134] and the draft American Declaration contain similar provisions.[135] With regard to Article 7 of ILO Convention 169, the CEACR has pointed out that the consultations required under Article 15 of the Convention in relation to the exploitation of natural resources pertaining to Indigenous peoples' lands must actually be read in conjunction with Article 7 and be inserted in the broader process of participation in the formulation of development plans. In this regard, the Committee has especially emphasized the importance of ensuring the participation of Indigenous peoples in the discussion and decision-making on the models and priorities of development, underlining that the realization of ad hoc consultations on specific measures may fall short of fulfilling the requirements of the Convention. In this regard, the Committee referred to the situation 'where the peoples concerned consider agriculture to be the priority, but they are only consulted regarding mining exploitation after a development model for the region, giving priority to mining, has been developed'.[136]

With regard to the peoples' right to development recognized in Article 22 of the African Charter, in the case of the *Endorois Welfare Council v Kenya* the ACommHPR spelled out that 'freedom of choice' is an essential part of this right and Indigenous peoples should be given an authentic opportunity to shape the overall policies affecting them.[137]

It is also interesting to note that the HRComm has highlighted the relationship between the right to self-determination, as enshrined in Article 1(2) of the Covenant, and the exercise of control by Indigenous peoples over their resources and lands.[138] Likewise,

[131] See Section 2 above. See also Art 20 of the Declaration.

[132] UN Doc A/HRC/12/34 (15 July 2009) para 49. See also Preamble, paras 6 and 10.

[133] Declaration on the Right to Development, UN Doc A/RES/41/128 (4 December 1986) Art 1(1). See also Agenda 21, Chapter 26; and Rio Declaration on Environment and Development, Principle 22. See further Section 4 and Errico (n 68) 341ff.

[134] Article 7(1) of ILO Convention 169 reads: 'The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.'

[135] Article XXI(1) of the draft American Declaration sets out Indigenous peoples' right 'to decide democratically what values, objectives, priorities and strategies will govern and steer their development course'.

[136] See CEACR, General Observation (n 85). Please also note that Art 15 of the Convention recognizes the right of Indigenous peoples to participate in the use, management, and conservation of the natural resources pertaining to their lands.

[137] See n 103 above, paras 278, 281.

[138] See Concluding Observations of the Human Rights Committee on Canada, UN Doc CCPR/C/79/Add.105 (7 April 1999). See also Concluding Observations of the Human Rights Committee on Australia, UN Doc A/55/40 (24 July 2002) paras 506–08, in which the Committee admonished Australia that it should 'take the necessary steps in order to secure for indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources'.

the CESCR, recalling the right to self-determination, has urged the Russian Federation to ensure that Indigenous peoples are not deprived of their means of subsistence.[139] More explicitly, having clearly in mind Article 32 of the Declaration, the CERD has recommended States to provide opportunities for Indigenous peoples 'to define development in their own terms and to contribute to decision-making as to how development is operationalized'.[140]

For its part, the IACtHR has considered that the protection offered by Article 21 of the Inter-American Convention should include 'the right of members of indigenous and tribal communities to freely determine and enjoy their social, cultural and economic development'[141] and has underscored the State's obligation to ensure the effective participation of Indigenous peoples in any development plan within their territory.

Additionally, in the previous section, we have also referred to a number of decisions by national courts, as well as to examples of legislation explicitly recognizing Indigenous peoples' rights to set their own priorities for development. Suffice it here to recall, for example, that the Constitutional Court of Colombia has established a clear link between the right that Indigenous peoples have to decide their priorities of development and their right to consultation and has held that their participation is key to debates on relevant public policies.[142] Similarly, in the Philippines, the IPRA recognizes Indigenous peoples' right to determine their own priority for development affecting 'their lives, beliefs, institutions, spiritual wellbeing, and the lands they own, occupy or use' and accordingly states that Indigenous peoples shall participate in the formulation, implementation, and evaluation of policies, plans, and programmes of development which may affect them.[143]

The Declaration is, however, silent on another essential aspect, namely the participation of Indigenous peoples in the realization of impact assessment studies in relation to development plans and projects, including natural resources extraction, affecting them. It refers, nonetheless, at Article 32(3), to the adoption of measures to mitigate adverse impacts flowing from projects affecting their territories. Illustrative of the importance of the realization of impact assessment studies are the former Special Rapporteur's recent observations on the El Diquis hydroelectric project in Costa Rica, in which he noted that consultations with Indigenous peoples should have started before undertaking the impact assessment and considered that Indigenous peoples' ability to exercise their right to self-determination and to set their own priorities for development had consequently been affected.[144]

[139] CESCR, Concluding Observations on the Russian Federation, UN Doc E/C.12/1/Add.94 (12 December 2003) para 39.

[140] CERD, Concluding Observations on Laos, UN Doc CERD/LAO/CO/16-18 (9 March 2012) para 18. In this regard, it is worth recalling that in its General Recommendation 23 on Indigenous Peoples, the Committee recommended that States 'provide indigenous peoples with conditions allowing for a *sustainable development* and social development *compatible with their cultural characteristics*' and ensure that 'no decisions directly relating to their rights and interests are taken without their informed consent'. CERD, General Recommendation 23: Rights of Indigenous Peoples, UN Doc A/52/18 (18 August 1997) Annex 8, para 4(c), (d) (emphasis added).

[141] *Saramaka People* (n 41) para 95.

[142] In this respect, see, eg, decision C-366/11 of 11 May 2011, paras 13.2, 23.1.

[143] IPRA (n 124) s 17. See also the implementing regulations, National Commission on Indigenous Peoples, Administrative Order No 1 of 1998.

[144] Report of the Special Rapporteur on Costa Rica (n 86) para 12.

The obligation of States to carry out, in cooperation with Indigenous peoples, the assessment of the social, spiritual, cultural, and environmental impact on them of development activities is explicitly incorporated in ILO Convention 169. The ILO's supervisory bodies have underlined that this obligation shall be fulfilled before authorizing or undertaking exploration or exploitation activities in Indigenous territories. Article 7(3) of the Convention further indicates that the result of these studies 'shall be considered as fundamental criteria for the implementation of these activities'. The UN Treaty bodies[145] and the Inter-American institutions have equally put emphasis on this requirement.[146]

Recently, the Special Rapporteur has drawn attention to impact assessment as a part of the consultation process with Indigenous peoples, along with the definition of appropriate measures to compensate for any negative effect identified. He has also pointed out that it is a key element in connection with Indigenous peoples' right to the conservation and protection of the environment.[147]

6. Redress and Participation in Benefits

Article 32(3) requires States to establish effective mechanisms for 'just and fair redress' for any of the activities referred to in Article 32(2). Additionally, as already mentioned, it provides for the adoption of appropriate measures to mitigate any adverse environmental, economic, social, cultural, or spiritual impact resulting from them.[148]

The issue of redress is examined in more detail in Chapter 19 in this volume. It should be noted here that Article 32(3) is inseparably connected to Article 28 of the Declaration, especially as regards the identification of the mechanism of redress, as indicated during the preparatory works.[149] It also bears a close connection with Articles 8(2) and 20(2), which are examined in Chapter 19.

For the purpose of this analysis, it is interesting to note that the question of redress in the area of use of natural resources has also been linked to the participation of Indigenous peoples in the benefits arising out of the activities carried out in their territories. The IACtHR has held that a reasonable share in those benefits can be considered as a form of just compensation under Article 21 of the Inter-American Convention.[150] The Court, in fact, considers participation in the benefits to be one of those requirements to be met as a fundamental safeguard in the case of restrictions on the property rights of Indigenous peoples.[151] In the same vein, the Constitutional Court of Colombia has argued that Indigenous peoples should be guaranteed an equitable share in the benefits stemming from the exploitation of natural resources in their territory.[152] Similarly, the ACommHPR

[145] See, eg, CERD, Concluding Observations on Bolivia, UN Doc CERD/C/BOL/CO/17-20 (8 April 2011) para 20; CESCR, Concluding Observations on Ethiopia, UN Doc E/C.12/ETH/CO/1-3 (31 May 2012) para 24.

[146] See *Saramaka People* (n 41); *Kichwa Indigenous People of Sarayaku* (n 41).

[147] Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Doc A/HRC/15/37 (19 July 2010) paras 71ff.

[148] Article 20(2) of the Declaration also stipulates that Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress. See Chapter 19.

[149] See UN Doc E/CN.4/2005/89 (n 59) para 35.

[150] See *Kichwa Indigenous People of Sarayaku* (n 41) para 157.

[151] *Saramaka People* (n 41) para 129.

[152] See Decision T-129/11 (n 97) para 7.1.

has affirmed that 'benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the [affected] community.'[153] In the specific case before it, the Commission has accordingly recommended paying royalties from the existing economic activities in favour of the community and ensuring that they benefit from the employment opportunities associated with it.[154] The CERD has also followed the same approach.[155]

In this regard, it is worth recalling that Article 15 of ILO Convention 169, besides stipulating that Indigenous peoples must receive fair compensation for any damages deriving from the exploration or exploitation of natural resources, also sets out that they 'shall *wherever possible* participate in the benefits of such activities'.[156] The CEACR has pointed out that there is no single model for benefit sharing and that appropriate systems have to be established on a case-by-case basis, taking into account the circumstance of the particular situation of the Indigenous peoples concerned. It has, however, indicated that this should be part of the broader consultation to be held with the Indigenous peoples concerned before undertaking the activities.[157]

The draft American Declaration also states that Indigenous peoples must participate in the benefits of the exploitation of natural resources and, contrary to ILO Convention 169, provides an unconditional right in this regard.[158]

It is also worth mentioning that the Philippines' IPRA, mentioned above, recognizes the right of Indigenous peoples to 'benefit and share the profits from allocation and utilization of the natural resources' within their territories.[159] Most recently, the Congolese Act on the promotion and protection of the rights of Indigenous populations has also stated this right.[160] However, as the Special Rapporteur highlighted: 'Domestic law still presents serious limitations in this sphere. States rarely guarantee a share in the benefits arising from natural resource exploitation, and when such benefit sharing is established by law, a distinction is usually not made between the local population and indigenous communities per se.'[161]

The Declaration does not refer expressly to the matter, but in the light of the practice above, it can be argued that benefit-sharing arrangements fall within the scope of Article 32 and should be part of the consultation envisaged in Article 32(2).

7. Conservation and Protection of the Environment

In view of the special ties that Indigenous peoples have with their territories, the Declaration also pays particular attention to the protection of the environment, recognizing, at Article 29, Indigenous peoples' right to the conservation and protection of the environment and productivity capacity of their territories. Furthermore, Article 29 prohibits the storage or disposal of hazardous materials in Indigenous territories unless the peoples concerned

[153] See case of *Endorois Welfare Council* (n 96) para 295. [154] ibid Recommendations, 80.
[155] See, eg, CERD, Concluding Observations on: Ecuador, UN Doc CERD/C/62/CO/2 (21 March 2003) para 16; United States, UN Doc CERD/C/USA/CO/6 (8 May 2008) para 29.
[156] Emphasis added.
[157] CEACR, Observation, Norway, Convention 169, adopted 2009, published 99th ILC Session (2010).
[158] Draft American Declaration (n 135) Art XVIII(5). [159] IPRA (n 124) s 7(b).
[160] Loi No 5-2011 (n 125) Art 41. [161] UN Doc A/HRC/15/37 (n 147) para 78.

give their FPIC to it.[162] As has been seen, the provision aims at responding to the pressing concerns and the testimonies that Indigenous peoples shared during the drafting process of the Declaration regarding the adverse impacts on their lives and livelihoods of various activities implemented in their territories, including uncontrolled mining and military nuclear testing.[163]

It should be recalled that the negotiation of this Article took place against the backdrop of increasing international attention to environmental issues and growing awareness of the effects of hazardous wastes on human health.[164] Among others, the Rio Declaration had recognized the importance of participatory approaches to environmental issues and public access to information, including on hazardous materials and activities.[165] On this latter point, in 1989, the Basel Convention[166] had already proclaimed that States should ensure that management and disposal of hazardous wastes be consistent with the protection of human health and the environment.[167] Specifically referring to Indigenous peoples, Chapter 26 of Agenda 21 recommended that Indigenous peoples and their lands be protected from 'activities that are environmentally unsound'.

One of the core aspects of the debate surrounding the formulation of Article 29 of the Declaration actually concerned the extent of the obligations placed on States in this domain. Whereas the 1994 draft made reference to the 'restoration' of the environment

[162] See also the Preamble to the Declaration, which recognizes the contribution of Indigenous knowledge, cultures, and traditional practices to sustainable and equitable development and proper management of the environment.

[163] In his report of 2008, the Special Rapporteur on the adverse effect of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights acknowledged the specific challenges and difficulties confronting Indigenous peoples and urged to involve them in decision-making processes related, among others, to extraction of natural resources and development generally. See UN Doc A/HRC/7/21 (18 February 2008) para 13. See also Report of the Special Rapporteur on the Human Rights Obligations related to Environmentally Sound Management and Disposal of Hazardous Substances and Waste, UN Doc A/HRC/21/48 (2 July 2012) para 68; Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN Docs A/HRC/18/35 and A/HRC/18/35/Add.3 (nn 8 and 97).

[164] In 1972, UN Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) urged to halt the discharge of toxic substances to avoid irreversible damage to the ecosystems (Principle 6). In 1989, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was adopted, which at Art 4(2)(c) calls upon States to take steps to prevent pollution due to hazardous wastes and to minimize the consequences thereof for human health and the environment. The Convention on Biological Diversity was then adopted in 1992 with the objective, inter alia, of conserving biological diversity. Chapter 19 of Agenda 21 on the 'Environmentally Sound Management of Toxic Chemicals, Including Prevention of Illegal International Traffic in Toxic and Dangerous Products' is also worth noting. In 2002, the Johannesburg Declaration on Sustainable Development reaffirmed the principles set out in the Rio Declaration (see below) and Agenda 21. For a general overview of relevant instruments, see also Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, UN Doc E/CN.4/1996/17 (22 February 1996). See also 'The Future We Want' (n 167).

[165] Principle 10, Rio Declaration on Environment and Development states that: 'Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.' See also Principles 13, 17, 22, 23.

[166] See n 164. Article 1 of the Convention contains a working definition of 'hazardous wastes' referring to categories listed in its Annexes.

[167] Basel Convention, Preamble, paras 4 and 16. More recently, the outcome document of the 2012 UN Conference on Sustainable Development ('The Future We Want') restated those principles. It also recognized the importance of the UNDRIP in the context of global, regional, national, and subnational implementation of sustainable development strategies. See UN Doc A/RES/66/288 (11 September 2012) para 49.

in addition to its conservation and protection, thus encompassing explicitly both the prevention and the reversal of damages to the environment, the text finally adopted dropped any express reference to the former, out of States' concern about an 'apparently unlimited obligation on States to restore it'[168] and the actual impossibility of doing it in some cases, as well as considerations for concomitant responsibilities of third parties. It is, however, important to highlight that the States' obligations under this Article are intertwined with the other rights and related obligations recognized in the Declaration, including those contemplated in Article 32(3).

Article 29(1) calls on States to establish and implement assistance programmes for Indigenous peoples to conserve and protect the environment 'without discrimination'.[169] States are also required under Article 29(3) to take effective measures to ensure the implementation of programmes for monitoring, maintaining, and restoring the health of Indigenous peoples affected by hazardous materials, as needed.

Generally speaking, it has been recognized that there exists a profound relationship, even an interdependence, between the protection of the environment and the enjoyment of human rights,[170] first and foremost the rights to life and health,[171] but also the rights to food, housing,[172] property,[173] and family and private life,[174] among others, which adds on to specific obligations that States may have under environmental international law. In practice, this has allowed the examination of threats and damages to the environment also in the absence of an express provision stipulating the right to a 'safe, clean, and healthy' environment.[175] This applies also to the specific case of environmental threats or damages faced by Indigenous peoples which have been addressed based on the above-mentioned rights, resorting to the fundamental principles of consultation, participation in decision-making, FPIC, and the need for prior impact assessments which have been illustrated above.[176]

ILO Convention 169 contains an express provision on the protection of the environment, requiring that States take measures in cooperation with Indigenous peoples to protect and preserve the environment of the territories they inhabit. It also calls for the

[168] UN Doc E/CN.4/2003/92 (6 January 2003) para 37.

[169] See against 1994 draft in section II. During the negotiations, some States had suggested including in Art 28(1) of the 1994 draft the words 'equal right to any assistance available' before 'for this purpose'. See UN Doc E/CN.4/2004/81 (7 January 2004) para 119.

[170] The UN Expert on Human Rights and the Environment has indicated that the obligations that human rights law imposes regarding environmental protection need further exploration, however. See UN Doc A/HRC/22/43 (24 December 2012) para 35.

[171] See ICESCR Art 12(2)(b); CESCR, General Comment 14: The Right to the Highest Attainable Standard of Health, UN Doc E/C.12/2000/4 (11 August 2000). See also UN Convention on the Rights of the Child Art 24.

[172] See, eg, the CESCR's General Comments on the Rights to Adequate Food (No 12, UN Doc E/C.12/1999/5 (12 May 1999)) and Adequate Housing (No 4, UN Doc E/1992/23 (13 December 1991)).

[173] See, eg, IACHR, Report on the Situation of Human Rights in Ecuador, Doc OEA/Ser.L/V/II.96. doc 10, rev 1; *Belize* (n 46) para 153; *Saramaka People* (n 41) paras 95, 158; *Yakye Axa* (n 42) paras 143, 156.

[174] In this regard, see the jurisprudence of the European Court of Human Rights on Art 8 of the European Convention on Human Rights, eg the case of *Lopez-Ostra v Spain*, EHCHR (1994), Series A No 303C. For a comprehensive overview, see A Mowbray, *Cases and Materials on the European Convention on Human Rights* (Oxford University Press 2007) 546ff.

[175] It should be noted that the African Charter on Human and Peoples' Rights (Art 24), the OAS Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (1988) (Art 11(1)), the 2004 Arab Charter on Human Rights (Art 38), and the ASEAN Human Rights Declaration of 2012 (para 28(f)) all contemplate a right to a satisfactory, healthy, or safe and clean environment.

[176] In addition to the European and American jurisprudence mentioned in the notes above, see also, eg: CERD, Early Warning and Urgent Action Procedure, Decision 1 (68) USA, UN Doc CERD/USA/

adoption of special measures to this end.[177] In practice, this provision has been applied by the ILO's supervisory bodies in conjunction with the Articles stipulating States' obligations concerning the realization of impact assessment studies and the implementation of consultation and participation mechanisms.[178]

The draft American Declaration also explicitly addresses the issue, incorporating Indigenous peoples' right to a safe and healthy environment, along with the right to be informed of measures affecting the environment, participate in the formulation, planning, and implementation of conservation programmes[179] of their territories, and receive assistance from the States for the purpose of environmental protection. It also calls on States to prohibit, punish, and impede jointly with Indigenous peoples the introduction, abandonment, or deposit of radioactive materials or residues, toxic substances, and garbage in violation of legal provision.[180]

At the national level, the provisions of the Declaration influenced the drafting of Article 43 of the Act on the promotion and protection of the rights of Indigenous populations of Congo, which recognizes the right of Indigenous peoples to a healthy, satisfactory, and sustainable environment and prohibits the storage of hazardous and toxic wastes in Indigenous lands.[181]

Referring to Article 24 of the African Charter, which recognizes the right to a 'general satisfactory environment', the African Commission has clarified that this right requires the State to take measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[182] This may include independent scientific monitoring of threatened environments, realizing and publicizing environmental and social impact studies prior to any activity, undertaking appropriate monitoring, and providing information to those communities exposed to hazardous materials and activities, as well as providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[183]

Likewise, the Inter-American institutions have maintained that States are under the obligation to undertake preventive and positive action to guarantee an environment that

DEC/1 (11 April 2006) para 8; CERD, Concluding Observations on Chile, UN Doc CERD/CHL/CO/15-18 (7 September 2009) para 23; and Peru, UN Doc CERD/C/PER/CO/14-7 (3 September 2009) para 14; CCPR, Concluding Observations on Sweden, UN Doc CCPR/C/SWE/CO/6 (2 April 2009); CESCR, Concluding Observations on Ethiopia, UN Doc E/C.12/ETH/CO/1-3 (31 May 2012) para 24; Peru, UN Doc E/C.12/PER/CO/2-4 (30 May 2012) para 22; and Ecuador, UN Doc E/C.12/ECU/CO/3 (30 November 2012) para 25.

[177] Arts 7(4) and 4.

[178] See Arts 6, 7, 15. See, just to cite an example, the CEACR's observation on Brazil published at the 100th ILC Session (2011) or the direct request on Paraguay, published 101st ILC Session (2012).

[179] In this regard, it is also worth mentioning the situation of conservation programmes or environmental protective measures, such as conservation areas or forestry programmes, implemented disregarding Indigenous peoples' rights or negatively affecting them. See, eg, CERD, Concluding Observations on Thailand Urging the State to Review Relevant Forestry Laws in order to Ensure Respect for Ethnic Groups' Way of Living, Livelihood and Culture, and Their Right to FPIC in Decisions Affecting Them, While Protecting the Environment, UN Doc CERD/THA/CO/1-3 (31 August 2012).

[180] See Art XIII, which further refers to the production, introduction, transportation, possession, or use of chemical, biological, and nuclear weapons in Indigenous areas.

[181] See n 125. [182] See *Ogoni People* case (n 74) para 52.

[183] ibid para 53. In this specific case, the Commission recommended that the State: undertake a comprehensive clean-up of lands and rivers damaged by oil operations; ensure that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil

does not compromise Indigenous peoples' capacity to exercise their most basic human rights, as well as to ensure access to information, participation in decision-making, and access to remedies.[184]

Similarly, in a case concerning the exploitation of oil affecting Indigenous territories where the claimant asked for the suspension of the activities and the restoration of the *status quo ante*, invoking the right to enjoy a satisfactory environment, the Constitutional Court of Peru addressed the claim resorting to the principles of sustainable development and prevention and emphasized the importance of consultation and participation of Indigenous peoples, referring to the correlated rights established in international law.[185]

Clearly, Article 29 of the Declaration also needs to be read in tandem with the other Articles of the Declaration, particularly those described in this chapter, as considerations related to the environmental impact of proposed activities in Indigenous territories and the consequent repercussions on the life, culture, and livelihood of the concerned communities shall be part of the consultation and decision-making process required under the Declaration, in accordance with the basic principles delineated in Sections 4 and 5 above.

8. Military Activities in Indigenous Territories

The provision of the Declaration on military activities in Indigenous peoples' lands and territories was originally part of the broader Article on the protection of the environment. This circumstance can be explained by the fact that during the initial stages of the drafting process, Indigenous representatives made reference to the storage of hazardous wastes derived from military use in their lands in addition to the issue of military presence in their territories.[186]

It should be noted that ILO Convention 169 does not incorporate a similar provision. The Declaration is thus the first instrument on Indigenous peoples' rights which devotes a specific Article to this subject.[187]

Article 30 tries to strike a balance between, on the one hand, State security and public order issues, and, on the other, Indigenous peoples' rights and interests. As a general principle, it prohibits military activities in Indigenous peoples' territories, but contemplates

development is guaranteed through effective and independent oversight bodies for the petroleum industry; and provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

[184] IACHR, Indigenous and Tribal Peoples' Rights over Their Ancestral Lands—Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II, Doc 56/09 (30 December 2009) paras 194, 197. See also paras 216ff on States' duties of immediate action. See also the precautionary measures ordered by the IACHR in the case of the communities of the Maya people (*Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala* (PM 260-07). In this case, the IACHR has furthermore asked the State begin a health assistance and care programme in favour of the victims.

[185] Constitutional Tribunal of Peru, Decision No 03343-2007-AA of 19 February 2009.

[186] The Preamble to the Declaration emphasizes 'the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world'.

[187] It should, however, be noted that the implementing rules of the Philippines' IPRA of 1998, mentioned above, already made the entry of military or paramilitary forces as well as the establishment of temporary or permanent military facilities within Indigenous territories conditional upon Indigenous peoples' free and prior informed consent. See n 124, Part III, s 7.

three exceptions, namely where those activities are: (1) justified by a 'relevant public interest'; or (2) freely agreed with or (3) requested by the Indigenous peoples concerned.

In this regard, it should be noted that the text approved in 2006 by the Human Rights Council specified that only 'significant threats' to public interest would justify a military presence in Indigenous territories. During the last phase of the negotiations in the General Assembly, the more stringent requirement was removed, thus apparently justifying military activities on the mere basis of an existing relevant public interest, which may raise some concerns in light of the militarization of Indigenous territory experienced by various Indigenous communities around the globe.

All the exceptions provided in Article 30 are conditional upon the realization of prior consultations with the Indigenous peoples concerned 'through appropriate procedures and in particular through their representative institutions'. The additional requirement for 'the full respect of all human rights and fundamental freedoms', which appeared at one point in time during the negotiations,[188] was then deleted since, as the Chairperson of the WGDD recalls, it was understood that 'this omission would in no way affect the States' obligations in this regard'.[189]

The principle enshrined in Article 30 is being applied by the UN Treaty Bodies when dealing with situations implying military operations in Indigenous territories. In the context of an Early Warning and Urgent Action procedure concerning military interventions carried out to protect Indigenous peoples, the CERD, for instance, indicated that these interventions 'should take place by common consent with those concerned and in full respect of their rights'.[190] Furthermore, the UN Committee on the Rights of the Child in its General Comment 11 on Indigenous Children and Their Rights under the Convention stated that military activities on Indigenous territories should be avoided to the extent possible and recalled Article 30 of the Declaration.[191]

9. Conclusions

While conceding that States can dispose of subsoil resources located in Indigenous lands, the Declaration establishes, in Article 32, a specific framework within which any activity in Indigenous territories must be carried out, requiring that Indigenous peoples are consulted through their representative institutions in order to obtain their free and informed consent prior to these activities being approved.

The obligation of States to consult Indigenous peoples in relation to projects affecting them should not be disconnected from the underlying substantive rights of these peoples. In particular, the fact that the protection of Indigenous peoples' rights to their lands, territories, and resources is closely linked to the need to preserve the integrity of these peoples actually has a bearing on the comprehension of this provision, as Indigenous peoples' rights in this domain have implications that go beyond the mere application of common principles regulating property regimes.

[188] See UN Doc E/CN.4/2005/WG.15/CRP.1 (n 63).

[189] L-E Chávez, 'The Declaration on the Rights of Indigenous Peoples, Breaking the Impasse: The Middle Ground' in Charters and Stavenhagen (n 34) 104.

[190] CERD, UA/EW, Colombia, 2 September 2011. See also CERD, UA/EW, Laos, 12 March 2010, referring to Art 30 of the Declaration.

[191] UN Doc CRC/C/GC/11 (12 February 2009) para 66.

Apart from cases that will thus require the free, prior, and informed consent of Indigenous peoples, the issue of use and control of natural resources in Indigenous territories should be addressed more broadly in light of the recognition of Indigenous peoples' right to determine their priorities and strategies for the development and use of their lands and territories in Article 32(1) of the Declaration.

As illustrated above, Article 32 bears a profound relationship with the right to self-determination and defines overall the contours and requirements for States' disposal of natural resources, in line with the contemporary emphasis on human-rights-based and participatory forms of development. The provision is in fact pivotal to enabling Indigenous peoples to set and pursue their own development path and requires participation and engagement at a broader level, beyond ad hoc consultations on specific projects.

The Declaration is silent on an essential aspect, namely the participation of Indigenous peoples in the realization of impact assessment studies in relation to development plans and projects affecting them. However, in the light of the international, regional, and national practice, this element can be considered as forming part of the consultation process contemplated in Article 32.

Similarly, although not expressly indicated in the Declaration, current practice also suggests that Indigenous peoples have the right to participate in the benefits deriving from the implementation of projects in their territories. As described in this chapter, this issue has been linked to the question of redress, which is referred to in Article 32(3) and, more broadly, in Article 28 of the Declaration.

In view of the special ties that Indigenous peoples have with their territories, the Declaration moreover pays particular attention to the protection of the environment of those territories and their productive capacity, and prohibits, as a general principle, military activities in such territories. Articles 29 and 30 of the Declaration need to be read in conjunction with the other Articles of the Declaration, particularly those described in this chapter, because considerations related to the impact of the proposed activities on the environment of Indigenous territories and the consequent repercussions on the life, culture, and livelihood of the concerned communities shall be part of the consultation and decision-making process required under the Declaration.

The Articles examined in this chapter have captured and consolidated the principles developed throughout the years by the UN Treaty Bodies and the regional human rights institutions when applying universal human rights provisions to the specific case of Indigenous peoples, thus strengthening the protection of Indigenous peoples under those instruments and triggering a number of developments at national level, some of which have been referred to in this chapter. As a matter of fact, these Articles are being increasingly referred to as interpretative tools by the UN Treaty Bodies as well as regional and national courts, which are, in their turn, contributing significantly with their practice to better delineate and clarify the implications and scope of the provisions of the Declaration. It should also be noted that these Articles are receiving increasing attention from the private sector in the context of initiatives based on corporate social responsibility.

More generally, building on existing instruments and important developments that occurred during the more than twenty years of negotiations leading to the Declaration, these Articles are overall based upon and reflect legal principles that are part of customary international law, *in primis* the principles of non-discrimination and those of

self-determination and participation.[192] In this regard, we should recall the fundamental shift in approach which intervened to overcome the assimilationist approach of earlier instruments and which relied precisely on the recognition of Indigenous peoples' right to participate in decision-making, to determine their priorities for development, and to preserve their cultural identity.

The effective implementation of the provisions described in this chapter is key to national efforts to pursue inclusive development and tackle social inequalities. Even more so, in a context where the number of communities adversely affected by development projects, especially large-scale exploitation of natural resources, continues to increase.

[192] On this, see UN Special Rapporteur on the Rights of Indigenous Peoples, UN Doc A/69/317. See also the report of the ILA's Committee on the Rights of Indigenous Peoples, Hague Conference Report (2010).

PART V

ECONOMIC AND SOCIAL RIGHTS

Chapter 16. Labour Rights

Article 17

Lee Swepston

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with Indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

1. Introduction

The adoption in 2007 of the UN Declaration on the Rights of Indigenous Peoples (the Declaration or UNDRIP) was a real step forward in the recognition of the rights of Indigenous peoples to continue to exist in a changing world, and of the principles which should govern their interactions with the world around them. From the time of the beginning of the United Nations' taking awareness of this question, more than thirty-five years passed before the Declaration's adoption, and the drafting itself took some twenty years.

This was not, of course, the first time the situation of Indigenous peoples had come before the international community since the establishment of the United Nations. The history of the involvement of the International Labour Organization (ILO) in the situation of Indigenous and tribal peoples is referred to briefly below, and this subject has also been an increasing part of the deliberations of both development and human rights bodies at the universal and regional levels for many years.[1]

The drafting process for the UNDRIP took place in the UN Commission on Human Rights (later the Human Rights Council), placing the consideration of Indigenous rights firmly in the human rights universe. The ILO's Indigenous and Tribal Peoples Convention (No 169) had been adopted already in 1989 (revising an earlier ILO Convention of 1957). The ILO Convention contained statements of rights, but it actually had a combined rights and development approach. The UN system as a whole, including the World Bank and other development banks, had also taken on the development implications of the adoption of the ILO Convention and the growing awareness of the need for special

[1] The history of deliberations in the United Nations on this issue can be found on the website of the UN Permanent Forum on Indigenous issues at <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html>. For the history of work on this subject in the ILO, see the ILO website on Indigenous and tribal peoples at <http://www.ilo.org/indigenous/lang--en/index.htm> accessed 19 October 2017. See also L Swepston, *The Foundations of Modern International Law on Indigenous and Tribal Peoples: The Preparatory Documents of the Indigenous and Tribal Peoples Convention*, vol I: *Basic Policy and Land Rights* (Brill/Nijhoff 2015).

consideration of Indigenous peoples' needs through, inter alia, the adoption of development guidelines by the UN Development Group, the World Bank, the UN Development Programme (UNDP), and the ILO. The adoption of the UNDRIP built on all these discussions by giving the subject an explicitly human rights focus.

The UNDRIP thus did not constitute an entirely new approach. In many respects—including on labour rights, considered in the present chapter—it built on a vast body of existing international law and policy decisions while providing a new human rights focus to it. Article 17 is a brief restatement of existing protections that already exist in ILO standards, and in the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (ICESCR and ICCPR), among others. In other respects, in particular on the question of free, prior, and informed consent, it expressed a newly evolved consensus. Among other things, it benefitted from close and wide involvement of representatives of Indigenous peoples themselves in the deliberations during the drafting.

This does not mean that the UNDRIP, and in particular Article 17 for the purposes of this study, has not had a significant influence on the way this issue is dealt with at the national and international levels. UN Treaty Bodies and the ILO supervisory machinery have paid more explicit attention to the application of international law to Indigenous and tribal peoples as a particularly vulnerable part of national populations, who often lack effective protection under generally applicable law.

The following study examines the meaning and influence of Article 17 as a whole, as well as phrase by phrase. It also examines how this Article of the Declaration is an integral part of international human rights law, and the influence it is likely to have as the Declaration gains increasingly wide acceptance.

2. Drafting of Article 17

The draft considered by the Working Group on Indigenous Populations at its 1993 Session already contained an embryonic version of what was to become Article 17:

Operative paragraph 20

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, health and social security. Attention shall be paid to the special needs of Indigenous elders, women, youth, children and disabled ...[2]

Later on, in the 1994 'technical review' of the draft as it then existed, the following paragraph suggests that this provision need not be long or detailed given other international law on the subject:

67. The Sub-Commission may consider that the text of the article is satisfactory given the extensive international standards existing, in particular the relevant Conventions of the ILO. However, consideration may be given to placing the article within Part V, dealing with economic and social rights.[3]

[2] UN Doc E/CN.4/Sub.2/1993/26 (8 June 1993) 8.
[3] UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994) 14.

The draft emerged from the 1994 Session of the Working Group as follows:

Article 18

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.[4]

This is the form in which this Article was referred to the Commission on Human Rights in 1994.

This Article of the Declaration was adopted in the Human Rights Commission without much discussion on its contents, apart from the inevitable discussions on 'individuals and peoples' and the addition of the references to child labour in paragraph 2. With some minor wording changes as the text of the Declaration evolved, the concepts in paragraphs 1 and 3 of Article 17 were part of the discussion from the beginning, and no serious discussion or controversy over their meaning emerged. Paragraph 2 was added following the adoption by the ILO of its Worst Forms of Child Labour Convention (No 182) in 1999, and the discussions show that this paragraph was a direct response to that adoption.[5]

While this reflects a broad consensus and support for these principles, it also means that the concepts were not much clarified in the course of discussions, and that their meaning must for the most part be derived from the text itself. There are, however, some clues in the discussion leading to the UNDRIP's adoption. Reference was made in the earliest discussions to the labour protections figuring in the Universal Declaration of Human Rights and in the ICESCR,[6] and as these references were never challenged they may be assumed to be incorporated by implication. It also emerges clearly from the record of discussions that references to the standards on labour law adopted by the ILO were intended to be incorporated by reference.[7] This includes the labour provisions of the ILO Indigenous and Tribal Peoples Convention, 1989 (No 169) and Convention 182, to which explicit reference was made in the discussions. There were more general references to the protections contained in a broad range of ILO standards, and in UN human rights Conventions of broader coverage than labour matters.

2.1 Kind of Work Covered

It is important to understand that this Article does not cover only salaried employment in the formal sector of the economy, but extends also to all kinds of productive activity undertaken by Indigenous peoples. This understanding does not appear to have been discussed in so many words during the adoption process, but it is clear from the wording of the Article, which refers to conditions of labour and to employment as only an example of situations to which it applies.

It is important that the Article be understood in this way. Many Indigenous peoples work outside the formal economic sphere, both in the underground market that exists outside the effective coverage of labour law—casual and seasonal labour, unskilled labour,

[4] UN Doc E/CN.4/Sub.2/1994/2/Add.1 (20 April 1994) 6.

[5] UN Doc E/CN.4/2000/84 (6 December 1999) para 129.

[6] See, eg, UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994) para 65.

[7] No explicit decision was ever made to this effect as concerns ILO Convention 169, but there were regular references to the ILO standards concerned and the draft of the UNDRIP did not vary substantially from them. See, eg, UN Doc E/CN.4/1997/102 (10 December 1996) paras 157, 160.

etc.—and in their traditional economic activities that are never monetized, such as hunting and gathering, shifting cultivation, and handicrafts. Child labour in particular, to which reference is made in paragraph 2 of Article 17, rarely takes place in the formal sector because it is almost always illegal.

The second factor is that when Indigenous peoples do join the monetized economy, they often do so in areas that are only scantily covered by national labour law and labour administration. For instance, much national labour legislation does not apply to agriculture, which deprives many of the poorest workers from legal protection in a set of occupations heavily inhabited by Indigenous peoples. Another aspect of this factor is that even when their work is covered in formal terms, much of it takes place outside the reach of national labour inspection systems, so that their conditions of work tend to be overlooked by law enforcement authorities, and Indigenous peoples therefore receive little or no real protection. International labour law, whether adopted by the ILO or contained in such UN standards as the ICESCR, is understood to apply to all forms of work unless it explicitly states otherwise, although national legislation and practice often have a narrower coverage.[8]

All this means that the other Articles of the Declaration, and other provisions of international law, that refer to other kinds of economic activity than employment in the formal sense, are also relevant to the application of Article 17 of the Declaration. While they will not be discussed in detail here, the provisions of the Declaration that refer to the right of Indigenous peoples to continue or to develop their traditional economic activities should be understood to be covered in relevant part by Article 17 protections on workers' rights. This includes, for instance, Articles 5, 11, 20, 21, and 32. This Article may also be understood to be relevant to Articles referring to land rights development, given the close relationship between those land rights and economic activity—for example, Articles 10, 26, and 32.

3. Detailed Examination of Article 17

Article 17(1)

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

3.1 Indigenous Individuals and Peoples

This curious usage appears several times in the text of the Declaration (except that in other instances (see, for example, Article 2) it is used in the reverse order, as 'peoples and individuals'). It is the result of a series of amendments introduced by the United States and Canada in the drafting of the Declaration in the Commission on Human Rights, and is intended to emphasize the contention of these countries that human rights are exclusively a question of individual rights, and that collective rights cannot be sanctioned.[9] The version of the Draft offered by the Working Group on Indigenous Populations referred

[8] See generally, among many other examples, 'Social Protection Floor for a Fair and Inclusive Globalization' (ILO 2011) (on the ILO website, <http://www.ilo.org>).

[9] See, eg, an exploration of these concepts in P Jones, 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21(1) Human Rights Quarterly 80–107.

to the right of Indigenous *peoples* to enjoy these rights, and Indigenous *individuals* to be free from discrimination (now paragraph 3—see below). The result of a long discussion over many years about whether these rights could belong to peoples (ie collective rights), or whether they belonged only to individuals, resulted in both concepts being included in paragraph 1.[10]

The inference from this change is an emphasis on the fact that labour rights have both collective and individual dimensions, and that both are important. While individuals suffer from violations of their rights as workers, many of the most common violations are applicable to Indigenous peoples as a group.

3.2 The Right to Enjoy Fully All Rights

This phrasing is the same as was included in the Working Group's draft, and there were no proposals to change it during the discussions at the Commission level. The concept of enjoying 'fully' all the rights concerned makes it clear that these rights are not subject to abatement or limitation because of the identity of the peoples or individuals concerned (which does not undercut the possibility that special measures, or affirmative action, might be called for). It also implies that there should be *effective* enjoyment of these rights, ie that they should not merely be included in legislation, but that States have a duty to ensure their implementation in fact as well as in theory.

3.3 All Rights Established under Applicable International and Domestic Labour Law

The proposal forwarded to the Sub-Commission by the Working Group referred to 'all rights established under international labour law and national labour legislation'. It was amended in the course of discussion in the Working Group of the Commission to add the term 'applicable' and to refer to domestic law instead of national legislation.[11] The effect of the addition of 'applicable' worried the Indigenous representatives in the Commission. The following passage appears in the report in 2004:[12]

> 46. A governmental delegation stated that the insertion of the word 'applicable' to the original draft could be acceptable. Indigenous representatives once again expressed their concern regarding that term, saying that such an addition would make international standards dependent on the acceptance or unilateral interpretation by each State and, therefore, potentially discriminatory or non-applicable.

The change was nevertheless accepted without further discussion appearing in the record.

The effect of this wording is indeed to narrow somewhat the scope of the national and international labour law that should be taken into account. As concerns *domestic law*, in

[10] See, eg, UN Doc E/CN.4/1997/102 (10 December 1996), in which Canada is reported as saying that the labour rights provisions 'should also refer to the rights of indigenous individuals rather than indigenous peoples'. This was a recurring theme throughout the drafting process, and is a discussion that affected the entire text. Note that Art 20(1) of ILO Convention 169, which deals extensively with labour rights, does refer to Indigenous individuals, but places the Article within the concept of collective rights by referring to 'workers belonging to these peoples'—and of course is part of a Convention that approaches the rights of Indigenous and tribal peoples both from individual and collective points of view.

[11] This is a much more accurate formulation, as law is composed not only of legislation, but also of ministerial orders and other acts, and of the judgments courts and other judicial bodies make on its meaning.

[12] UN Doc E/CN.4/2004/81 (7 January 2004).

far too many cases the economic activities of Indigenous peoples are not covered by national labour law, which often excludes work in agriculture and domestic work, and work in small firms, and in many cases does not cover non-employees for social benefits such as social security and health care.[13] Indigenous peoples and their advocates may therefore need to be creative in seeking to extend the protection of labour laws to Indigenous peoples. General prescriptions are difficult in the face of multiple national situations, but, for instance, it may be possible that national constitutional and legal protections against discrimination on the basis of ethnic origin can be used to counter exclusion of the economic activities of Indigenous peoples from the coverage of national labour law.

The question of what *international labour law* is 'applicable' is a good deal more complex, as is the extent to which international law compensates for gaps in national labour law. There are many provisions in international human rights law providing for rights at work, from the Universal Declaration of Human Rights to the two International Covenants on human rights, and this is protected most extensively in the large volume of ILO standards. Regional standards should also be considered, particularly in the Americas, in Europe, and to a lesser extent in Africa and Asia. A very few of these instruments, in particular the UNDRIP and the two ILO Conventions on Indigenous and tribal peoples, apply specifically to Indigenous peoples, but most are of more general coverage. It is important to know how to use both kinds of protections.

To refer to the wording of this paragraph of the UNDRIP, the international conventions are binding only when ratified by the country concerned. This was clearly the intent of the addition of the word 'applicable' to the text.[14] This is not the place to discuss whether some of the provisions of the applicable conventions have passed the *jus cogens* test and become customary international law applicable even in the absence of ratification—nearly every country with Indigenous peoples within its borders has ratified a sufficient number of international conventions to provide at least basic labour rights and other human rights protection through international law, assuming it can be invoked in national legal systems, which is not always the case.[15]

3.3.1 Declarations Affecting Labour Rights

There are two major non-Convention sources for basic workers' rights that apply to everyone, including Indigenous peoples. The most widely known with the widest coverage is the Universal Declaration of Human Rights, of which Article 23 provides:

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

[13] The best consolidated source for national labour legislation can be found on the website of the ILO (<http://www.ilo.org>), under Labour Standards, and then NORMLEX.

[14] The word 'applicable' was added following a number of amendments offered over several years. The first proposals to add the concept were reported in UN Doc E/CN.4/1998/106 (15 December 1997), with some variants proposing to include directly a reference to such conventions having to be ratified to be applicable.

[15] Put simply, nations are either monist or dualist in their treatment of international law. In monist States, international treaties are incorporated directly into national law once ratified; while in dualist States, international treaties must be enacted by national legislation to become effective.

The other major source of this kind is the ILO's 1998 Declaration of Fundamental Principles and Rights at Work, which in its Article 2:

Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

This Declaration also is not binding in itself. However, it reflects a commitment by ILO Member States that the principles it lists are binding for any State that is a member of the ILO—and this includes all but a few very small countries.[16]

3.3.2 Generally Applicable Conventions

In addition to the Declarations, there are human rights Conventions containing labour rights, which can be ratified and become binding on the States that ratify them.

3.4 UN Conventions

The ICESCR, adopted in 1966, contains several Articles on labour rights which are as applicable to Indigenous peoples as they are to all other inhabitants of ratifying countries. These Articles are a summary of the ILO standards on labour rights adopted up to 1966 when the Covenants were adopted, and General Comment 18 on the Right to Work adopted by the Committee on Economic, Social and Cultural Rights (CESCR) refers in detail to the ILO standards concerned (see below). By incorporating them in the Covenant, the United Nations made it clear that these are human rights applicable to everyone, without undercutting or contradicting the more specific ILO standards on the same subjects. The relevant Articles read as follows:

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

[16] The 1998 Declaration was supplemented in 2008 by the ILO Declaration on Social Justice for a Fair Globalization, which repeats the reference to the applicability of these fundamental human rights to everyone, and adds concerns for labour inspection and the promotion of employment—see the ILO website.

(a) Remuneration which provides all workers, as a minimum, with:
  (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
(b) Safe and healthy working conditions;
(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8

1. The States Parties to the present Covenant undertake to ensure:
   (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
   (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
   (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
   (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

The CESCR's General Comment 18,[17] referred to above, details the Committee's understanding of Article 6 of the Covenant, which broadly reflects the ILO's understanding of the same concepts. As the Committee states in the General Comment:

7. Work as specified in article 6 of the Covenant must be *decent work*. This is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families as highlighted in article 7 of the Covenant. These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment.[18]

[17] CESCR, General Comment 18: The Right to Work, UN Doc E/C.12/GC/18 (6 February 2006).
[18] Emphasis in the original.

In the later General Comment 20 on Non-Discrimination in Economic, Social and Cultural Rights,[19] the Committee has explicitly mentioned discrimination against Indigenous peoples as one of its concerns:

> 18. The Committee has consistently raised concern over formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities among others.

Both of these General Comments are, of course, consistent with the approach of the UNDRIP, and were adopted at around the same time as the UNDRIP, and thus with knowledge of its provisions.

The Committee regularly examines the implementation of these Articles of the Covenant, as they affect, among others, Indigenous peoples in the countries whose reports it is examining. The comments, as well as those made by the ILO in a similar vein, will of course help to illuminate how Article 17 of the UNDRIP should be understood. In addition, Article 17 is consistent with the Committee's approach. See, for example, the following extract from one of the Committee's concluding observations, illustrating the need for equal treatment of Indigenous peoples with other segments of the national population:

> 11. The Committee is concerned that unemployment remains high in the State party, in particular in rural areas and among young persons, women, indigenous and afro-colombian peoples. The Committee is also concerned that the creation of employment opportunities is taking place primarily in the informal economy (60%) with a negative impact on access to social security. The Committee is further concerned about the working conditions in the informal economy and rural areas where wages remain very low (arts. 6, 7).
>
> The Committee recommends that the State party:
>
> (a) take effective measures to reduce the high rate of unemployment;
> (b) design specific policies and strategies aimed at creating employment opportunities for young persons, women, indigenous and afro-colombian peoples;
> (c) continue the vocational training programs for young persons, as well as incentives already adopted.
>
> The Committee strongly recommends that the State party promote employment opportunities while improving the working conditions in the informal economy and rural areas, in particular with regard to low wages and social security benefits.[20]

Less detailed provisions on labour rights are included in the ICCPR, adopted in 1966 at the same time as the Covenant cited previously. Article 8 of that Covenant protects everyone against slavery and other forms of forced and compulsory labour, reproducing the rights contained in the ILO's Forced Labour Convention, 1930 (No 29)—see below. Article 22 contains provisions similar to those of the other Covenant on freedom of association and trade union rights, both the Covenants referring to the more detailed ILO standards on this subject.

Both Covenants are very widely ratified, and therefore are 'applicable' (in the terms of paragraph 1 of Article 17 of the UNDRIP) to everyone including Indigenous peoples in

[19] CESCR, General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2), UN Doc E/C.12/GC/20 (2 July 2009).

[20] CESCR, Forty-Fourth Session, Geneva, 3–21 May 2010, Concluding Observations Concerning Colombia, UN Doc E/C.12/COL/CO/5 (7 June 2010).

most countries, unless the ratifying country has attached a reservation excluding part of the population. Although some reservations have been attached to ratifications—mostly to do with the Covenants' provisions on trade union rights and sometimes on women's rights—none has provided for an exclusion of Indigenous peoples from the coverage of either Covenant.[21]

There are also other UN Conventions that contain rights relevant to work, and that are applicable to Indigenous peoples. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is prominent among them. Article 5 of the Convention requires ratifying States to:

> ... prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...
>
> (e) Economic, social and cultural rights, in particular:
>
> (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
>
> (ii) The right to form and join trade unions; ...

The Committee on the Elimination of Racial Discrimination (CERD) adopted General Recommendation 23 in 1997 affirming that the Convention applies to Indigenous peoples, although the Committee does not often examine conditions of work on the basis of racial discrimination against Indigenous peoples. One exception is the concluding observations of CERD on the examination of the report of one country:

> The Committee remains concerned that Pygmies are subjected to marginalization and discrimination with regard to the enjoyment of their economic, social and cultural rights, in particular their access to education, health and the labour market. The Committee is particularly concerned at reports that Pygmies are sometimes subjected to forced labour.
>
> The Committee encourages the State party to intensify its efforts to improve the indigenous populations' enjoyment of economic, social and cultural rights and invites it in particular to take measures to guarantee their rights to work, decent working conditions and education and health (art. 5).[22]

3.5 Conventions Applicable Directly to Indigenous and Tribal Peoples

There are two international Conventions that apply directly to Indigenous and tribal peoples.[23] They have both been adopted by the ILO, on behalf of the entire UN system and with its participation.

[21] See <http://www2.ohchr.org/english/law> accessed 19 October 2017, giving the status of ratifications and reservations of the Covenants.

[22] Concluding Observations of the Committee on the Elimination of Racial Discrimination, Democratic Republic of the Congo, UN Doc CERD/C/COD/CO/15 (17 August 2007) paras 18, 19.

[23] Note that the ILO uses the term 'Indigenous and tribal', as compared to the use of 'Indigenous' alone in the UN standards. This was intended to ensure that the peoples concerned are not defined solely on the basis of their historical primacy in a particular region, and to focus on their living and working conditions more generally. In practice, the use of the term 'Indigenous' in the United Nations has taken on the broader meaning associated by the ILO with 'Indigenous and tribal', and while there is still a 'first nations' flavour to the term, it goes beyond those who can claim prior occupation.

The first of these two Conventions, the Indigenous and Tribal Populations Convention, 1957 (No 107), was adopted before the world's Indigenous peoples had begun to organize at the international level, and was conceived as a way of guiding development concerning them. While it was intended to be protective, it was adopted with the 'top-down' orientation that was prevalent at the time. It later came to be seen as having an integration-oriented approach and was eventually revised by the Indigenous and Tribal Peoples Convention, 1989 (No 169). ILO Convention 107 nevertheless contains some good protective provisions, and remains binding on seventeen countries[24] (as of 2017). Both Conventions contain special provisions on labour rights for Indigenous peoples that correspond to the more general statements in Article 17 of the UNDRIP. ILO Convention 107 provides:

Article 11

1. Each Member shall, within the framework of national laws and regulations, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to the populations concerned so long as they are not in a position to enjoy the protection granted by law to workers in general.
2. Each Member shall do everything possible to prevent all discrimination between workers belonging to the populations concerned and other workers, in particular as regards—
   (a) admission to employment, including skilled employment;
   (b) equal remuneration for work of equal value;
   (c) medical and social assistance, the prevention of employment injuries, workmen's compensation, industrial hygiene and housing;
   (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

When ILO Convention 107 was revised in 1989, a much longer and more complex version of the same Article was included in ILO Convention 169, which is more directly adapted to the special situation of Indigenous and tribal peoples. Paragraphs 1 and 2 are redrafted and expanded from the same paragraphs in ILO Convention 107. Paragraphs 3 and 4 contain a number of added protections that reflect additional experience with the disadvantaged situation of these peoples in the labour market and the kind of work they most often do.

Article 20

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.
2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:
   (a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
   (b) equal remuneration for work of equal value;
   (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
   (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

[24] Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Syrian Arab Republic, Tunisia. Note that although some of these do not now have Indigenous and tribal peoples within their borders, India alone has a population of designated 'tribal' people greater than all the Indigenous peoples in North and South America combined.

3. The measures taken shall include measures to ensure:
   (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;
   (b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;
   (c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;
   (d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.
4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

The rights listed in Article 11 of ILO Convention 107 and Article 20 of ILO Convention 169 apply directly by virtue of the Convention only to countries that have ratified the Conventions. They nevertheless reproduce the rights contained in many other Conventions adopted by the ILO, almost all of which have been ratified by more countries than ILO Conventions 107 and 169 (see below). Even when these two Conventions directly applicable to Indigenous and tribal peoples have not been ratified by a particular country, the Articles on labour rights tend to highlight the fact that these rights are often applied to Indigenous and tribal peoples in a way that differs from other parts of the national population.

Most of the comments of the principal supervisory body of the ILO, the Committee of Experts on the Application of Conventions and Recommendations, relating to the implementation of ILO Convention 169 deal with broad questions of protection of the fundamental rights of Indigenous and tribal peoples, consultations intended to protect their rights in the event of development projects affecting their territories, and related matters. However, the Committee also raises questions relating to the working conditions of these peoples, which parallel the concerns covered in Article 17 of the UNDRIP. The following is an extract from one observation, based on information submitted to the ILO by a national trade union concerned with labour exploitation of the Indigenous community:

Protection of the rights of the Misquito people. Conditions of employment, social security and health of Misquito divers. The Committee notes the observations of the Single Confederation of Workers of Honduras (CUTH), sent to the Government in September 2011, and the Government's reply, received in October 2012. The CUTH supplemented its communication with documentation from the Office of the Special Prosecutor for Ethnic Groups and Cultural Heritage, the Fund of the Centre for Justice and International Law and the Inter-American Development Bank. The CUTH expresses concern that diving is undertaken without proper conditions of safety by Misquito fishers, largely in the Department of Gracias a Dios. Misquito divers fishing for crayfish and prawns use old equipment which is not maintained, lack any relevant training and work on average for 12 to 17 hours a day on the high seas, with diving periods of more than five hours. The CUTH indicates that diving in such inadequate conditions has serious health implications, decompression sickness being the most common occupational disease. The CUTH also reports that Misquito divers have no social security cover, and no access to medical treatment or to administrative or judicial remedies. The CUTH emphasizes that the situation of Misquito divers is a clear example of discrimination and vulnerability. These workers should enjoy the protection afforded by the Convention as members of indigenous peoples whose life and integrity is constantly under

threat from the consequences of diving for deep water fish and as members of a geographically isolated and historically marginalized indigenous peoples ...[25]

Many other such comments have been made on the application of Article 20 of ILO Convention 169, too numerous to detail here. One fairly typical comment of this kind is the following, indicating that the ILO Committee of Experts continues to track developments in ratifying countries as situations evolve:

Article 20. Recruitment and conditions of employment. The Committee notes the 2012 amendment to various provisions of the Federal Labour Act, including those regulating rural work (sections 279 to 284). The Committee notes with *interest* the addition of a special obligation upon employers concerning the use of the services of an interpreter when workers do not speak Spanish (section 283, XII). The Committee also notes the programmes intended to benefit agricultural workers, the pilot project on the training of community managers and the project to promote decent work for young persons in a situation of vulnerability. The objective of the first project is to promote and disseminate knowledge of the labour and agrarian rights of daily agricultural workers through community leaders and authorities (both indigenous and non-indigenous). In the case of the second project, the objective is to promote the productive development of young persons who are in a vulnerable employment situation. The Committee also notes the adoption of special inspection procedures in agriculture. The Government considers that, during the period 2008–12, the inspections conducted benefited a total of 25,969 workers. Moreover, with regard to the situation of indigenous workers from the Zolontla community in the municipality of Ixhuatlán de Madero (State of Veracruz), the Committee notes that the state government is cooperating with the Federal Labour Delegation to prevent any form of labour exploitation. The Government adds that the system of anonymous complaints and denunciations of the Secretariat for Labour, Social Welfare and Productivity of the government of Veracruz has not produced cases of forced labour or any other form of labour exploitation in that or any other community involving indigenous daily workers or children. *The Committee invites the Government to continue providing updated information on the measures adopted to give effect to Article 20 of the Convention. It requests the Government to continue providing information on the specific measures taken to ensure adequate labour inspection in areas in which workers from indigenous peoples work.*[26]

In a number of cases, such comments detail allegations or findings of serious labour abuses practised against these peoples, as in the following:

Article 20. Recruitment and conditions of employment. In September 2011, a communication was forwarded to the Government from the International Trade Union Confederation (ITUC), transmitting the observations of the National Confederation of Workers of Paraguay (CNT), according to which indigenous peoples are exploited, working over 12 hours a day in exchange solely for food. In its previous comments, the Committee also referred to discrimination relating to wages and treatment on the basis of the indigenous origins of workers, and particularly those working on ranches in the interior of the country and for Mennonite communities, under conditions which in certain cases constitute situations of forced labour. The Government indicates that situations of forced labour have not been identified in the inspections carried out in ranches or major agricultural undertakings. The Committee also notes the information provided on the inspections carried out in 2011 in stock-raising undertakings in the Chaco region and the other activities promoted by the Chaco Regional Directorate to ensure compliance with labour rights. The Government also established a Subcommission on Fundamental Labour Rights and the Prevention of Forced

[25] Observation by the ILO Committee of Experts, adopted 2012, published 2013, 102nd Session of the International Labour Conference, Indigenous and Tribal Peoples Convention, 1989 (No 169), *Honduras*.

[26] Observation by the ILO Committee of Experts, adopted 2013, published 2014, 103rd Session of the International Labour Conference, Indigenous and Tribal Peoples Convention, 1989 (No 169), *Mexico* (emphasis in the original).

Labour, composed of representatives of public institutions, cooperatives, employers, trade unions, non-governmental organizations and organizations of indigenous communities from the area. In its comments made in August 2012, the CUT–A reports the testimony of indigenous women and young persons who were relocated from their communities to the municipality of Mariscal Estigarribia and once again denounces the working conditions of women domestic workers and temporary and informal workers, as well as the exploitation of child labour in the department of Boquerón. *The Committee invites the Government to continue providing information on the activities of the Regional Labour Directorate of Chaco and the support received by the representatives of indigenous organizations to ensure the application of the provisions of the Convention on recruitment and conditions of employment, the solutions adopted and the penalties imposed. Considering the new comments made by the CUT–A, the Committee requests the Government to add information on the results of the measures taken by the Government for the elimination of forced labour and discriminatory treatment against indigenous peoples, especially in Mennonite ranches and communities. The Committee also refers to its comments on the application of the fundamental Conventions relating to the abolition of forced labour and the elimination of child labour.*[27]

This is a small sampling of such comments by the ILO's supervisory bodies. Those who seek information on the situation of Indigenous and tribal peoples in particular countries can find information on the application of the Convention on the ILO website.

3.6 ILO Standards of General Application

There are also many ILO Conventions that are applicable to Indigenous and tribal peoples, in addition to those aimed directly at their situation, and that develop in more detail the rights enunciated in Article 17 of the UNDRIP.

Indigenous workers enjoy protection under the broader body of international labour standards. In particular, the ILO's eight fundamental human rights Conventions address the issues of forced labour, discrimination, child labour, and freedom of association, to which Indigenous workers are particularly vulnerable. These are the Conventions by which the principles enunciated in the ILO's 1998 Declaration, quoted above, are applied. The fundamental ILO Conventions on human rights are as follows:

- Equal Remuneration Convention(ILO No 100) (1953);
- Convention concerning Discrimination in Respect of Employment and Occupation (ILO No 111) (1960);
- Convention concerning Minimum Age for Admission to Employment (ILO No 138) (1976);
- Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, (ILO No 182) (2000);
- Convention concerning forced or Compulsory Labour (ILO No 29)1932);
- Convention Concerning the Abolition of Forced Labour (ILO No 105) (1957);
- Convention concerning Freedom of Association and Protection of the Right to Organize (ILO No 87) (1950); and
- Convention concerning the Application of the Principles of the Right to Organize and Bargain Collectively (ILO No 98) (1951).

These Conventions have been ratified by between 154 and 181 countries by late 2017. Comments by ILO supervisory bodies often refer to labour rights of Indigenous and

[27] Observation by the ILO Committee of Experts, adopted 2012, published 2013, 102nd Session of the International Labour Conference, Indigenous and Tribal Peoples Convention, 1989 (No 169), *Paraguay* (emphasis in the original).

tribal peoples under these Conventions of more general application, even when the ILO Conventions relating specifically to these peoples have not been ratified. See, for instance, the following extract from an observation under ILO Convention 111:

Discrimination based on race or ethnic origin. The Committee notes that the Government's report does not reply to the Committee's previous comments regarding the socio-economic situation of the Batwa, and discrimination faced by the Batwa in employment and occupation ... *The Committee urges the Government once again to take measures with a view to ensuring equality of opportunity and treatment of the Bambuti, Batwa and Bacwa in employment and occupation, and to indicate the steps taken in this regard. The Government is also requested to indicate the measures taken to ensure that these indigenous groups enjoy their right to engage in their traditional occupations and livelihoods without discrimination.*[28]

Apart from these fundamental human rights Conventions, there are a number of others of particular relevance to Indigenous workers, and that correspond broadly to Article 17 of the UNDRIP and to the protections indicated in the ICESCR. These Conventions apply certain aspects of Article 17, as well as of ILO Convention 169, and when ratified form binding obligations on the States concerned that can be invoked for the protection of the Indigenous peoples in those countries. The following can be of particular relevance to the working situation of Indigenous peoples, although there are many others that could also be useful in protecting the rights enumerated in the UNDRIP:[29]

- Convention concerning the Protection of Wages, (ILO No 95) (1952);
- Convention concerning Labour Inspection in Industry and Commerce (ILO No 81) (1950) (and its Protocol of 1995 to the Labour Inspection Convention, 1947(ILO P 81) (1998) adopted in 1995;
- Convention concerning Labour Inspection in Agriculture, (ILO No 129) (1972);
- Convention concerning Occupational Safety and Health and the Working Environment (ILO No 155) (1983);
- Convention concerning Minimum Standards of Social Security(ILO No 102) (1955);
- Convention concerning Migration for Employment Convention (Revised)(ILO No 97) (1952); and
- Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO No 143) (1978).

In examining the situation of a particular country relating to Indigenous peoples' rights at work, it will therefore be a good idea to check first whether these and other ILO Conventions have been ratified. It is worth noting that, unlike most international Conventions, ILO Conventions may not be ratified subject to reservations.

Article 17(2)

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's

[28] Observation by the ILO Committee of Experts, adopted 2012, published 2013, 102nd Session of the International Labour Conference, Discrimination (Employment and Occupation) Convention, 1958 (No 111), *Democratic Republic of the Congo* (emphasis in the original).

[29] The ILO has published a compilation of the references by the ILO's supervisory bodies to a number of Conventions' applicability to Indigenous and tribal peoples. Although it covers only a two-year period, it contains a useful reference to the wide number of ILO Conventions under which such references are made. See 'Monitoring Indigenous and Tribal Peoples' Rights through ILO Conventions—A Compilation of ILO Supervisory Bodies' Comments 2009–2010' (ILO 2010), <http://www.ilo.org/indigenous/Resources/Publications/WCMS_126028/lang--en/index.htm> accessed 26 January 2013.

> health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

A specific reference to the protection of children was not included in the early drafts of the Declaration, and was introduced after the adoption of the ILO's Worst Forms of Child Labour Convention (No 182) in 1999. It also reflects concepts from the UN Convention on the Rights of the Child (CRC) that had been adopted in 1989.

The CRC is the only one of the major international human rights instruments to refer directly to Indigenous peoples, in Articles 29(1)(d) on education and 30 on culture, religion, and language. The Convention does refer to economic exploitation of children, although without any particular reference to Indigenous children, in the Article concerned with economic exploitation, recognizing in Article 32 'the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'. This language from Article 32 is directly taken over in Article 17(2) of the Declaration.

In drafting this Article of the CRC, the Commission on Human Rights relied heavily on the considerable body of standard-setting on child labour by the ILO.[30]

Under ILO Convention 138, a minimum age should be set for admission to employment or work, which should be no lower than 15, or 14 in developing countries. Light work that does not interfere with health or schooling may be done from the age of 13 (12 in developing countries); and dangerous work should not be allowed until the child has reached 18 years of age except in very limited circumstances. The ILO's Worst Forms of Child Labour Convention, 1989 (No 182) takes the approach that some forms of child labour are completely unacceptable even in countries that are unable to adopt immediately a general prohibition of child labour, and requires immediate action to eliminate them. These are defined in Article 3 of that Convention as:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Some of these are, of course, kinds of child labour to which Indigenous children are particularly vulnerable. Slavery, debt bondage, trafficking, and forced labour are well-documented evils practised upon Indigenous peoples, including children.[31] There are also many incidents of Indigenous children being kidnapped into participating in armed conflicts,

[30] This is developed in detail in L Swepston, *A Commentary on the United Nations Convention on the Rights of the Child. Article 32: Protection from Economic Exploitation* (Martinus Nijhoff 2012).

[31] The ILO Committee of Experts often refers to such situations under the relevant Conventions. As examples, see observations under the Worst Forms of Child Labour Convention (No 182) concerning Indigenous children, to Honduras and Mexico in 2012, to Bolivia, Colombia, Honduras, and Mexico in 2011, to Philippines in 2010, and a number of others. Similar comments are made under the Minimum Age Convention, 1973 (No 138), for instance to Guatemala and Panama in 2011, and Colombia, Panama, and Venezuela in 2010. The texts of these comments and others are available on the ILO website.

usually by non-governmental armed forces. The involvement of Indigenous children in prostitution and other sex work, and in illicit activities such as drug trafficking, is also a persistent danger. Sub-paragraph (d) quoted above probably covers the greatest exposure of Indigenous children to these worst forms of child labour, as they take part in economic activity that endangers their health, safety, and morals—for instance, participating in underground mining, or being exposed to the dangers involved in being domestic workers. The Convention requires ratifying States—which includes almost all ILO members—to make an active determination of what kind of work in the country is covered by paragraph (d), which could give Indigenous advocates an opportunity to highlight particular situations facing Indigenous peoples in those countries. Since international labour law is applicable to Indigenous peoples in function of Article 17(1) of the UNDRIP, when measures are taken to apply the UNDRIP, governments should refer directly to the requirements of ILO Conventions 138 and 182 and adapt them to the special needs of Indigenous children.

The ILO's International Programme on the Elimination of Child Labour and the Programme for the Promotion of Convention 169 have taken special cognizance of the problem of child labour among Indigenous children, and in 2008 the ILO issued a 'Handbook on Combating Child Labour among Indigenous and Tribal Peoples'.[32]

Article 17(3)

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Whereas paragraphs (1) and (2) of Article 17 of the UNDRIP lay down specific standards of attainment, this paragraph seeks to ensure more generally that Indigenous individuals are not discriminated against in the national workforce. This paragraph corresponds to the basic premise of Article 11 of Convention 107 and Article 20 of Convention 169.

A guarantee of equal treatment is in many ways the central precept of international human rights law. Indigenous peoples, like everyone else, are to be protected against discrimination in every aspect of their lives in accordance with the Universal Declaration of Human Rights and the rest of the human rights canon. Articles 23 and 24 of the UDHR explicitly protect the labour rights of 'everyone'; and a direct reference to non-discrimination is found in Article 23(2) of the UDHR as: 'Everyone, without any discrimination, has the right to equal pay for equal work.' All the instruments in the Bill of Human Rights are based on the principle of equal opportunity and treatment. Treatment of these situations by the CERD has already been cited above.

This provision takes account of the fact that Indigenous peoples, both as a group and individuals among them, are in fact often the subject of discrimination with regard to work. Indicators of Indigenous well-being show that Indigenous peoples are at the bottom of virtually every social indicator in every country in which they live, including with regard to labour rights.[33]

This provision is not particularly well drafted and leaves its terms open to some ambiguity. The term 'discriminatory conditions of labour' can be taken to refer to less favourable

[32] Available on the ILO website.

[33] See generally the discussion of indicators specific to Indigenous peoples on the website of the UN Permanent Forum on Indigenous Issues, <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/data-and-indicators.html> accessed 7 November 2017. See also L Swepston, 'Discrimination, Indigenous and Tribal Peoples, and Social Indicators' (2011) 18 Int'l J Minority & Group Rights 419–31.

conditions of work for Indigenous people in respect, for instance, of the situations to which reference is made in Article 20, paragraphs 3 and 4 of ILO Convention 169. This spells out in more detail the central ideas contained in Articles 6 to 9 of the ICESCR, outlined above. The term 'conditions of labour' appears to refer to all forms of work, whether or not under a contract of employment, and even without regard to the adequacy of national labour legislation. It will be noted that in the process of drafting, this paragraph was separated from paragraph 1, which accords to Indigenous peoples 'all rights established under applicable international and domestic labour law', and Article 17(3) may therefore be considered to be a more general statement of rights not limited by ratified international standards and domestic law.

The last phrase of this paragraph refers to 'inter alia, employment or salary'. The term 'inter alia' makes it clear that the coverage of this Article is not limited to work under a contract of employment. With regard to 'salary', the ILO suggested at one point[34] that this term be changed to 'remuneration' as including all forms of payment for work and not only that under a contract of employment; but this advice was not taken, and the specialized agencies were not asked to submit further comments on the draft. This does not necessarily mean that the drafters intended any restriction of remuneration, in part because of the term 'inter alia' which precedes it, and in part because of the absence of labour law specialists among those drafting this Article. In any case, the invocation of international labour law means that the broader application of that aspect of international law includes the more general concepts included in international labour law.

3.6.1 Regional Application

It should be noted also that in the American region in particular, there are mechanisms that protect the rights of Indigenous peoples with regard to work, although they will not be explored *in extenso* here. For instance, in 2009, the Inter-American Commission on Human Rights issued a publication on 'Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources',[35] in which it explored the effect that loss of these lands and resources can have on the labour rights of these peoples. The following extract from that report refers to an individual case the Inter-American Court of Human Rights (abbreviated here to IACHR) had earlier considered:

> The IACHR has also proven that the occupation and restriction of indigenous territories, insofar as they prevent indigenous and tribal peoples from access to their traditional subsistence activities, expose their members to situations of work exploitation (marked by bad working conditions, low salaries and lack of social security), and even to practices such as forced labor or servitude for debts, analogous to slavery.
>
> In its 2009 report on 'Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco', the IACHR verified the direct causal link that exists between the territorial dispossession and forced labor of the members of the Guaraní indigenous communities of the Bolivian Chaco. In such report, the IACHR 'finds the

[34] UN Doc E/CN.4/1995/119 (6 February 1995) para 2.

[35] Inter-American Commission, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II, Doc 56/09 (30 December 2009). In this section, the footnotes refer to several earlier cases of the Court, in particular IACHR, Third Report on the Situation of Human Rights in Paraguay, Doc OEA/Ser./L/VII.110, Doc 52 (9 March 2001) Ch IX, paras 35, 37, 40; IACHR, Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia, Doc OEA/Ser.L/V/II, Doc 34 (28 June 2007) paras 257–68, 297, Recommendation 8.

existence of debt bondage and forced labor, which are practices that constitute contemporary forms of slavery. Guaraní families and communities clearly are subjected to a labor regime in which they do not have the right to define the conditions of employment, such as the working hours and wages; they work excessive hours for meager pay, in violation of the domestic labor laws; and they live under the threat of violence, which also leads to a situation of fear and absolute dependency on the employer. The Commission highlights the importance of the fact that these are individuals, families, and communities who belong to an indigenous people, who find themselves in those deplorable conditions due to the involuntary loss of their ancestral lands, as a result of actions and policies taken by the State over more than a century, and who at present find it impossible to enjoy their fundamental rights, as an indigenous people, to collective communal property, access to justice, a dignified life, and the development of their own self-government and their own social, cultural, and political institutions.' Therefore it concluded that '[t]he problem of bondage and forced labor in the Bolivian Chaco has its origins in the dispossession of their territory suffered by the Guaraní indigenous people over more than a century, which resulted in the subjugation of its members to conditions of slavery, bondage, and forced labor. The solution to this problem lies not only in the elimination of contemporary forms of slavery on the estates of the Chaco, but also in measures of reparation including the restitution of the ancestral territory of the Guaraní people and integral measures that solve their needs in health, housing, education, and technical training that would arise after the "emancipation" of the Guaraní captive communities.'[36]

These references confirm the approach taken by the United Nations in including Article 17 in the UNDRIP, emphasizing that labour rights are among the important human rights protected in the Declaration. This treatment by the Inter-American Court goes even further, in affirming the close link between the human rights of Indigenous peoples related to their conditions of life and work, and their right to retention of their ancestral lands and resources—in other words, the fact that rights cannot be considered in isolation, but form an integrated whole.

4. Concluding Remarks

This analysis of Article 17 of the UNDRIP shows that it was intended to guarantee to Indigenous peoples and individuals fair and equal treatment under labour law at both the international and domestic levels. There is an underlying acknowledgement that this is in fact seldom the case, and that Indigenous peoples suffer from exclusion, discrimination, and unequal treatment in every aspect of their income-generating activities compared with the rest of the population, in virtually every country. This is not always the result of direct discrimination, to be fair. Virtually every country has laws and procedures intended to provide equal opportunity and treatment regardless of race or ethnicity; and all these countries acknowledge also that this is more an aspiration than a guarantee. The lack of equal opportunity and treatment is not always based in the labour arena, even if it is manifested there. When Indigenous peoples have fewer opportunities of vocational training and general education, when they live in regions to which the State does not extend its labour inspection and effective law enforcement, and when the traditional economic activities of Indigenous people are not given full recognition as falling within

[36] IACHR, Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco, Doc OEA/Ser.L/V/II, Doc 58 (24 December 2009) para 216.

the protection of domestic labour law, these exclusions lead inexorably to a lack of equal treatment in the field of labour as well.

The lack of detail in this Article of the UNDRIP should not be understood to limit its application. On the contrary, as was clear from the drafting process, it opens up the protection afforded under the wider standards adopted by the United Nations and by the ILO, among others, to Indigenous and tribal peoples as they endeavour to support themselves and their families. The UNDRIP provides a standard of aspiration which must in all cases be pinned to 'harder' forms of law, domestically and internationally.

As stated by the former UN Special Rapporteur on the rights of Indigenous peoples, S. James Anaya, in his 2012 report on 'The Situation of Indigenous Peoples in the United States of America':

> By its very nature, the Declaration on the Rights of Indigenous Peoples is not legally binding, but it is nonetheless an extension of the commitment assumed by United Nations Member States—including the United States—to promote and respect human rights under the United Nations Charter, customary international law, and multilateral human rights treaties to which the United States is a Party, including the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination.[37]

Even if the UNDRIP is not a law-making instrument, especially in an area such as international labour law which is so extensively regulated, it does fulfil another function. It emerges from the analysis above that Article 17 does not create new international human rights law—instead, it reaches into existing human rights law on labour matters and incorporates those concepts in the broad and comprehensive treatment of Indigenous rights covered by the UNDRIP. It draws attention to the need to apply generally applicable international labour law, as well as domestic labour law, to these peoples who so often are neglected in its application. The UNDRIP has drawn attention to the need to review the ways in which States deal with the situation of these peoples, and by its nature as an instrument of advocacy it should provide the occasion for a general and regular review at the national level of the treatment of Indigenous peoples. Including labour law in national reviews is likely to provide one of the best instruments for increasing equal treatment and the extension of the rule of law to Indigenous peoples within the nations in which they live.

One of the weaknesses in the supervision of international human rights law is the relative insularity of international supervisory bodies, and of those responsible for national reporting to them. Governments are normally represented in the Human Rights Council and in UN Treaty Bodies by ministries of foreign affairs, and experience indicates that the 'line ministries' responsible for such questions as labour, health, and cultural affairs are very rarely included in national representation. By the same token, in the ILO it is ministries of labour that normally speak for each country without the involvement of other ministries. There are exceptions, of course, but this lack of coordination is severely felt when drawing up and defending national reports to international bodies.

The contribution of the UNDRIP to a more coordinated vision is thus particularly significant. By including a wide range of issues, and in particular labour questions, in the general review of the way in which Indigenous peoples are treated, national reviews are that much more likely to take into account all the aspects of law and policy necessary to

[37] UN Doc A/HRC/21/47/Add.1 (30 August 2012).

provide comprehensive protection to Indigenous peoples. International labour law is a vitally important part of human rights law, but the ability of the ILO to reach into parts of national governments other than ministries of labour is more limited than the broad and general coverage afforded by the adoption and implementation of the UNDRIP. In the end, these instruments express a broadly compatible view of international human rights law that should be seen as an integrated whole.

Chapter 17. Indigenous Rights to Development, Socio-Economic Rights, and Rights for Groups with Vulnerabilities

Articles 20–22, 24, and 44

Camilo Pérez-Bustillo and Jessie Hohmann

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

1. Introduction

This chapter is focused on the challenges and implications of Articles 20(1), 21, 22, 24, and 44 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, or the Declaration). These provisions are centred on: the economic, social, and cultural (ESC)

rights of Indigenous peoples (with a particular focus on the right to health); their right to development; and the rights of those Indigenous individuals and groups who are particularly vulnerable, including women and children, and again with a particular focus on women's rights to be free from violence. The provisions highlight the evolving place of Indigenous rights within the overall framework of international law and international human rights.

The chapter begins, in Section 1.1, by providing a short summary of the content of the principles. Section 1.2 identifies the relevance and importance of the Articles, drawing attention to the legal and policy framework within which their legal and broader political meaning must be understood. This context includes the long-standing issues of poverty and marginalization that remain entrenched in many Indigenous communities, and the emerging architecture of international poverty law that is recently developing through more robust understandings of the intersections between economic, social, and cultural rights, the right to development, and the rights of specific vulnerable groups. This architecture includes relevant provisions of the Sustainable Development Goals[1] (SDGs; previously known as the Millennium Development Goals, or MDGs[2]) which were adopted by the UN General Assembly in September 2015. Section 2 then analyses the pre-existing legal standards on economic, social, and cultural rights, the right to development, and rights for vulnerable groups. We then turn, in Section 3, to the drafting history of the UNDRIP provisions discussed here, in order to illuminate better the meaning of the final provisions. Section 4 returns to the final text of the provisions and, proceeding issue by issue, outlines their position within, or contribution to, the legal landscape on Indigenous and human rights. Finally, Section 5 concludes the chapter's analysis.

1.1 The Provisions in Context

Several main strands and standards can be drawn from the provisions above. These include, first, the right to development of Indigenous peoples. This is explicitly included in Article 20 and also implicitly in Article 21's 'improvement' of economic and social standards. The second main strand is the socio-economic rights of Indigenous individuals and peoples, including in particular health, but also rights to education and housing, training, and social security. The third main strand is that of the protection of individuals and groups who are of particular vulnerability: elders and the elderly, women, children and youth, and those with disabilities.

Article 20 begins by articulating Indigenous peoples' right 'to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities'. This Article frames issues related to economic, social, and cultural rights within an underlying framework of Indigenous rights to self-determination and autonomy, as the context from which everything else flows, and within which Article 20's approach to ESC rights is embedded. This is underlined, for example, by Article 20's emphasis on a right to be 'secure in the enjoyment of their own means of subsistence and development'.

Ongoing, often divisive and polarizing debates as to the meaning and implications of 'development' during the process which led to the Declaration's adoption explain in part

[1] UNGA, Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/Res/70/1 (21 October 2015).

[2] UNGA, United Nations Millennium Declaration, A/Res/55/2 (18 September 2000).

why this concept is in fact never defined explicitly in the text.[3] For that reason, Articles 21 to 24, with their emphasis on Indigenous-driven improvement of social and economic conditions and control over the processes of their development, stand in for an explicit, overall right to development. The UNDRIP's approach thus implicitly grounds the right to development of Indigenous peoples within the context of the exercise of Indigenous peoples' rights to self-determination and autonomy. This is reinforced in Articles 3 and 4 of the Declaration, and further reflected in other key Articles with a related emphasis, such as Articles 18, 31, 32, and 34, and corollary concerns as to processes of development in Articles 39 and 41. As a central, guiding thread of 'fundamental importance', it is also given prominence in the Preamble.[4]

This overall emphasis in the Preamble and in the Declaration as a whole on self-determination, as reflected in Articles 3, 4, 5, and 23, must also shape our understanding of its provisions relating to the impact of development policies and practices on Indigenous peoples. Article 3 clearly suggests that Indigenous peoples' exercise of their rights to self-determination lays the basis for, or is a precondition necessary in order to ensure, their free pursuit of economic, social, and cultural development. Articles 4 and 5 further underline this approach with their emphasis on Indigenous peoples' rights to 'autonomy or self-government in matters relating to their local or internal affairs' (Article 4) and to 'maintain and strengthen their distinct political, legal, economic, social and cultural institutions' (Article 5).

All of this is explicitly echoed in Article 20's introductory sentence: 'Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions', which, as drafted, serves as a predicate or prerequisite for its second clause: 'to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities'. Article 23 of the Declaration reinforces this interpretation: 'Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development.' Articles 20 and 23 together suggest that the exercise of Indigenous peoples' rights to self-determination through autonomous systems of self-governance is a necessary basis for, or at minimum intimately related to, their capacity to enjoy the benefits of their rights to subsistence and development and to engage in their traditional and other economic activities.

Article 21(1) situates Article 20's emphasis on economic, social, and cultural issues, specified in Article 21 in terms of a right to the 'improvement' of conditions and rights related to 'education, employment, vocational training and retraining, housing, sanitation, health and social security', within the overall framework of the right of Indigenous peoples to non-discrimination.[5] Article 21(2) focuses on State duties, in terms of obligations to take 'effective measures' 'and, where appropriate, *special measures* to ensure continued improvement'.[6] This is the only Article in which special measures are explicitly included in the UNDRIP.[7] Article 21 also stresses that States should undertake such measures with '[p]articular attention ... to the rights and special needs of indigenous elders, women,

[3] See Section 3 below.

[4] UNDRIP Preamble, para 16.

[5] This echoes UNDRIP Art 2's emphasis on this entitlement, which is also referenced explicitly in Arts 8, 9, 13–17, 24.

[6] Emphasis added.

[7] Special measures are also addressed further by Kirsty Gover in Chapter 7, this volume.

youth, children and persons with disabilities'. Gender equality is specifically the emphasis of Article 44.

Article 24's approach to issues involving Indigenous peoples and health rights embeds in Article 20 deeper notions as to self-determination and autonomy. Just as Article 20 insists on a relationship between violations of economic and social rights related to 'subsistence and development' and violations of rights to autonomy, Article 24(1) begins with an overall statement of Indigenous peoples' rights to traditional medicines and traditional health practices, 'including the conservation of their vital medicinal plants, animals and minerals', and then of rights of access 'without any discrimination, to all social and health services'. Article 24(2) then situates the right to health within the overall context framed by Article 24(1), with its two interrelated components: the right to traditional practices; and the right to all social and health services without discrimination. This construction strongly suggests that the UNDRIP's approach to health rights (and economic and social rights more generally) is that the best way to guarantee them is within the framework of Indigenous systems of self-governance and autonomy which respect internationally recognized human rights standards.

It is this broader context within which the provisions analysed in this chapter must be read.

1.2 Relevance and Importance of the Issue Area

The provisions discussed here raise issues of the relationship between Indigenous rights and recent advances as to the recognition of poverty as a violation of human rights, and must also be understood in the context of how issues of poverty and development have been approached by specialized bodies within the UN system, including international development organizations, and in settings such as the Inter-American Court of Human Rights (IACtHR), developments discussed in the next section. Developments as to the recognition and understanding of Indigenous rights in the Americas are of particular interest because of the large numbers and high concentration of Indigenous peoples in that region (particularly in Latin America), and the recent adoption in June 2016 of the OAS American Declaration on the Rights of Indigenous Peoples,[8] which draws heavily on the UNDRIP and on the IACtHR's case law.

These developments are especially relevant to the context of Indigenous peoples because of the very high incidence of poverty experienced by Indigenous peoples worldwide, including the most extreme forms of poverty, and because, accordingly, ESC rights are central to the UNDRIP.

The concentration and persistence of poverty and inequality of Indigenous peoples on a global scale has been extensively documented.[9] Troublingly, studies reveal 'little to no improvement in poverty rates over time'.[10] The World Bank's overall conclusion from its many reports[11] is that 10 per cent of the world's poor are Indigenous, although

[8] OAS American Declaration on the Rights of Indigenous Peoples, OEA/Ser.P.AG/doc.5537/16 (8 June 2016).

[9] World Bank, 'Still among the Poorest of the Poor: Indigenous Peoples Country Brief', World Bank Policy Brief 64760 (World Bank 2011); and GH Hall and HA Patrinos (eds), 'Indigenous Peoples, Poverty, and Development: A Seven-Country Study of Indigenous Peoples' (World Bank 2011).

[10] GH Hall and HA Patrinos, 'Introduction' in Hall and Patrinos (eds), *Indigenous Peoples, Poverty and Development* (Cambridge University Press 2012) 1.

[11] Collected at <http://www.worldbank.org/en/topic/indigenouspeoples/research/all> accessed 24 October 2017.

Indigenous peoples account for only 4 per cent of the total world population, that they remain among the poorest of the poor, and that they are the most resistant to moves out of poverty.[12]

Indigenous peoples suffer from significantly lower life expectancies, have lower educational attainment, and experience high rates of criminalization.[13] Evidence of social harm and dysfunction can be found in the high levels of substance abuse and domestic violence experienced in Indigenous communities.[14] The UN Permanent Forum on Indigenous Issues (UNPFII) has noted that:

> Indigenous peoples face systemic discrimination and exclusion from political and economic power; they continue to be over-represented among the poorest, the illiterate, the destitute; they are displaced by wars and environmental disasters ... indigenous peoples are dispossessed of their ancestral lands and deprived of their resources for survival, both physical and cultural; they are even robbed of their very right to life.[15]

The Indigenous peoples of the world continue to be exposed to a high level of preventable deaths—due to hunger and illness, for example—attributable to poverty, as the result of the structural injustices in the global international order.[16] These findings clearly heighten the importance of the provisions in Articles 20, 21, and 24 of the UNDRIP regarding the economic, social, and cultural rights of Indigenous peoples in the context of persistent conditions of poverty and inequality.

There is heartening evidence, however, from States which have undertaken sweeping constitutional and legislative reforms in favour of Indigenous peoples—such as Bolivia and Ecuador. Since 2009, 'special measures' taken in these States have seen significant overall declines in long-standing and ingrained poverty rates.[17] Such examples reinforce the crucial nature of the UNDRIP provisions discussed in this chapter, and their potential as real drivers of change for Indigenous individuals and peoples.

Article 43 of the Declaration explicitly affirms that the rights recognized in the UNDRIP reflect 'minimum standards' related to the 'survival, dignity and well-being' of the Indigenous peoples of the world. This conceptualization of the Declaration as establishing a set of minimums, which is crucial, is discussed further below. But the decision to include words such as 'survival, dignity and well-being' has additional importance for two reasons. First, in effect, Article 43 defines these as three overall imperatives of the Declaration, which should shape the landscape within which its more specific requirements must be understood.[18] Second, Articles 43, 21, and 22 must also be assessed at the level of their implementation in terms of their efficacy as measures for the prevention of genocide, given the catastrophic histories of many Indigenous peoples

[12] World Bank (n 9). See also GH Hall and HA Patrinos (eds), *Indigenous Peoples, Poverty and Human Development in Latin America* (Palgrave Macmillan 2006).

[13] International Law Association, The Hague Conference, 'Rights of Indigenous Peoples' Interim Report (2010) 28.

[14] ibid.

[15] UN Department of Economic and Social Affairs, Secretariat of the Permanent Forum on Indigenous Issues, 'The State of the World's Indigenous Peoples' (United Nations 2009) 1.

[16] See TW Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press 2002).

[17] See C Pérez-Bustillo, 'UNDRIP and Substantive Aspects of the "Right to Development" and the "Right to a Dignified Life" in the Context of Indigenous Peoples: Hegemonic and Counter-Hegemonic Dimensions' (2014) 1 QMHRR 42, 58–59.

[18] See Hohmann, Chapter 6 in this volume.

and the infinite variety of calculated destructive policies that have been wielded against them.[19]

All three of Article 43's concepts of survival, dignity, and well-being also reflect recurrent themes among social movements, advocates, and scholars who specialize in issues related to poverty. The concepts underlie the relationship between poverty, inequality, and human rights in general, and broader issues as to the right to development and the pursuit of global justice, and the concept of development ethics.[20] They thus implicate some of the deepest and most difficult issues in international law and policy.

1.3 An Emerging Architecture of International Poverty Law

The provisions addressed here on the right to development, particular vulnerabilities of Indigenous peoples including women, children, and the elderly, and the economic and social rights of Indigenous peoples, should be understood in reference to an emerging international architecture of poverty law.

The UNDRIP's approach to ESC rights in the context of Indigenous peoples should thus also be understood in relation to broader efforts within the UN system to rectify the historic imbalance between the recognition, monitoring, and enforcement of civil and political rights on the one hand and of ESC rights on the other. This includes the recent entry into force of the Optional Protocol to receive and consider individual and group communications alleging violations of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[21] the adoption of the UN Guiding Principles on Extreme Poverty and Human Rights,[22] and that of the SDGs in 2015.[23]

Indigenous peoples are specifically mentioned in the SDGs, referring respectively to issues related to hunger and health,[24] and also fall squarely within the SDGs' reiterated references to groups which have heightened vulnerabilities or which are in 'vulnerable situations'.[25] There is also an analogous reference to 'marginalized communities'.[26] Further examples include the SDGs' recognition of a need to protect forms of 'traditional knowledge'[27] and the need to 'empower and promote the social, economic, and political inclusion of all' (irrespective of race, ethnicity, etc.).[28] Section 4.7, within the context of issues related to health rights, specifically refers to the need to apply a human rights

[19] ibid.

[20] See, eg, W van Genugten and C Pérez-Bustillo, 'The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional and National Dimensions' (2004) 11 Int'l J Minority & Group Rights 379; A Sen, *Development as Freedom* (Oxford University Press 1999); Pogge (n 16); A Follesdal and TW Pogge (eds), *Real World Justice: Grounds, Principles, Human Rights and Social Institutions* (Springer 2006); V Gauri and D Brinks (eds), *Courting Social Justice* (Cambridge University Press 2007); ME Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Cambridge University Press 2007).

[21] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered in force 5 May 2013); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 999 UNTS 3.

[22] OHCHR, Guiding Principles on Extreme Poverty and Human Rights, Resolution Adopted by the Human Rights Council, UN Doc A/HRC/RES/21/11 (18 October 2012).

[23] See n 1. [24] ibid ss 2.3 and 4.5 respectively. [25] ibid, eg, ss 1.4, 1.5, 2.1, 6.2.

[26] ibid s 13b (within the context of issues related to the mitigation of the impacts of climate change).

[27] ibid s 2.5 (within the context of issues as to the protection of the genetic diversity of seeds, plants, and fauna).

[28] ibid s 10.2.

framework to the interpretation and implementation of the SDGs. Human rights issues are also alluded to more generally in SDG Goal 16's references to the promotion of the rule of law and of principles of non-discrimination.

The Guiding Principles on Extreme Poverty and Human Rights, meanwhile, 'are premised on the understanding that eradicating extreme poverty is *not only a moral duty but also a legal obligation* under existing international human rights law',[29] and grounded in recognition of the fundamental right to 'live in freedom and dignity, free from poverty and despair'.[30]

The Guiding Principles emphasize the importance of fostering the rights of participation of the poor in a manner that is parallel to and convergent with the emphasis in the UNDRIP on the self-determination and autonomy of Indigenous peoples, as noted in the UN General Assembly Resolution on Extreme Poverty and Human Rights adopted in December 2012, which stresses the need for participation by the poorest in the decision-making processes in the countries in which they live, with particular emphasis on the planning and implementation of those polices that will affect them, so as to enable them 'to become genuine partners in development'.[31]

The UN Office of the High Commissioner for Human Rights (OHCHR) has stressed the relationship between the Guiding Principles on Extreme Poverty and Human Rights, and fundamental notions of human dignity, equality, and non-discrimination which also converge with the UNDRIP, in its interpretation of the Guiding Principles.[32]

The UN Guiding Principles on Extreme Poverty and Human Rights are not the only relevant statements from UN bodies on poverty and human rights. As the UN Committee on Economic, Social and Cultural Rights (CESCR) noted in May 2001:

> The rights to work, an adequate standard of living, housing, food, health and education, which lie at the heart of the Covenant, have a direct and immediate bearing upon the eradication of poverty ... In the light of experience gained over many years, including the examination of numerous States parties' reports, the Committee holds the firm view that poverty constitutes a denial of human rights.[33]

From this perspective, the emphasis on ESC rights overall in the UNDRIP, as to the improvement of economic and social conditions of Indigenous peoples in the Articles discussed in this chapter, situates the UNDRIP within the broader emerging framework of international poverty law, along with the May 2001 CESCR Statement, the ICESCR Optional Protocol, the UN Guiding Principles on Extreme Poverty and Human Rights, and the SDGs.

[29] OHCHR, Report on the Guiding Principles on Extreme Poverty and Human Rights, 2 (emphasis added), <http://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf> accessed 24 October 2017.

[30] UN World Summit Outcome 2005, Resolution adopted by the GA, UN Doc A/Res/60/1 (24 October 2005) para 143.

[31] Resolution Adopted by the GA on 20 December 2012, Human Rights and Extreme Poverty, UN Doc A/Res 67/164 (13 March 2013) para 2.

[32] OHCHR Report (n 29).

[33] UNCESCR, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights: Statement Adopted by the Committee on Economic, Social and Cultural Rights on 3 May 2001, UN Doc E/C.12/2001/10 (10 May 2001) para 1.

1.4 Pre-Existing Standards on the Right to Development, Economic, Social, and Cultural Rights, and the Rights of Specific Vulnerable Groups

1.4.1 Right to Development

1.4.1.1 Development in International Law: Underlying Principles and Development Policy Framework

The UNDRIP was drafted, debated, and ultimately approved within a historical context shaped by the centrality of universal aspirations for economic and social development which have been key objectives of the UN system since its origins. Yet, at the same time, 'the history of planned development is replete with the imposition of projects resulting in the destruction or loss of indigenous peoples' lands and resources, as well as their political, economic, and sociocultural systems'.[34] This points to the multiple meanings of development in international law, all of which impact on the understanding of the right to development in the UNDRIP. Different bodies of law and policy in this area are of relevance for understanding the UNDRIP provisions discussed in this chapter. These include development as a principle of international law as expressed in the UN Charter; the right to development as a human right given content in international law; and the development policies and practices of major agencies such as the World Bank and the UN Development Programme (UNDP).

The UN Charter contains references in its Preamble to the promotion of 'social progress and better standards of life',[35] and Articles related to or which explicitly highlight the concept of development. These include UN Charter Article 1(3)'s purpose '[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character', Article 55's 'the United Nations shall promote: higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems', and Article 56's 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55 of the Charter'.

Both the Preamble and Article 55 of the UN Charter emphasize the interrelated character within the United Nations' overall mission of promoting social progress, better standards of life, and development within the framework of a commitment to human rights and fundamental freedoms, without discrimination. Key expressions of this foundational, intertwined approach to issues of development and human rights are reflected in turn in the Preamble and Articles 22 to 28 of the Universal Declaration of Human Rights (UDHR).[36] Article 28 of the UDHR situates this framework within the context of the international system as such: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'[37]

[34] K Masaki, 'Recognition or Misrecognition? Pitfalls of Indigenous Peoples' Free, Prior, and Informed Consent (FPIC)' in S Hickey and D Mitlin (eds), *Rights-Based Approaches to Development: Exploring the Potential and Pitfalls* (Kumarian Press 2009) 70.

[35] UN Charter, signed 26 June 1945, San Francisco, entered into force 24 October 1945, Preamble.

[36] Universal Declaration of Human Rights, Proclaimed by the UNGA 10 December 1948, Paris, GA Res 217/A.

[37] ibid Art 28.

The focus on development in the UN Charter is important, as is Article 28 of the UDHR, as it points to the fact that development is not only the duty of individual States, but an obligation on the international community as a whole. This duty thus extends to action by—and coordination among—all States, the International Labor Organization (ILO), the UNDP, UN human rights monitoring bodies, the International Monetary Fund (IMF), the World Bank, and relevant regional agencies such as the Organization of American States (OAS).

The references to development in the UN Charter, and even in Article 28 of the UDHR, are not necessarily to a *right* to development, either for individual persons or for peoples. As underlying imperatives or policy commitments, rights and development have crucial differences in their aims, their methods, and their underlying values.[38] Nevertheless, a *right* to development has been advanced in international law, which in turn provides one of the key conceptual foundations for the SDGs, discussed above.

1.4.1.2 The Right to Development as a Human and Peoples' Right

A right to development as a human right finds its genesis in Human Rights Commission Resolution 5 (XXXV) of 1979.[39] Subsequently, General Assembly Resolution 36/133 of December 1981 phrased development as an 'inalienable human right'.[40] These resolutions were explicitly reinforced in the 1986 UN Declaration on the Right to Development, where development is a right of both individuals and peoples.[41] Article 1 states that:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The African Charter on Human and Peoples' Rights[42] also includes a right to development, as a peoples' right in Article 22:

> (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
> (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

In 1990, the African Charter on Popular Participation in Development and Transformation was signed with an important emphasis on human centred, popularly supported and driven, development.[43]

Despite these statements, the right to development has not been embraced by all States, as was evident even in the drafting of the UNDRIP,[44] and its status within international law remains contested.[45]

[38] See R Archer, 'Linking Rights and Development: Some Critical Challenges' in Hickey and Mitlin (n 34). See also LT Munro, 'The "Human Rights-Based Approach to Programming": A Contradiction in Terms?' in ibid.

[39] UN HRComm Res 5 (XXXV) (2 March 1979).

[40] UNGA Res 36/133 (14 December 1981).

[41] UNGA Res 41/128 (4 December 1986).

[42] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), 1520 UNTS 217.

[43] African Charter for Popular Participation in Development and Transformation, UN Doc A/45/427 (1990).

[44] See the discussion below in Section 2.

[45] See, eg, C Tomuschat, *Human Rights: Between Realism and Idealism* (2nd edn, Oxford University Press 2008) 55.

Nevertheless, both the Declaration on the Right to Development and the African Charter on Human and Peoples' Rights explicitly recognize the social and cultural aspects of development, in addition to its economic elements. The CESCR has pointed out the 'complementarity' between the ICESCR and the Declaration on the Right to Development, which is evident in:

> the provisions of article 8, paragraph 1, of the Declaration on the Right to Development and those of the Covenant relating to, for example, ensuring the empowerment and active participation of women, disadvantaged and marginalized individuals and groups; employment; basic resources and fair distribution of income; eradication of poverty; the provision of an adequate standard of living, including food and housing; health services; education; and enjoyment of culture.[46]

The Declaration on the Right to Development's phrasing can be used to respond to narrow conceptions of economic development which result in environmental and social degradation. This is reinforced by its Article 2(2), which references respect for human rights and fundamental freedoms in the development process.[47]

Indigenous peoples have been generally absent, until recently, as recognized actors and as explicit subjects of internationally recognized rights during most of the relevant history of development policies within the UN system, and their equivalents within the Member States where they have the most significant presence.[48] In addition, their non-recognition as peoples in international law would have meant, at that time of the adoption of the Declaration on the Right to Development, that any rights under it would apply to them as individuals only.

Significant, then, in their dealing explicitly with Indigenous populations' and peoples' right to development are the ILO's Indigenous and Tribal Populations Convention, 1957 (No 107)[49] and Indigenous and Tribal Peoples Convention, 1989 (No 169).[50]

Article 6 of ILO Convention 107 specifies that:

> The improvement of the conditions of life and work and level of education of the populations concerned shall be given high priority in plans for the over-all economic development of areas inhabited by these populations. Special projects for economic development in the areas in question shall also be designed as to promote such improvement.

Far from a right to development itself, however, this provision provided guidance for appropriate State priorities in *their* development aims of Indigenous lands and territories. Further references to economic and social development in ILO Convention 107 are also premised on an understanding of development as imposed on Indigenous people and peoples from outside. For example, Article 13(1) allowed customary Indigenous land

[46] CESCR, Statement on the 25th Anniversary of the Declaration of the Right to Development, UN Doc E/C.12/2011/2 (12 July 2011) para 5.

[47] Article 2(2) reads: 'All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.'

[48] ILA Interim Report (n 13) 36.

[49] ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957 (ILO No 107) (1959).

[50] ILO Indigenous and Tribal Peoples Convention, 1989 (No 169), entered into force 5 September 1991.

transfer practices, 'in so far as they ... do not hinder [the indigenous people's] economic and social development'. Article 14(b) envisaged Indigenous lands as ripe for the promotion of development.[51]

Accordingly, ILO Convention 169 is significant in its recognition of the right to development of Indigenous peoples. Article 6(1)(c) states that:

1. In applying the provisions of this Convention, governments shall: ...
   (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

Article 7 gives Indigenous peoples the right to decide their own development priorities in the following terms:

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

Both Article 6 and 7 are an important recognition of the need for self-determined development, and the links between development and economic, social, and cultural conditions of Indigenous individuals and peoples. Article 7(4) also specifically provides for the protection of Indigenous environments and territories.

1.4.1.3 International and Regional Development Agencies and Development Policy

The World Bank's first policies regarding tribal peoples were adopted in 1981 and 1982, and since 1991 have required borrowers to mitigate the impacts of development on Indigenous peoples.[52] Operational Policy 4.10 (OP 4.10), most recently revised in 2013,[53] requires the Bank to identify if there are Indigenous people who are likely to be affected, the borrower to conduct a social assessment of the impacts of the project, and for both to engage in a process of free, prior, and informed consultation with the

[51] ILO Convention 107 Art 14 reads: 'National agrarian programmes shall secure to the populations concerned treatment equivalent to that accorded to other sections of the national community with regard to—
(a) the provision of more land for these populations when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
(b) the provision of the means required to promote the development of the lands which these populations already possess.'

[52] See generally S Davis, 'The World Bank and Indigenous Peoples', World Bank Doc 27205 (World Bank 1993).

[53] World Bank Operation Policy 4.10 on Indigenous Peoples (revised April 2013), <https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f89d5.pdf> accessed 24 October 2017.

project-affected peoples.[54] The Policy states that the Bank will lend only where such consultation results in 'broad community support to the project by the affected Indigenous peoples'.[55] Adverse impacts should be, in the first instance, avoided and, in the second, mitigated.[56] The Policy further states that 'Bank-financed projects are also designed to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate and gender and intergenerationally inclusive.'[57] Pararaph 22 of OP 4.10 states that the Bank will also support projects that seek to provide development *for* Indigenous peoples.[58] Although the Bank's policies are intended to avoid and mitigate harms to Indigenous peoples, as Bantekas and Oette note, the overall protection offered by the Bank is limited, and accordingly the likely outcome is that the 'cycle of poverty and underdevelopment will be perpetuated'.[59]

Issues regarding the relationship between development, human rights, and the rights of Indigenous peoples which are raised by Articles 20, 21, 22, and 44 of the UNDRIP have also been addressed within the context of broader debates regarding the United Nations' MDGs, the predecessors of the current SDGs, which coincided with the United Nations' proclamation of the first International Decade of the World's Indigenous People (1994–2004).[60]

Three of the five main objectives of the Second International Decade of the World's Indigenous People (2005–2014)[61] refer directly to development issues for Indigenous peoples. These are Objective iii, which promotes '[r]edefining development policies that depart from a vision of equity and that are culturally appropriate, including respect for the cultural and linguistic diversity of indigenous peoples'; Objective iv, which aims at '[a]dopting targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth'; and Objective v, which aims towards '[d]eveloping strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives'.[62]

The MDGs' targeted monitoring-based approach to global poverty reduction efforts is clearly alluded to in the Decade's objectives centred around the needs and demands of Indigenous peoples, but it has been widely noted that the process to develop the MDGs, their content, and their implementation failed to reflect and incorporate the perspectives and concerns of Indigenous peoples. For instance, the UNPFII Inter-Agency Support Group expressed concern in 2005 that the exclusion of Indigenous people from the formulation of the MDGs:

> ... may lead to the exclusion of indigenous peoples from sharing the benefits of the MDGs and may in fact adversely impact their communities by deepening the discrimination faced by

[54] ibid. [55] ibid para 1. [56] ibid. [57] ibid. [58] ibid para 22.

[59] I Bantekas and L Oette, *International Human Rights Law and Practice* (Cambridge University Press 2013) 451.

[60] UNGA International Decade of the World's Indigenous People, UN Doc A/Res/48/163 (21 December 1993).

[61] UNGA Second International Decade of the World's Indigenous People, UN Doc A/Res/59/174 (24 February 2005).

[62] UNGA, Draft Programme of Action for the Second International Decade of the World's Indigenous People, UN Doc A/60/270 (18 August 2005).

indigenous peoples and accelerating the exploitative use of their land and resources in the name of progress and economic development.[63]

One explanation for the failure of the MDG process to adequately address issues involving Indigenous peoples may be that the UNDRIP had not yet been adopted when the MDG process was first conceived, and did not become the point of reference for Indigenous rights issues until almost halfway along the MDGs' trajectory towards 2015. However, even post UNDRIP, Indigenous concerns are not well met in the MDGs, as recently expressed by the UNPFII:

> Despite many of the successes of the MDGs, they have not managed to fully address the values and principles outlined in the Millennium Declaration, particularly in relation to human rights and equality. Addressing inequalities in the post-2015 development agenda means looking at both equality of opportunities and outcomes (or lack thereof), and entrenched structural factors, that perpetuate various forms of inequalities such as discrimination based on ethnicity, gender, age, location, etc.[64]

As for explicit attention to Indigenous peoples and the right to development in general international human rights instruments, as early as 1997, the UN Committee on the Elimination of Racial Discrimination (CERD) had produced a General Recommendation on the Rights of Indigenous Peoples in which it noted that Indigenous peoples must be provided with 'conditions allowing for a sustainable economic and social development compatible with their cultural characteristics'.[65]

1.4.1.4 Sustainable Development

As set out in the Brundtland Report of 1987, sustainable development is defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[66] The concept seeks to capture the problems of an economic development paradigm, based on the recognition that environmental degradation and the persistence of global poverty are inherently issues of development, and provide solutions through an alternative development approach.[67]

The 1992 Rio Declaration on Environment and Development[68] and 1992's Agenda 21[69] both provide principles of, and a framework for action on, sustainable development. The principles of sustainable development have been further set out in the 2002 Johannesburg Declaration.[70] Sustainable development is also referred to in a host of international legal standards, though most often in a preambular paragraph, or in a

[63] UNPFII, Report of the Inter-Agency Support Group on Indigenous Peoples' Issues on Its 2004 Session, UN Doc E/C.19/2005/2 (14 February 2005) Annex III; Technical Position Paper Prepared by the Inter-Agency Support Group on Indigenous Issues on the Millennium Development Goals and Indigenous Peoples, para 3.

[64] UN Division for Social Policy and Development, Indigenous Peoples, 'Post-2015 Agenda', <https://www.un.org/development/desa/indigenouspeoples/focus-areas/post-2015-agenda.html> accessed 24 October 2017.

[65] CERD, General Recommendation 23: Rights of Indigenous Peoples, UN Doc A/52/18 (18 August 1997) Annex V, para 4(c).

[66] World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) IV 3, para 27 (hereafter, Brundtland Report).

[67] D French, *International Law and Policy of Sustainable Development* (Manchester University Press 2005) 14–15.

[68] UNEP, Rio Declaration on Environment and Development (14 June 1992) (1992) 31 ILM 874.

[69] UN Sustainable Development, 'Agenda 21 2—United Nations Conference on Environment & Development', Rio de Janerio (3–14 June 1992).

[70] Johannesburg Declaration on Sustainable Development, UN Doc A/CONF.199/20 (4 September 2002).

paragraph setting out the treaty's objectives.[71] For example, it is included in the Preamble to the WTO agreement.[72] All of these previous standards lay the groundwork for the recently adopted SDGs, discussed above.

The normative status of the concept of sustainable development in international law is uncertain, though it is 'undoubtedly a central concept in international politics'.[73] What is settled is that it can be considered part of the object and purpose of a host of international treaties,[74] and is thus, under the Vienna Convention on the Law of Treaties (VCLT), relevant to the interpretation of the provisions of those treaties.[75] The concept has been referred to by the International Court of Justice in the *Gabčikovo—Nagymaros Case*,[76] and confirmed by the Permanent Court of Arbitration.[77] Its inclusion in the WTO Preamble was considered to have interpretive effect in the *Shrimp Turtle* case.[78] These cases sanction sustainable development as a norm to interpret economic development in a balanced and mutually supportive fashion with both environmental and social goals.

The relevance of sustainable development for Indigenous peoples rests on their ties to the land. The devastation of lands and the ecosystems they support through rampant, destructive development for pure economic gain is linked to their destruction as peoples.[79] In addition, however, Indigenous peoples have often been held up as communities living in an exemplary, sustainable relationship with the earth.[80] The Brundtland Report itself pronounced that Indigenous communities 'are the repositories of vast accumulations of traditional knowledge and experience' from which we 'could learn a great deal ... in sustainably managing very complex ecological systems'.[81]

Thus, Indigenous peoples' role in, and need for, sustainable development has also been recognized in international instruments. The 1992 Rio Declaration on Environment and Development states in Principle 22:

> Indigenous people and their communities ... have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[82]

[71] See French (n 67) 43.

[72] Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995), 1867 UNTS 154, Preamble.

[73] French (n 67) 45, and see ibid 15–16, 37–50; V Lowe, 'Sustainable Development and Unsustainable Arguments' in A Boyle and D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) 36; Boyle and Freestone, ibid 16–18.

[74] See M-C Cordonier-Segger and A Khalfan, *Sustainable Development Law: Principles, Practice and Prospects* (Oxford University Press 2004) ch 5.

[75] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331; 8 ILM 679 Art 31(1).

[76] *Case Concerning the Gabčikovo-Nagymaros Dam (Hungary/Slovakia)* (25 September 1997) (Judgment) [1997] ICJ Rep 7, 162.

[77] *Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway (Belgium/Netherlands)* (24 May 2005), Reports of the international Arbitral Awards vol XXVII 35–125, para 59.

[78] World Trade Organization, *US—Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 October 1998), WT/DS58/AB/R, paras 129, 131.

[79] LA Baer, 'Protection of Rights of Holders of Traditional Knowledge, Indigenous and Local Communities' (2002) 12(1) World Libraries 17; L Magdagasang and L Riches, 'Resource Development versus Indigenous Rights in the Philippines' (1999) 71 Indigenous L Bull 71.

[80] See BJ Richardson, 'The Ties that Bind: Indigenous Peoples and Environmental Governance' in BJ Richardson, S Imai, and K McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart 2009) 337, 340–43.

[81] Brundtland Report (n 66) 114–15.

[82] Rio Declaration (n 68) Principle 22.

Similarly, the 1995 Copenhagen Declaration on Social Development commits States to take action to '[r]ecognize and support indigenous people in their pursuit of economic and social development, with full respect for their identity, traditions, forms of social organization and cultural values'.[83] The World Bank also recognizes the role of Indigenous peoples in sustainable development.[84]

On the positive side, a principle of sustainable development can reinforce Indigenous world-views and perspectives on development. At the same time, Indigenous peoples can draw on sustainable development to move beyond narrow economic development paradigms. However, criticisms of sustainable development and its potential persist, often grounded in the analysis that sustainable development does not fundamentally alter the paradigm of economic development based on the exploitation of both the earth and its peoples.[85] Mander and Tauli-Corpuz's work on the 'Paradigm Wars' focuses centrally on Indigenous peoples in this respect.[86] This criticism thus brings us to the developing law and policy of Indigenous driven and Indigenous world-view-based development.

1.4.1.5 Indigenous-Driven and Indigenous World-View-Based Development

In 2006, Mander and Tauli-Corpuz brought Indigenous world-views of development to the forefront in their influential *Paradigm Wars: Indigenous Peoples' Resistance to Globalization*.[87] They argued for a need to understand development as grounded in Indigenous cosmologies, languages, practices, and demands. Rather than synthesizing economic development with the needs of the poor and the good of the natural environment, this is an argument for development based on, often, fundamentally different values. It is grounded in counter-hegemonic visions of human rights, the insistence on a need to decolonize Eurocentric versions of international law, and to situate rights, and particularly development, in alternative paradigms such as 'interculturality' and international poverty law.[88]

At the level of international organizations, various regions have made specific progress in this respect. The European Council, in a Resolution adopted on 30 November 1998,[89] undertook to respect the concept of 'self-development' by Indigenous peoples, which the Resolution defines as the 'shaping of their own social, economic, and cultural development and their own cultural identities',[90] and which includes respect for their 'right to choose their own development paths', the 'right to object to projects, in particular in

[83] World Summit for Social Development, Copenhagen Declaration on Social Development, UN Doc A/CONF.166/9 (14 March 1995) para 26(m).

[84] World Bank OP 4.10 (n 53) para 2.

[85] F de Piva Durante, 'Environment and Development Debate: Paradoxes, Polemics and Panaceas' (1999) 9 Griffith L Rev 258; S Atapattu, 'Sustainable Development, Myth or Reality? A Survey of Sustainable Development under International Law and Sri Lankan Law' (2001) 14 Georgetown Int'l Env'l L Rev 279.

[86] J Mander and V Tauli-Corpuz, *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (Sierra Club Books 2006).

[87] ibid.

[88] See Pérez-Bustillo (n 17). See also C Walsh, *Interculturalidad crítica y (de) colonialidad: Ensayos desde Abya Yala* (Abya Yala/ICCI-ARY 2009); C Pérez-Bustillo, 'Towards International Poverty Law: The World Bank, Human Rights, and Indigenous Peoples in Latin America' in W van Genugten, P Hunt, and S Mathews (eds), *The World Bank, IMF, and Human Rights* (Wolf Legal Publishers 2003); C Pérez-Bustillo and K Hernández-Mares, *Human Rights, Hegemony and Utopia in Latin America: Poverty, Forced Migration, and Resistance in Mexico and Colombia* (Brill 2016).

[89] European Council, Indigenous Peoples within the Framework of the Development Cooperation of the Community and the Member States, Resolution of 30 November 1998.

[90] ibid para 2.

their own traditional areas', and to compensation 'where projects negatively affect' their livelihoods.[91] The European Commission's May 1998 Working Document regarding 'support for indigenous peoples in the development cooperation of the Community and the Member States',[92] which helped lay the basis for the November 1998 Resolution, specifically refers to the Draft UNDRIP as one of the bases for its approach.[93]

The Inter-American Development Bank's (IADB) policy for Indigenous peoples specifically emphasizes meanwhile the need to 'promote the institutionalization of the information, timely diffusion, consultation, good faith negotiation and participation mechanisms and processes' necessary to fulfil 'commitments made both nationally and internationally regarding consultation with and participation of indigenous peoples in the issues, activities and decisions that affect them', and that such 'mechanisms and processes must take into account the general principle of the free prior and informed consent of indigenous peoples as a way to exercise their rights' and to 'decide their own priorities for the process of development ... and to exercise control, to the extent possible, over their own economic, social, and cultural development', in language anticipating the essence of Articles 19, 20, 21, and 24 of the UNDRIP.

Similarly the IADB's 2006 Strategy for Indigenous Development[94] adopts the paradigm of 'development with identity',[95] which it defines in terms of principles such as 'equity, wholeness, reciprocity, and solidarity',[96] concepts which are present in either or both of the approaches developed in terms of the alternative Andean Indigenous paradigms of 'living well' or 'collective well-being' in the Bolivian and Ecuadorian constitutions, and which at minimum are convergent with such approaches. These new constitutional paradigms post date the adoption of the UNDRIP, and are discussed below in Section 4.

Meanwhile, the UNDP explicitly recognizes the right to 'free prior informed consent' by Indigenous peoples in the context of development processes and ties it directly to the UNDP's understanding of their 'right to development'[97] and rights to self-determination and autonomy, while carefully anchoring its overall approach within the framework of larger trends as to the recognition of Indigenous rights within the UN system.[98]

As such, international agencies and bodies were increasingly paying attention to Indigenous-driven development needs as the UNDRIP was being negotiated. Further developments post UNDRIP are discussed below in Section 4.

1.4.2 The Socio-Economic Rights of Indigenous Peoples

As a preliminary point, it is important to note that each Indigenous individual is entitled to all economic and social rights contained in international and relevant regional human rights covenants. These rights include those in the ICESCR, such as the right to an adequate standard of living in Article 11(1) within which fall the right to adequate food, clothing, and housing; the right to health in Article 12; the right to education in Article 13; the right to social security in Article 9; and Article 6's labour rights.

[91] ibid para 5.

[92] European Commission, 'On Support for Indigenous Peoples in the Development Co-operation of the Community and the Member States', Working Document of the Commission (May 1998).

[93] European Council, Resolution of 30 November 1998 (n 89).

[94] Inter-American Development Bank, Operational Policy on Indigenous Peoples and Strategy for Indigenous Development (OP-765 and Strategy GN-2387-5) (IADB July 2006).

[95] ibid 18–21. [96] ibid 5.

[97] UNDP, 'UNDP and Indigenous Peoples: A Policy of Engagement' (UNDP 2001) paras 27–28.

[98] ibid.

Indigenous people in Africa are entitled to the rights in the African Charter on Human and Peoples' Rights, which include the right to work in Article 15; the right to health and medical attention in Article 16; and the right to education and cultural life in Article 17. They also enjoy a right to housing, implied into the Charter by the African Commission on Human and Peoples' Rights (ACommHPR).[99] Indigenous people across Europe would be entitled to the social and economic rights under the European Social Charter[100] and Revised European Social Charter,[101] while Indigenous people in the Americas should enjoy all rights under the OAS's Protocol San Salvador.[102] Indigenous peoples in the Arab world are entitled, meanwhile, to those social and economic protections in the Arab Charter on Human Rights.[103]

The enjoyment of these rights is crucial to the survival, personhood, dignity, and human flourishing of every person, but they are even more relevant to Indigenous people, given their overwhelming economic and social marginalization across the world.

The economic marginalization of Indigenous peoples was recognized in ILO Convention 107. Article 3(1) provides that:

> So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.

Article 3(2) specified that care should be taken that special measures did not result in 'creating or prolonging a state of segregation', which could be seen as recognition that 'separate but equal' rarely results in equality itself, but the overall assimilationist stance of ILO Convention 107 gives the provisions a different character, focusing the provision on the limited duration of special measures until integration is achieved. Article 6, on the economic development of areas inhabited by Indigenous peoples, states that:

> The improvement of the conditions of life and work and level of education of the populations concerned shall be given high priority in plans for the over-all economic development of areas inhabited by these populations. Special projects for economic development in the areas in question shall also be designed as to promote such improvement.

Part IV, which dealt with vocational training, handicrafts, and rural industries, guaranteed the same vocational training opportunities to Indigenous people as the general population, but also envisaged, in a highly culturally imperialist fashion, that special training might be needed. As set out in Article 17(2):

> These special training facilities shall be based on a careful study of the economic environment, stage of cultural development and practical needs of the various occupational groups among the

[99] See Communication 155/96, *Social and Economic Rights Action Center (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* [2001] AHRLR 60 (*Ogoni* Case); Communication 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya* [2009] AHRLR 75.

[100] European Social Charter (1965) CETS No 035 (opened for signature 18 October 1951, entered into force 26 February 1965).

[101] European Social Charter (Revised) (1999) CETS No 163 (opened for signature 2 May 1996, entered into force 1 July 1999).

[102] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (opened for signature 17 November 1988, entered into force 16 November 1999), OAS Treaty Series No 69 (1989) 28 ILM 156.

[103] Arab Charter on Human Rights (adopted 15 September 1994, entered into force 15 March 2008).

said populations; they shall, in particular enable the persons concerned to receive training necessary for the occupations for which these populations have traditionally shown aptitude.

Likewise, Article 18 envisaged these handicrafts and rural activities as 'factors in the economic development of the populations concerned' to be encouraged 'in a manner which will enable these populations to raise their standard of living and adjust themselves to modern methods of production and marketing'.

More positively, ILO Convention 107 did provide for the progressive extension of social security to Indigenous people, and, in Article 20, States committed to 'assume responsibility for providing adequate health services for the populations concerned'. Article 21 provided for equal opportunity to education at all levels, but Article 22 reintroduced paternalistic assumptions about the levels of education appropriate for these communities.

A major shift in tone and assumption occurred in ILO Convention 169. Article 2(2)(c) of ILO Convention 169 calls on governments to take measures for 'assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life'. Article 20 deals with employment; Article 21 with vocational training; Article 24 with social security; and Article 25 with health services.

Article 7(2) meanwhile states that:

> The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and cooperation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

This provision crucially includes the need for Indigenous cooperation and participation in development and economic and social improvement, importantly taking steps to rectify the *imposition* of social and economic improvement on Indigenous communities through development of their lands and territories in Article 6(1) of ILO Convention 107.

The Inter-American Court of Human Rights (IACtHR) has also specifically addressed the socio-economic conditions of Indigenous peoples through the paradigm of the right to life under the American Convention on Human Rights (ACHR).[104] In its 2006 *Sawhoyamaxa v Paraguay* case,[105] the Court found that the disastrous results of the removal of the community from their ancestral lands 'where they could have used and enjoyed their natural resources, which resources are directly related to their survival capacity and the preservation of their ways of life'[106] resulted in the violation of their rights to life. More specifically, the Court also focused on the right to health and health care of the Indigenous peoples. They rejected the argument that the Indigenous people had a responsibility to travel to health centres outside the Community to seek treatment,[107] noting the evidence that even those who sought treatment were either turned away because they were unable to pay, or given substandard treatment and attention due to discrimination against them.[108] The Court found a violation of the right to life under Article 4(1) of the ACHR and, with regard to the children who had died—most of easily preventable and treatable causes—Article 19 of the ACHR.[109] The case is especially important because it

[104] American Convention on Human Rights (Pact of San José) (adopted 22 November 1969, entered into force 19 July 1978), 1144 UNTS 123.

[105] *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No 146 (29 March 2006).

[106] ibid para 164. [107] ibid para 173. [108] ibid para 174. [109] ibid paras 176–78.

departs from the previous ruling in *Yakye Axa v Paraguay*,[110] where the IACtHR had not found the State responsible for individual deaths (due to lack of evidence) even though it had held the State 'abridged' Article 4(1) of the ACHR, by failing to take measures 'regarding the conditions that affected [the Yakye Axa's] possibility of having a decent life'.[111] Both *Yakye Axa* and *Sawhoyamaxa* also turned on the special vulnerability of the individuals and communities involved, to which we now turn.

1.4.3 Groups with Special Vulnerabilities

1.4.3.1 Pre-existing Standards on Groups with Special Vulnerabilities

Not only do international and regional human rights instruments include specific provisions to ensure the equality and rights of those who are particularly vulnerable or marginalized, but a number of specific covenants exist specifically to provide for the rights protection of those groups.

In the general human rights covenants, Articles aimed at the prevention of discrimination against women and the equal guarantee of human rights to women can be found in: Article 2 of the UDHR; Article 2 of both the ICESCR and the International Covenant on Civil and Political Rights[112] (ICCPR); and in the Convention on the Elimination of All Forms of Discrimination against Women[113] (CEDAW). Attention is also drawn here to Article 3 of both the ICCPR and ICESCR, which reads:

> The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all ... rights set forth in the present Covenant.

Article 10 of the ICESCR provides for special protections under certain circumstances for women and children in the context of its recognition of the special role of families and family-related rights. And Article 12(2)(a) places obligations on States to take steps towards the full realization of the right to health, specifically for 'the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child'. Interpreting the Convention on the Rights of the Child[114] (CRC), the Committee on the Rights of the Child's (CommRC) General Comment 13, on the right of the child to freedom from all forms of violence, notes that Indigenous children tend to be those of particular vulnerability,[115] including to discriminatory treatment by the authorities which can lead to their torture and inhuman or degrading treatment or punishment, and their removal from their families.[116]

In the African context, Article 18(3) of the African Charter on Human and Peoples' Rights (ACHPR) requires the State to ensure 'the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child

[110] *Yakye Axa Indigenous Community v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No 125 (17 June 2005).

[111] ibid para 176.

[112] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.

[113] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), 1249 UNTS 13.

[114] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3.

[115] CommRC, General Comment 13: The Right of the Child to Freedom from All Forms of Violence, UN Doc CRC/C/GC/13 (18 April 2011) para 72(g).

[116] ibid fn 26 and see para 26.

as stipulated in international declarations and conventions'. Article 18(4) guarantees that 'the aged and the disabled shall also have the right to special measures of protection in keeping with their physical and moral needs.'

Under the OAS, Article 19 of the ACHR provides for the protection of the rights of minor children. The Protocol San Salvador provides for the special protection of children, mothers, and adolescents in Article 15, and deals specifically with children's rights in Article 16. Article 17 provides protection for the elderly, and Article 18 for 'the handicapped'.

The Inter-American Court of Human Rights has also interpreted the right to life in Article 4 of the ACHR as a 'right to a dignified life' or '*vida digna*', which imposes enhanced State obligations to ensure the socio-economic conditions of particularly vulnerable groups.[117] Those vulnerable groups include children and pregnant women, the elderly, and Indigenous peoples denied their ancestral lands.[118] Indigenous peoples' rights in this context have been set out in the *Yakye Axa* and *Sawhoyamaxa* cases, where the State's responsibility for violation of human rights under the ACHR turned importantly on the vulnerability of the individuals and communities involved.[119]

European Human Rights Conventions likewise include attention to the rights of the vulnerable and marginalized. The Revised European Social Charter includes attention to the special needs and rights of women in Articles 4, 8, and 27, the rights of children and young persons in Article 7, and in Article 17 provides specifically for children and young persons' economic and social protection. Article 15 gives rights of economic and social integration to those with disabilities. Article 23 gives elderly people the right to social protection. The European Convention on Human Rights[120] (ECHR) prohibits discrimination in terms similar to Article 3 of the ICCPR and ICESCR, while its Protocol 7,[121] Article 5, ensures equality between spouses in marriage, and takes special account of the rights of the child. Protocol 12 of the ECHR[122] provides a more general provision on the right to equality.

Subject-specific Covenants exist specifically to protect the rights of vulnerable groups of people, whose rights have not been adequately guaranteed by generally applicable human rights law. The CEDAW, the CRC, and the Convention on the Rights of Persons with Disabilities[123] (CRPD) are the key referents in international human rights law. All three instruments are among those with the highest levels of universal acceptance in the international system. The CRC makes specific reference in Article 30 to the cultural rights of Indigenous children, while the Preamble of the CRPD identifies that Indigenous persons with disabilities are particularly vulnerable and often suffer from multiple discriminations.[124]

[117] *Sawhoyamaxa* (n 105); J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart 2013) 87–89.

[118] J Pasqualucci, 'The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System' (2008) 31 Hastings Int'l & Comparative L Rev 1, 12.

[119] See *Yakye Axa* (n 110) paras 160–75; *Sawhoyamaxa* (n 105) paras 157–60.

[120] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), CETS 5, as amended.

[121] Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 22 November 1984, entered into force 1 November 1988), 1525 UNTS 195.

[122] Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005), ETS 177.

[123] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), 2515 UNTS 3.

[124] ibid preamblular para P.

Of particular relevance is also the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women[125] (Convention of Belém do Pará), which builds on the CEDAW, but adds greater specificity to issues relating to sexual and gender violence. Article 6(b), for example, affirms the 'right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination'. Article 9 emphasizes that:

> With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.

Older persons[126] lack an international instrument or framework equivalent to that of women or children. The OHCHR has called for intensified efforts to address their needs and in recent years a UN Open-ended Working Group on Ageing was convened and a Public Consultation on the Rights of Older persons was held under the auspices of the OHCHR.[127] Much of this gradually emerged as a result of the adoption of a Resolution by the UN General Assembly in December 1990 establishing 1 October each year as the International Day of Older Persons.[128]

ILO Convention 169 also specifically protects, in Article 3, all human rights of Indigenous human beings and peoples, 'without hindrance or discrimination', and notes that 'the provisions of the Convention shall be applied without discrimination to male and female members of these peoples'.

There is, accordingly, a wealth of international law on the rights of vulnerable groups, much of which brings together law that prohibits discrimination with law that seeks to protect those who have particular vulnerabilities. Intersecting vulnerabilities, however, and multiple bases of discrimination, mean that very often, Indigenous peoples are least able to benefit from their internationally recognized rights.[129] This brings us to the need for special measures to redress such situations, discussed in the section below.

1.4.3.2 Special Measures

Special measures seek to give effect to substantive equality in the enjoyment of human rights. Provision for special measures is made in Articles 1(4) and 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination[130] (ICERD), interpreted in the ICERD Committee's General Recommendation 32, which obliges States to take 'temporary special measures designed to secure to disadvantaged groups

[125] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995), 33 ILM 1534.

[126] To adopt the terminology of Office of the UN High Commissioner for Human Rights: OHCHR, 'Human Rights of Older Persons', <http://www.ohchr.org/EN/Issues/OlderPersons/Pages/OlderPersonsIndex.aspx> accessed 24 October 2017.

[127] ibid. [128] UNGA A/Res 45/106 (14 December 1990).

[129] For a discussion of these issues with regard to the CEDAW, see L Buckner-Inniss, J Hohmann, and E Tramontana, 'Kell v. Canada' in L Hodgson and T Lavers (eds), *Feminist International Judgments* (Hart forthcoming).

[130] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969), 660 UNTS 195.

the full and equal enjoyment of human rights and fundamental freedoms'.[131] Special measures are also a part of the legal architecture of the CEDAW (in Article 4) and the ECHR (in Article 5). Article 20(1) of ILO Convention 169 is directed specifically to Indigenous peoples as workers, and states that special measures are required to 'ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to [indigenous] peoples'.

The concept of special measures is discussed extensively by Kirsty Gover in Chapter 7 of this volume, in light of the UNDRIP's provisions on equality in Article 2. However, special measures are included explicitly only in Article 21 of the UNDRIP, and the scope of these measures will be discussed further below in Section 5.

2. The Drafting History of the Articles

As with much of the UNDRIP's negotiating history, the discussions regarding the provisions analysed in this chapter were complex and lengthy. In the synopsis that follows, we concentrate on the main issues of contention. These were: Indigenous development of and control over economic and political systems and the means of subsistence and development; special measures; the relationship between traditional medicinal systems and the right to health; compensation; and a general concern with the clarity of and overlap between and among provisions. After tracing the early development of principles, this section turns to consider these four main issues in the negotiations.

2.1 Early Development of Principles

From the earliest discussions in the Working Group on Indigenous Populations (WGIP), Indigenous peoples insisted on the interrelationship between self-determination, cultural identity, and survival and the right to development, the right to control over their own internal economic affairs, and the right to health and physical integrity.[132] Accordingly, the right to development, socio-economic rights and conditions, and issues of cultural survival were linked from the first with the central issue of self-determination.

Draft Principle 9 stated that Indigenous peoples had '[t]he right to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional economic activities, without adverse discrimination'.[133] Meanwhile, Draft Principle 10 stated that Indigenous peoples had '[t]he right to determine, plan and implement all health, housing, and other social and economic programmes affecting them'.[134] Draft Principle 8 included attention to special measures, calling for 'the right to special State measures for the immediate, effective and continuing improvement of [indigenous] social and economic conditions, with their consent, that reflect their own priorities'.[135]

Although there was little real controversy surrounding these provisions at this stage, a few States noted that Draft Principle 10 would give undue influence to Indigenous

[131] CERD, General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination, UN Doc CERD/C/GC/32 (24 September 2009) para 11.

[132] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Fifth Session, UN Doc E/CN.4/Sub.2/1987/22 (24 August 1987) para 53.

[133] ibid Annex II. [134] ibid. [135] ibid.

peoples in the design and planning of health services within the State.[136] Canada stated, meanwhile, that any special measure or duty on States in this regard should be seen as a 'means rather than an end in itself'.[137] Some States also expressed concern about the purpose and duration of special measures.[138]

The Declaration of Principles adopted by the Indigenous Peoples' Preparatory Meeting in 1987 had put forward a particularly strong stance on Indigenous traditional medicines, which serves as a further important reminder that economic, social, and *cultural* rights are linked in very specific and deeply tangible ways for Indigenous peoples. Clause 21 stated that:

> All indigenous nations and peoples have the right to their own traditional medicine, including the right to the protection of vital medicinal plants, animals and minerals. Indigenous nations and peoples also have the right to benefit from modern medical techniques and services on a basis equal to that of the general population of the States within which they are located. Furthermore, all indigenous nations and peoples have the right to determine, plan, implement, and control the resources respecting health, housing, and other social services affecting them.[139]

Two years later, in 1989, a First Revised Text of the Draft Universal Declaration on the Rights of Indigenous Peoples was prepared by the WGIP.[140]

The relevant draft principles had, at this point, been substantially reframed. Self-determination of social and economic programmes was included in draft Article 20, as follows:

> The right to determine, plan and implement all health, housing and other social and economic programmes affecting them, and as far as possible to develop, plan and implement such programmes through their own institutions.

Self-determination and self-driven development were clearly enshrined in these draft provisions. The most complex and multi-layered provision was clearly what stood as draft Article 18:

> The right to maintain and develop within their areas of lands or territories their traditional economic structures and ways of life, to be secure in the traditional economic structures and ways of life, to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional and other economic activities, including hunting, fresh- and salt-water fishing, herding, gathering, lumbering and cultivation, without adverse discrimination. In no case may an indigenous people be deprived of its means of subsistence. The right to just and fair compensation if they have been so deprived.

[136] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Peoples, Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Populations, Information Received from Governments, UN Doc E/CN.4/Sub.2/AC.4/1988/2 (24 May 1988) (Finland); UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Peoples Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Populations Information Received from Governments, UN Doc E/CN.4/Sub.2/AC.4/1988/2/Add.1 (14 June 1988) (Canada).

[137] UN Doc E/CN.4/Sub.2/AC.4/1988/2/Add.1 (Canada). [138] ibid.

[139] Report of the WGIP, Fifth Session (n 132) Annex V.

[140] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, First Revised Text of the Draft Universal Declaration on Rights of Indigenous Peoples Prepared by the Chairman-Rapporteur of the Working Group on Indigenous Populations, Mrs Erica-Irene Daes, pursuant to Sub-Commission Resolution 1988/18, UN Doc E/CN.4/Sub.2/1989/33 (15 June 1989).

It might be tempting to construe this provision as an unwieldy 'catch-all', but it is better understood as an attempt to capture the nuances of Indigenous self-determination and development through and within the cultural integrity and survival of Indigenous peoples, and in light of the present realities of the poverty, marginalization, and dispossession of Indigenous peoples across the world. The right to compensation perhaps sits oddly here, but is another cardinal concern for Indigenous peoples.

The 'right to special State measures for the immediate, effective and continuing improvement of their social and economic conditions, with their consent, that reflect their own priorities' was included as a stand-alone right in draft Article 19.

In 1990, governments were invited to comment on the text.[141] Subsequently, in 1993, the WGIP agreed a revised text of forty-two operative paragraphs, which was submitted to the Human Rights Council's (HRC) Sub-Commission on Prevention of Discrimination and Protection of Minorities.[142]

The WGIP agreed on a text at its Eleventh Session in 1993;[143] the draft Articles were then phrased as follows:

Draft Article 21

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Draft Article 22

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Draft Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

[141] See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Eighth Session, UN Doc E/CN.4/Sub.2/1990/42 (27 August 1990).

[142] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft Declaration on the Rights of Indigenous Peoples, Revised Working Paper Submitted by the Chairman-Rapporteur, Mrs Erica-Irene Daes, pursuant to Sub-Commission Resolution 1992/33 and Commission on Human Rights Resolution 1993/31, UN Doc E/CN.4/Sub.2/1993/26 (8 June 1993).

[143] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Working Group on Indigenous Populations on Its Eleventh Session, Chairperson-Rapporteur: Ms Erica-Irene A Daes, Annex I: Draft Declaration as Agreed upon by the Members of the Working Group at Its Eleventh Session, UN Doc E/CN.4/Sub.2/1993/29/Annex I (23 August 1993).

Draft Article 24

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

Draft Article 43

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Although some States felt the relevant Articles were vague and 'could lead to situations of conflict with various State institutions',[144] the draft was then adopted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in July 1994.[145]

2.2 Continuing Debate before the Working Group on the Draft Declaration

The draft text agreed at the Eleventh Session of the WGIP was referred to the UN Commission on Human Rights (UNCHR), which created a further ad hoc working group.[146] Over the next decade, the working group met on eleven occasions to attempt agreement on the final text. During this period, Indigenous participants adopted the still controversial 'no change' negotiating position, and many breakthroughs on the text only came very late in the day.[147]

Although many of the provisions relevant to this chapter proved difficult to negotiate, there was overwhelming support from both States and Indigenous participants for Article 43. The only point of contention here was whether this important principle of equality between male and female Indigenous persons would be better placed in the first section of the Declaration, alongside other 'general principles'.[148] In December 1997, this provision was adopted by consensus by the Working Group,[149] and remained unchanged in content and, ultimately, in its general placement in the Declaration, though finally becoming Article 44. Likewise, there was little disagreement that attention should be included to the special vulnerabilities of particular groups.

The negotiating issues on draft Articles 21 to 24 concerned several main substantive points, which included the issues of: special measures; compensation; Indigenous development; and control over economic and political systems. A final point, raised throughout the discussion, was one of clarity of organization.

[144] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations, Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Populations, Information Received from Governments, UN Doc E/CN.4/Sub.2/AC.4/1994/2 (9 June 1994) (Ecuador).

[145] See UN Sub-Commission on Prevention and Discrimination and Protection of Minorities Res 1994/45 (26 August 1994).

[146] Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly Res 49/214, UNCHR Res 1995/32 (25 July 1995).

[147] M Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 Melbourne J Int'l L 439, 449–50.

[148] See, eg, UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Chairperson-Rapporteur: Mr. José Urrutia, UN Doc E/CN.4/1997/102 (10 December 1996) paras 103–29.

[149] ibid, UN Doc E/CN.4/1998/106 (15 December 1997) para 41.

2.2.1 *Indigenous Development of, and Control over, Economic and Political Systems and the Means of Subsistence and Development*

While the protections of economic, social, and cultural rights of Indigenous peoples in draft Articles 21 to 24 were generally uncontroversial in and of themselves, and were seen as reflecting already existing international law,[150] it was their framing *within* provisions on Indigenous development and self-determination that made these provisions difficult to agree. One Indigenous representative characterized the draft provisions as giving content to the 'economic, social, cultural, spiritual and political dimensions of the right of self-determination'.[151] As such, they presented a challenge to States on several levels.

First, ongoing, often divisive, and polarizing debates as to the meaning and implications of 'development' during the negotiations explain in part why this concept is never defined explicitly in the text. For example, some States pointed out that they did not accept 'in an international context the right to development of States or groups' and could not accept collective development as a right.[152] At the same time, these controversies were not unrelated to underlying disagreements about the fundamental purposes and values of development.[153] For that reason, draft Articles 21 to 24, with their emphasis on Indigenous-driven improvement of social and economic conditions and control over the processes of their development, stand in for an explicit, overall right to development and are closely related to final Article 3 of the UNDRIP on self-determination, discussed in Marc Weller's Chapter 5 of this volume.

During negotiations, Indigenous groups and NGOs held firmly to the view that the right to development must be Indigenous driven. The World Council of Indigenous Peoples damned 'the devastating effects of so-called development on the lives, cultures, lands and rights of indigenous peoples'[154] as a 'direct result of the failure to respect our identity, cultures, rights to our lands and the ethnocentric and economicscentred [sic] biases of development itself'.[155] They relied for support on changing paradigms of development, towards participatory and human-centred development incorporated into the work of multilateral development agencies such as the World Bank and UNDP and protected in the Rio Declaration and Agenda 21.[156]

Some States and international organizations were concerned that the provisions, and particularly the 'right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions' in draft Article 23, gave Indigenous peoples, at the least, undue influence over these policies within the democratic process,[157] or gave Indigenous peoples both special rights and all existing rights with no correlative duties.[158]

[150] ibid, UN Doc E/CN.4/1997/102, para 199 (Canada).

[151] ibid, Chairperson-Rapporteur: Mr. Luis-Enrique Chávez, UN Doc E/CN.4/2001/85 (6 February 2001) para 101 (Indian Law Resource Centre, Assembly of First Nations, International Treaty Four Secretariat, and Grand Council of the Crees).

[152] UN Doc E/CN.4/1997/102 (n 148) para 221 (United States), 301, 304 (United States and Venezuela). See also UN Doc E/CN.4/1996/84 (4 January 1996) paras 81, 97.

[153] See above Section 1 on right to development.

[154] UNCHR, Open-Ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, Information Received from Non-Governmental and Indigenous Organizations, UN Doc E/CN.4/1995/WG.15/4 (10 October 1995) para 21.

[155] ibid. [156] ibid para 22. [157] UN Doc E/CN.4/1996/84 (n 152) para 80.

[158] UNCHR, Open-Ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, Consideration of a Draft United Nations Declaration on the Rights of

Some States were concerned that, as phrased, Article 23 could give Indigenous peoples sole control over all health, housing, and other economic and social programmes in a State.[159] A selection of States also raised concerns that Indigenous peoples would be able to claim priority access to State resources through the route of special measures.[160] When it came to the meaning specifically of 'their own means of subsistence and development', some States felt that this right was too broad and lacked clarity.[161]

As with all Articles in which existing Indigenous institutions and knowledge were to gain protection, a number of States queried how these provisions would fit within existing State legal frameworks. Argentina noted that despite its pluralistic Constitution, which respected culture and tradition, Article 24 'should not contravene public health regulations'.[162] Along with a concern for the coherence of the domestic legal framework, this statement also evidenced an oft-repeated anxiety about the safety of traditional medicinal practices.[163] It is indicative of the anxiety with which affording cultural rights to Indigenous and minority groups is still met.

The main points of contention here, therefore, remained a strong belief on the part of Indigenous representatives that only when economic and social rights were self-determined would they be meaningful and adequate, contrasted with State concerns about maintaining control over internal institutions and about unduly empowering Indigenous peoples through the grant of special rights or special measures.

2.2.2 Special Measures

Draft Article 22's phrasing that 'Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security' prompted negotiations over the meaning and purpose of 'special measures'.

Some States and most Indigenous participants were strongly in favour of special measures for Indigenous peoples, given as Chile put it in 1995:

> ... the centuries-old disregard to which they have been subjected as a result of the assimilationist policies that sought to do away with their specific identities as peoples or, at best, to respect some of their forms of social organization but in a context of marginalization and extreme poverty.[164]

Accordingly, such measures were needed to 'overcome their diminished circumstances' in a context of insufficient State support and commitment of resources.[165] Indigenous

Indigenous Peoples, Information Received from Intergovernmental Organization, UN Doc E/CN.4/1995/WG.15/3 (10 November 1995) para 1 (UNFAO).

[159] UN Doc E/CN.4/1998/106 (n 149) para 41.

[160] UN Doc E/CN.4/1996/84 (n 152) para 81.

[161] UN Doc E/CN.4/1997/102 (n 148) para 230 (Malaysia).

[162] ibid para 85 (Argentina). See also ibid para 82 (France), para 86 (Malaysia).

[163] ibid para 85 (Argentina), para 86 (Malaysia).

[164] UNCHR, Open-Ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, Information Received from Governments, UN Doc E/CN.4/1995/WG.15/2 (10 October 1995) para 7 (Chile).

[165] ibid.

organizations, joined by some States, firmly held throughout that special measures did not amount to preferential measures, but were about the achievement of equal rights.[166]

Some States and international organizations, however, queried the purpose and meaning of special measures, including what sorts of discrimination special measures should deal with,[167] and the open-ended nature of the phrasing which was not tied explicitly to disadvantage.[168] Some States also raised concerns that Indigenous peoples would be able to claim priority access to State resources through the route of special measures.[169]

The context of dire poverty and stubborn marginalization in which Indigenous peoples overwhelmingly live[170] gives strong support to the claim that Indigenous peoples have not benefitted equally from the existence of general human rights standards or general social policies within States. State concerns that special measures might unduly *advantage* Indigenous peoples must be understood in light of this reality.

2.2.3 Compensation

A right to 'just and fair compensation' for 'Indigenous peoples who have been deprived of their means of subsistence and development' was included in draft Article 21. The inclusion of a right to compensation in this Article complicated its text considerably. First, it turned what would otherwise have been a prospective right into one with a retrospective element. Second, it connected—or alternatively entangled—the provision with other provisions, among them the most controversial of all, such as rights to land. As Mexico noted early in the negotiating process, it was difficult to understand this provision without regard to the draft provisions on lands and territories.[171] Even if 'the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities' *can* be conceptually separated from the land base on which these activities have traditionally been performed, compensation for loss of such subsistence means clearly encompasses the loss of lands.

Nevertheless, as the observer for the Central Land Council stated in 1996, it would have been a shame for Article 21 to be rejected 'simply out of fear of the possibility of claims for compensation'.[172] As such, linking together rights to the means of subsistence and development with compensation was risky strategically, even if conceptually there is growing recognition and evidence of the inherent link between lands, and subsistence and development for Indigenous peoples. The eventual removal of this link in the text[173] was thus a matter of necessity for practical progress, rather than a move that succeeded in breaking a link that must, ultimately, be recognized.

[166] UN Doc E/CN.4/1996/84 (n 152) para 82. See also UN Doc E/CN.4/1997/102 (n 148) para 207 (Fiji), para 212 (Observer for the Central Land Council).

[167] UN Doc E/CN.4/1995/WG.15/3 (n 158) para 1 (UNFAO).

[168] UN Doc E/CN.4/1997/102 (n 148) para 202 (Sweden), para 204 (Japan), para 219 (Norway).

[169] UN Doc E/CN.4/1996/84 (n 152) para 81. [170] See above Sections 1.1.1–1.1.2.

[171] UNCHR, Open-Ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples. Information Received from Governments, Addendum, UN Doc E/CN.4/1995/WG.15/2/Add.1 (13 November 1995).

[172] UN Doc E/CN.4/1997/102 (n 148) para 226 (Central Land Council).

[173] See below text accompanying n 178.

2.2.4 Clarity, Organization, and Overlap with Other Provisions

The Draft text referred to the Commission on Human Rights was indeed far from clear and straightforward, with significant overlap between and among provisions. This led to repeated calls, particularly by States, to clarify and readjust the language of provisions,[174] as well as to move whole or parts of the draft Articles discussed here.[175] At one point, discussion on Article 21 proposed deleting it based on the fact that all relevant parts were contained in other Articles.[176] However, Indigenous representatives held firm in the need to include an Article stressing the right of Indigenous peoples to be secure in their own means of subsistence and development. They sought to clarify 'the importance of social, economic and political systems associated with traditional subsistence and development rights of indigenous peoples'.[177] In light of this statement, it is important to understand that the apparent lack of conceptual clarity and organization in the Draft Declaration was at least in part created by serious attempts to include within the Declaration attention to Indigenous needs and rights which are not adequately captured by currently existing paradigms of human rights and international law. Among these are the link between traditional subsistence activities and cultures, self-determination, and economic and social well-being. These links are only now beginning to be recognized and protected, in many instances in explicit light of the UNDRIP, as further discussed in Section 4 below.

2.3 Moving Forward

There was little movement on these points of contention until, in 2004, a text by Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland sought to overcome some of the areas of deadlock.

First, the proposal made Article 21 prospective again, by changing the provision to apply to those Indigenous peoples who 'are deprived of their means of subsistence and development' and replacing the word 'compensation' with 'effective mechanisms for redress'.[178]

With regard to the issue of special measures, they proposed that Article 22 include an 'equal right to effective and continuing improvement of disadvantage in their economic and social conditions'.[179] This proposal removed the words 'special measures' entirely, with explanatory text noting that 'basic criteria' for what special measures were was needed.[180] It tied the provision specifically to conditions of disadvantage.

[174] UN Doc E/CN.4/1996/84 (n 152) para 82. See UN Doc E/CN.4/1997/102 (n 148) para 210 (Chile). para 235 (United States).

[175] UN Doc E/CN.4/1997/102 (n 148) para 227 (Norway), para 228 (Sweden), para 231 (Canada).

[176] UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Chairperson-Rapporteur: Mr. Luis-Enrique Chávez, UN Doc E/CN.4/2004/81 (7 January 2004) para 95.

[177] ibid para 96.

[178] UNCHR, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Information Provided by States, Draft Declaration on the Rights of Indigenous Peoples: Amended Text, Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, UN Doc E/CN.4/2004/WG.15/CRP.1 (6 September 2004). See also the explanatory text at UNCHR, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Information Provided by States, Draft Declaration on the Rights of Indigenous Peoples: Explanatory Comments to Amended Text, Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, UN Doc E/CN.4/2004/WG.15/CRP.2 (6 September 2004).

[179] UN Doc E/CN.4/2004/WG.15/CRP.1 (n 178).

[180] UN Doc E/CN.4/2004/WG.15/CRP.2 (n 178).

To respond to the fear of undue Indigenous influence or control in the design and development of economic and social programmes, the proposal substituted 'determine and develop all' with 'be actively involved in developing and determining' their health, housing, and other programmes.[181] This change was suggested in order to ensure that 'democratically-elected representatives have the right to make final decisions'.[182]

With regard to the issue of whether or not traditional medicines were complementary to health services in general, the proposal clarified by inserting a Part 2 to the provision that enshrined the right to health as in Article 21(1) of the ICESCR.[183] It also changed 'protection' to 'conservation'.

These suggestions helped to break the stalemate in negotiations, and in October 2004, the Chairman was able to state that Article 22 was agreed.[184] That provision, as presented by the facilitators, now read:

Article 22

Indigenous peoples have the right to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

However, even subsequent to this text, quite different versions of Article 22 were proposed, such as the suggestion of the World Peace Council, which included a specific reference to the eradication of extreme poverty.[185]

In addition, several substantially different possibilities remained for each of Articles 21, 23, and 24.[186] These provisions were again summarized by the Chairman in April 2005, once more with several versions under consideration.[187] The continued disagreement over the provisions demonstrated that the right to development and to self-determination of Indigenous peoples, within which their economic and social rights were to be enjoyed, remained controversial.

At the end of the Eleventh Session of the working group,[188] consensus had still not been reached on draft Articles 22, 23, and 24. Article 21 was described as 'close to

[181] UN Doc E/CN.4/2004/WG.15/CRP.1 (n 178).

[182] UN Doc E/CN.4/2004/WG.15/CRP.2 (n 178).

[183] UN Doc E/CN.4/2004/WG.15/CRP.1 (n 178).

[184] UNCHR, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, Chairman's Summary of Proposals (Mr Luis-Enrique Chávez), UN Doc E/CN.4/2004/WG.15/CRP.4 (14 October 2004).

[185] UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, Chairperson-Rapporteur: Mr. Luis-Enrique Chávez, Addendum, UN Doc E/CN.4/2005/89/Add.1 (24 February 2005) C (Comments and Amendments to examined articles of the draft declaration on the rights of Indigenous peoples formulated by the World Peace Council).

[186] ibid.

[187] UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on Its Tenth Session, Chairperson-Rapporteur: Mr Luis-Enrique Chávez, Addendum, UN Doc E/CN.4/2005/89/Add.2 (1 April 2005).

[188] Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session, Chairman-Rapporteur: Luis-Enrique Chávez, UN Doc E/CN.4/2006/79 (22 March 2006) para 25.

agreement'.[189] The text of the Articles that went to the HRC had thus not been fully agreed by the negotiators at the Working Group.

The seemingly intractable negotiations had, perhaps, little to do with the actual wording of the provisions considered in this chapter, and can rather be best attributed to the general breakdown in negotiations over the text as a whole.[190] However, the specifics detailed here do illuminate the fact that Indigenous representatives and States had significantly different perceptions about the relative power of Indigenous peoples within States, and the need for Indigenous-driven institutions to achieve equality. While States saw special measures and Indigenous-led development or self-determination as a threat to authority and democratic processes, Indigenous peoples saw them as a response to a history of dispossession, and as a basic need for continued physical and cultural survival, let alone future development and potential flourishing.

2.4 Text Approved by the Human Rights Council

The text went through further changes before being approved by the HRC in June 2006.[191]

The Chairman's proposed Article 21 read:

> Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
>
> Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

This version kept the prospective nature of the right to redress, and inserted a right to maintain *institutions* alongside economic and social systems.
Draft Article 22 became:

> Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
>
> States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

In this version, the Chairman sought to clarify the nature of any special treatment due to Indigenous peoples by inserting the words 'without discrimination' before 'the improvement of their economic and social conditions'. Special measures were removed from the first paragraph and placed below, in a second paragraph. In addition, the text sought to clarify that special measures were due only where appropriate.

The Chairman also endorsed the proposal for a new Article 22, discussed at the Eleventh Session. This was a specific Article on the rights and needs of vulnerable Indigenous persons. Article 22 *bis* stated:

[189] ibid para 24. [190] See further Davis (n 147).
[191] HRC Res 1/2 of 29 June 2006, UN Doc A/HRC/1/L.10 (30 June 2006).

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Importantly, this proposal also included a right to *full* protection for women and children against violence and discrimination.

Draft Article 23, which had proved so difficult for States to align with their domestic policies, remained in this proposal as the original draft text.[192]

Draft Article 25 stated that:

Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

This proposal did not move the provision forward, but consolidated the changes to the text negotiated throughout the eleven sessions.

2.5 Discussion on the Adoption of the Text at the UN General Assembly

On 13 September 2007, the UN General Assembly was presented with a revised draft text that had emerged in negotiations subsequent to adoption of the Draft Text by the HRC, since that draft had not represented consensus. This revised draft[193] was presented to the General Assembly by the Chairperson of the Working Group, and endorsed by more than thirty-five States.[194] Other States, however, bemoaned the fact that they had not been afforded the opportunity to keep negotiating on the text in the final months.[195]

Many States, even those voting in favour of this final version of the Declaration, expressed considerable unease about some of the provisions. Thailand explicitly referenced Article 20 when it stated that the Declaration must be understood in accordance with the principles of territorial integrity or political unity in the Vienna Declaration and Programme of Action.[196] France referred to Article 20 when stating that the Declaration must be exercised in accordance with national constitutional norms.[197] Japan remained firm in its opposition to collective rights as human rights,[198] which would have implications for its understanding of Articles 20 and 21. Many other States referenced the fact that it was only the last-minute inclusion of Article 46 on the territorial integrity

[192] See the discussion in Section 2.2 above. [193] UNGA Res A/61/L.67.
[194] See UNGA 107th Plenary Meeting Thursday 13 September 2007 10am, UN Doc A/61/PV.107, 10.
[195] ibid 11 (Australia), 12 (Canada), 15 (United States). [196] ibid 25 (Thailand).
[197] UNGA 107th Plenary Meeting Thursday 13 Sept 2007 1pm, UN Doc A/61/PV.108, 10 (France).
[198] A/61/PV.107 (n 194) 20 (Japan).

of States that allowed them to support the Declaration, and by implication Articles such as 20 and 21 specifically.[199]

Australia, the United States, and Canada, voting against, expressed dissatisfaction with the Declaration's treatment of the right to self-determination, stating that it 'is not a right that attaches to an undefined subgroup of a population seeking to obtain political independence.'[200] This concern would have implications for States' understandings of Articles 20 and 21, although self-determination was not expressed in so many words in the final version of those Articles.

Nevertheless, looking back to the concerns expressed about the draft Articles in the 1990s, it is obvious that the final text overcomes many of the anxieties expressed by States during the negotiations. More clarity and organization was brought to the text. Specifically, compensation was excluded from these provisions, and concerns about the position of Indigenous peoples and their special treatment were allayed by more tightly worded provisions. At the same time, the crucial links between Indigenous-driven development, means of subsistence, and socio-economic rights were maintained and clarified.

We turn now to consider how the different rights expressed in final Articles 21, 22, 24, and 44 of the Declaration have influenced or otherwise been expressed or considered in international law and policy.

3. Analysing the Impact of Articles 21, 22, 24, and 44 on International Law and Policy

3.1 The Right to Development

The contribution to international law of the UNDRIP's provisions on the right to development can be addressed under three headings. The first is the growth of a right to development for indigenous peoples that takes particular cognisance of inherent links with land rights and with cultural survival. The second, and related, is a recognition of the need for sustainable development as part of a meaningful right to development for Indigenous peoples. The third—and building necessarily on the first two—is a nascent legal recognition, particularly in Latin America, of Indigenous world-view-based conceptions of development. These changes both reflect and rely on a perspective which approaches development as necessarily self-determined and Indigenous driven.

3.1.1 Development, Self-Determination, and Survival

The UNDRIP's approach to the relationship between the imperatives and policies within the UN system as to development and the specific circumstances and rights of Indigenous peoples must be understood within a historical and conceptual framework that takes due account of their long-standing marginalization as actors and subjects or referents within the international system, discussed above in Section 1. This marginalization is also reflected in the persistent concentration among Indigenous peoples of conditions of poverty and inequality on a global scale. Any right to development of Indigenous peoples must also take account of the long-standing hostility of some States to a right to

[199] See, eg, ibid 19 (Argentina), 20 (Japan), 20 (Chile), 21 (United States), 23 (Liechtenstein), 25 (Thailand); A/61/PV.108 (n 197) 2 (India), 3 (Namibia), 5 (Turkey).

[200] A/61/PV.107 (n 194) 11 (Australia). See also 12 (Canada), 15 (United States).

development per se, also discussed at the beginning of this chapter and raised again by States in the negotiation of the UNDRIP.

Nevertheless, the ILA Committee, in its Interim Report on the UNDRIP, noted a new trend in international law: that States are now more (though not universally) willing to accept a right to development for Indigenous peoples than for other groups or peoples generally.[201]

This has been attributed in part to an effort to assuage post-colonial guilt or undo historical wrongs.[202] However, the connection between Indigenous development and Indigenous *survival*, and references to the interlinked nature of these rights (including through the right to self-determination), give the right to development in the UNDRIP a distinction from a more general right to development that is also relevant to this emerging warmth to it on the part of States.

First, there is the crucial tie between development and the survival of Indigenous peoples expressed in the UNDRIP. The reference to 'subsistence' in Article 20 should be understood within the context of the Declaration as an allusion to the survival of Indigenous peoples as viable or sustainable communities with their distinct forms of governance and social life. This echoes, for example, the emphasis in the first substantive paragraph of the Preamble on Indigenous peoples' 'right to be different, to consider themselves as different, and to be treated as such', and that of Article 43 on their rights to 'survival, dignity, and well-being'. Subsistence here is thus intertwined with an emphasis on sustainability, as noted in paragraph 11 of the Preamble. Ultimately, this implies that Indigenous autonomy is a necessary condition for Indigenous survival, which in turn encompasses both sustainability and subsistence in development.

The African Commission's *Endorois* case[203] is important in this respect. In *Endorois*, Article 22 on the Right to Development of the ACHPR was interpreted as having a procedural and substantive element. That is the:

> ... right to development is a two-pronged test, that it is both *constitutive* and *instrumental*, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development.[204]

The Commission explicitly accepted that freedom of choice is an element of the right to development,[205] which would fulfil parts of the procedural element of the right, along with the free, prior, and informed consent[206] and participation[207] of the Endorois.

The substantive element would require benefit sharing, and, following the IACtHR's *Saramaka* case,[208] the Commission noted that the right to development is violated when a development project decreases the well-being of the Indigenous community.[209]

[201] ILA Interim Report (n 13) 37. [202] ibid. [203] *Endorois* (n 99).

[204] ibid para 277 (emphasis in the original).

[205] ibid para 278, referring to A Sengupta, 'The Right to Development as a Human Right', Francois-Xavier Bagnoud Centre Working Paper No 8 (2000) 8.

[206] ibid paras 283, 291. [207] ibid para 289.

[208] *Case of the Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR Series C No 172 (28 November 2007).

[209] *Endorois* (n 99) para 294.

Concluding, the Commission found that:

> ... the Respondent State bears the burden for creating conditions favourable to a people's development [Art 3 Declaration of the Right to Development]. It is certainly not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The Respondent State, instead, is obligated to ensure that the Endorois are not left out of the development process or benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process.[210]

Although the Commission did not rely on the relevant Articles of the UNDRIP, noting that Kenya had 'withheld its approval'[211] of the Declaration, the reasoning strengthens the links between Indigenous development, survival, and improvement of social and economic conditions as set out in the UNDRIP. It also reinforces the link between self-determined development and free, prior, and informed consent,[212] further strengthening the latter norm in international law.

Also linking survival and development, the CommRC's General Comment 11 on Indigenous Children and Their Rights under the Convention urges States to ensure realization of the right of Indigenous children to 'survival and development as well as an adequate standard of living', referencing Articles 6 and 27 of the CRC.[213] The Committee has also urged States to take into consideration the link between land, life, survival, and development in the rights of Indigenous children.[214] The CESCR has stated in General Comment 21 on the Right to Take Part in Cultural Life that Indigenous peoples' rights to cultural identity are tied to their rights to land and that:

> Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.[215]

In doing so, the CESCR made explicit reference to Article 20 of the UNDRIP.[216] In a statement on the Rio+20 Conference on the Green Economy, the CESCR also noted the need to balance the requirement of a green economy with States' human rights obligations to Indigenous peoples, with specific reference to their land and cultural rights as preconditions for their survival.[217]

The Inter-American Court of Human Rights has led in the recognition of Indigenous rights to survival and the tie with the right to traditional lands. Even before the UNDRIP was adopted, several landmark cases had made this point. In the 2001 *Awas Tingni v Nicaragua* case, the Court held that Indigenous territories must be:

> ... understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a

[210] ibid para 298, footnotes omitted. [211] ibid para 155.

[212] See further Barelli, Chapter 9, this volume.

[213] CommRC, General Comment 11: Indigenous Children and Their Rights under the Convention, UN Doc CRC/C/GC/11 (12 February 2009) para 34.

[214] ibid para 35.

[215] CESCR, General Comment 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1(a), of the ICESCR), UN Doc E/C.12/CG/21 (21 December 2009) para 36.

[216] ibid fn 35.

[217] CESCR, Statement in the Context of the Rio+20 Conference on 'the Green Economy in the Context of Sustainable Development and Poverty Eradication', UN Doc E/C.12/2012/1 (4 June 2012) para 6(g).

matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[218]

Sustainability of development is thus key for Indigenous peoples, given that their lands are about so much more than, as the Court puts it, 'possession and production'.[219] In the *Yakye Axa* case, the Court found that the State was responsible for the violation of the right to life: having failed to ensure the right to communal property, the State had deprived the Community of the possibility of having access to their traditional means of subsistence, as well as the use and enjoyment of the natural resources necessary to obtain clean water and for the practice of traditional medicine for the prevention and treatment of diseases, and for failing to adopt the affirmative measures required to ensure decent living conditions.[220] In 2006, *Sawhoyamaxa v Paraguay*[221] made similar points, again relying heavily on the link between land and a decent life.[222] The *Sarayaku*[223] decision further elaborated on this approach, and explicitly incorporated the implications of the UNDRIP into its overall reasoning.[224] These cases also demonstrate the link between survival as a people, and individual survival or the right to life, discussed in Chapter 7 of this volume.

3.1.2 Sustainable Development

The second distinct strand in the right to development for Indigenous peoples is the recognized need for sustainable development for Indigenous communities, based in large part on the growing recognition in international law, discussed above, that Indigenous peoples cannot survive as peoples without their traditional lands.

International institutions are beginning to take account of this emerging norm. For example, the World Bank Operational Policy on Indigenous Peoples, updated in 2013, states that:

> The Bank recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease.[225]

These risks map directly onto the subject matter of the UNDRIP Articles discussed here. Meanwhile, however, the World Bank continues to insist that international human rights standards such as the UNDRIP are not directly applicable to its activities nor enforceable within the framework of its policies and practices.[226]

[218] *Case of the Mayagna Community (SUMO) Awas Tingni Community v Nicaragua* (Merits, Reparations, and Costs), IACtHR Series C No 79 (31 August 2001) para 149.

[219] ibid.

[220] *Yakye Axa* (n 110) para 158(d), (e). See also *Case of the 'Children's Rehabilitation Institute' v Paraguay* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR Series C No 112 (2 September 2004) para 176; *Case of the La Rochela Massacre v Colombia* (Merits, Reparations, and Costs), IACtHR Series C No 163 (11 May 2007) paras 124, 125, 127, 128; *Case of Gelman v Uruguay* (Merits and Reparations), IACtHR Series C No 221 (24 February 2011) para 130.

[221] *Sawhoyamaxa* (n 105). [222] ibid para 69.

[223] *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations), IACtHR Series C No 245 (27 June 2012).

[224] ibid para 133. [225] World Bank OP 4.10 (n 53) para 2.

[226] See generally Human Rights Watch, 'Abuse-Free Development: How the World Bank Should Safeguard against Human Rights Violations' (HRW July 2013), <https://www.hrw.org/report/2013/07/22/abuse-free-development/how-world-bank-should-safeguard-against-human-rights> accessed 24 October 2017; 'The

Issues regarding development policy and poverty among Indigenous peoples have also been raised within the context of the United Nations' process to draft the recently adopted SDGs.[227] These issues reproduce those which must be tackled in order to understand the dimensions and implications of Articles 20, 21, 22, and 44 of the UNDRIP. The United Nations' summit to adopt the post-2015 development agenda was held in September 2015. The SDGs take a more holistic approach to development than that of the MDGs,[228] and make explicit reference to the particular vulnerability of Indigenous peoples as a whole,[229] their vulnerability in food production and security,[230] and their gender disparities in education.[231]

The SDGs, however, make no explicit reference to the UNDRIP or to the specific development priorities or needs of Indigenous peoples, however, and a key group of UN experts has expressed concern that the SDG process excluded crucial dimensions of the interface between Indigenous peoples and development.[232] From their perspective, the SDG process should have taken into account both the additional burdens confronted by Indigenous peoples living in long-standing conditions of poverty, and the potential contributions to sustainability grounded in their distinctiveness. The experts noted that: 'Indigenous peoples face distinct development challenges, and fare worse in terms of social and economic development than non-indigenous sectors of the population in nearly all of the countries they live.'[233] But, they argued, 'they also can contribute significantly to achieving the objectives of sustainable development because of their traditional knowledge systems on natural resource management which have sustained some of the world's more intact ecosystems up to the present.'[234] They also emphasized that the SDGs 'present a unique opportunity to remedy these shortcomings and the historical injustices resulting from racism, discrimination and inequalities long suffered by Indigenous peoples across the world'.[235] This directly echoes the language regarding development issues in paragraph 6 of the UNDRIP's Preamble.

The SDGs and the overall Post-2015 Development Agenda will be a test for assessing the extent to which the UNDRIP is shaping Indigenous policy concerns within the UN system and beyond. It is too early to tell how and whether Indigenous concerns will become a reality through the post-2015 development agenda. The references to Indigenous peoples in the SDGs remain limited, and the goals as a whole fall far short of an Indigenous world-view of development, discussed in the section below.

3.1.3 New Approaches to Development: Indigenous World-View and Participation

As demonstrated above, approaches to development have ignored Indigenous world-views and excluded Indigenous participation. However, new approaches to development

World Bank Should Champion Human Rights', *New York Times* (27 June 2016), <http://www.nytimes.com/2016/06/27/opinion/the-world-bank-should-champion-human-rights.html?_r=0> accessed 24 October 2017.

[227] See n 1. [228] See n 2. [229] SDGs (n 1) para 23. [230] ibid Goal 2.3.

[231] ibid Goal 4.5.

[232] These experts represent the three principal mechanisms in the UN system specializing in issues involving the rights of Indigenous peoples: the Special Rapporteur, the UNPFII, and the Expert Mechanism created by the HRC in December 2007 in the wake of the adoption of the UNDRIP. See OHCHR, 'Indigenous Peoples Cannot Be "Deleted" from the New Global Development Goals, UN Experts Say', OHCHR News Release (Geneva/New York, 18 July 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14888&LangID=E> accessed 24 October 2017.

[233] ibid. [234] ibid. [235] ibid.

are emerging, particularly in new constitutions in South America, but also in the policies of some of the international and regional development agencies. The UNDRIP itself contributes to the development of these new emerging norms, by insisting on Indigenous self-determination of development, thus opening a space in the international legal discourse for Indigenous world-views to emerge and gain weight.

One forum where such world-views are gaining credence is the ACommHPR. In 2010, in its *Endorois* decision, the Commission noted that the peoples concerned 'have not been accommodated by dominating development paradigms and in many cases they are being victimized by mainstream development policies and thinking and their basic human rights violated'.[236]

Meanwhile, the UNDP notes the 'fresh impetus'[237] for 'UNDP engagement with indigenous peoples'[238] resulting from the adoption of the UNDRIP, recognizing that the 'international normative framework applying to indigenous peoples has been strengthened'.[239] The UNDP specifically notes the emergence and broader relevance of alternative paradigms such as those summarized below in the context of Bolivia and Ecuador. Thus:

> Indigenous peoples from different parts of the world have been promoting a different concept of development that is multi-dimensional, holistic, cyclical, regenerative, and sustainable. A good example is the indigenous concept of '*Bien Vivir*' ('Living well') in Latin America ... This is something that is being used more and more by governments (e.g., the Governments of Bolivia and Nicaragua), and may significantly contribute to the concept of human development for all, not only indigenous peoples.[240]

The UNDP Guidelines on Indigenous Peoples' Issues of 2008[241] emphasize the connection between Indigenous peoples' right to development, rights to free, prior, and informed consent (FPIC), and rights to self-determination and autonomy,[242] and suggest the following framework for interpreting and implementing the right to development in the context of Indigenous peoples:

> Indigenous peoples have the right to define and decide on their own development priorities. This means they have the right to participate in the formulation, implementation and evaluation of plans and programmes for national and regional development that may affect them.[243]

This reflects closely Article 23 of the UNDRIP. Importantly, the Guidelines note economic, social, and cultural rights, including the right to adequate housing and the need for protection from forced evictions, as issues of prime importance.[244] The Guidelines also note that women and children may be in need of special protection, which can best be assured by Indigenous-led development.[245] Also of relevance to this chapter is the fact that the Guidelines specifically mention the necessary participation of women in decision-making processes.[246]

[236] *Endorois* (n 99) para 148.

[237] UNDP, UNDP Response to the Questionnaire on the Implementation of the Second International Decade of the World's Indigenous People (UNDP no date) response to Question 2, <http://www.un.org/esa/socdev/unpfii/documents/Second_%20Decade_%20Mid_Eva_Answers/UN%20agencies/United%20Nations%20Development%20Programme.pdf> accessed 24 October 2016.

[238] ibid. [239] ibid.

[240] UNDP, 'UNDP and Indigenous Peoples', cited in Pérez-Bustillo and Hernández-Mares (n 88) 143.

[241] UNDP, 'Guidelines on Indigenous Peoples' Issues' (United Nations, 2009), <http://www.un.org/esa/socdev/unpfii/documents/UNDG_guidelines_EN.pdf> accessed 24 October 2016.

[242] ibid 8. [243] ibid 15. [244] ibid 14. [245] ibid. [246] ibid.

The recently adopted OAS Declaration on the Rights of Indigenous Peoples also reflects Indigenous-driven views of development, rights to FPIC, and rights to restitution as lying behind any meaningful Indigenous right to development.[247]

At the domestic level, several new constitutions recently adopted in South America have explicitly incorporated an Indigenous world-view. In Bolivia and Ecuador, alternative Indigenous concepts of development underpin the constitutional framework.[248] '*Sumak kawsay*' (in the variant of the pre-Hispanic language of Quechua spoken in Ecuador) and '*suma qamaña*' (in the variant of the pre-Hispanic language of Aymara spoken in Bolivia) are translated into Spanish as '*vivir bien*' and into English as 'living well' or 'collective well-being'.[249] These concepts are deployed as bases for the 'refoundation' of these States and for the intended accompanying 'decolonization' of their constitutions and legal systems as a whole.[250] The insistence in the recently adopted constitutional frameworks in Bolivia and Ecuador on the need for alternative development paradigms rooted directly in Indigenous traditions and the ethics and practices of contemporary Indigenous social movements is convergent with the emphasis in the UNDRIP (eg Article 23) on the right of Indigenous peoples to determine and define their own priorities and strategies for development.

These concepts have been drawn from Indigenous movements in these countries as part of their recovery of basic principles embedded in the civilizations prevailing in the Andean region prior to Hispanic colonial conquest in the sixteenth century,[251] and provide the overall normative framework for the approach taken in these constitutions to issues of State legitimacy, social policy and social development, and human rights, as well as to Indigenous rights in particular.[252] The Indigenous social movements of Bolivia and Ecuador are among those which are most influential in Latin America as a whole,[253] and thus the impact of their success in obtaining constitutional recognition of their normative approach to Indigenous policy issues is also likely to have widespread impact beyond these two countries, as evidenced above in their incorporation into the UNDP's processes of consultation and policy development and in the discourse of organizations such as the influential Society for International Development (SID).[254]

The Bolivian Constitution, which is the most far-reaching thus far, includes a commitment in the Preamble to building a new kind of State based on 'respect and equality for all' and principles such as 'sovereignty, dignity, complementarity, solidarity, harmony and equity in the distribution of social wealth'. Both the Ecuadorian and Bolivian Constitutions, along with those of Venezuela and Colombia, are also notable for the extent to which they explicitly incorporate detailed aspects of international human rights law, including Indigenous rights, and provide for their justiciability in national courts.[255] In most cases, these references reflect the highest levels of protection or

[247] OAS Declaration (n 8) Art XXIX.

[248] See further Pérez-Bustillo and Hernández-Mares (n 88) 141–42. [249] ibid. [250] ibid.

[251] ibid. See also Pérez-Bustillo (n 17) 58; see generally E Lander, 'The Discourse of Civil Society and Current Decolonization Struggles in South America' in J Heine and R Thakur (eds), *The Dark Side of Globalization* (UN University Press 2010); CA Baldi, 'New Latin American Constitutionalism: Challenging Eurocentrism and Decolonizing History' (6 February 2012), <http://criticallegalthinking.com/2012/02/06/new-latin-american-constitutionalism-challenging-eurocentrism-decolonizing-history/> accessed 23 January 2017.

[252] Pérez-Bustillo (n 17) 58. [253] ibid.

[254] See, eg, C Walsh, 'Development as *Buen Vivir*: Institutional Arrangements and (De) Colonial Entanglements' (2010) 53(1) Development 15.

[255] Pérez-Bustillo (n 17) 59.

recognition existent in relevant international or regional instruments, and in others go further beyond the limits of current international minimums.[256] However, the existence of some States—such as Mexico—where the constitutional systems fall disturbingly short of the minimum protection required in international law[257] is evidence that Indigenous perspectives on development have yet to be fully embraced by States.

The Indigenous model of development was explicitly referred to by the IACtHR in the *Sarayaku* case,[258] where the representatives of the Sarayaku noted that the State had not taken the necessary and sufficient measures to ensure decent living conditions for all the members of the Sarayaku People, 'affecting their different way of life, their individual and collective life project and their development model',[259] which they argued constituted a violation of Article 4(1) of the American Convention.[260] This case clearly builds on the *Saramaka*[261] and *Awas Tingni*[262] cases, in which the IACtHR laid the groundwork for recognizing an Indigenous-driven world-view, and the more holistic view of survival, development, and cultural identity now the norm in the cases before the Court. The IACtHR's jurisprudence, along with the African Commission's *Endorois*[263] case, have been termed 'earth jurisprudence' by some commentators.[264]

3.1.4 Conclusion on the Right to Development

While there may still be resistance to the right to development per se, as the negotiation of the UNDRIP itself revealed, the UNDRIP's provisions on development contribute importantly to the emergence of three trends in international law. The first is a growing willingness on the part of States to recognize a right to development for Indigenous peoples, in part because of the inherent links between survival and Indigenous-driven development which are now being recognized in international law and which reflect the approach to the right to development in the UNDRIP. The OAS Declaration reinforces this trend, at least with regard to the Americas. The second is increased attention to sustainable development in international law and international development policy. Attention to sustainable development principles both helps to protect Indigenous peoples, but also creates space to introduce Indigenous world-views into international law and policy, which has been the third major area in which the UNDRIP contributes to the right to development.

3.2 Economic, Social, and Cultural Rights

3.2.1 Economic, Social, and Cultural Rights: Inherent Links and Contextual Understandings

The primacy of the concept of survival in the UNDRIP suggests that the ESC rights addressed by Articles 21 and 22 must be understood as providing the material basis necessary to ensure that survival. This in turn acquires additional meaning when it is understood that Indigenous peoples are confronted with at least three different kinds of threat to the survival which the Declaration is intended to ensure. First, physical survival in the face of material conditions of deprivation and discrimination; second, cultural survival as groups with distinct territories, cosmologies, traditions, identities, and institutions; and

[256] ibid. [257] ibid. See further Pérez-Bustillo and Hernández-Mares (n 88). [258] See n 223.
[259] ibid para 234. [260] ibid. [261] See n 208. [262] See n 218. [263] See n 99.
[264] See MM Ratiba, '"Just Piles of Rocks to Developers But Places of Worship to Native Americans"—Exploring the Significance of Earth Jurisprudence for South African Cultural Communities' (2015) 18(1) Potchefstroom Electronic LJ 3197.

finally, survival understood as sustainability as peoples, which requires a combination of the first two dimensions and has particular relevance in circumstances where environmental devastation (for example, due to mega-projects) and climate change undermine and ultimately erode or eliminate a people's ability to maintain and reproduce their identity in their traditional territories.

Article 21(1) frames the overall emphasis on ESC rights in the Articles discussed in this chapter in terms of Indigenous peoples' right to the '*improvement of their economic and social conditions*, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security'.[265]

The rights to education, employment, vocational training and retraining, housing, sanitation, health, and social security restate those rights Indigenous individuals have in already existing international human rights standards, as discussed above in Section 2. However, key to understanding Article 21(1) is the word 'improvement', which captures more than just the 'progressive realization' obligation of rights in current international human rights law. While the language in Article 21(1) and (2) as to the 'improvement' of economic and social conditions is directly drawn from Article 11 of the ICESCR's right to the 'continuous improvement of living conditions', the UNDRIP gives greater concreteness by referring specifically to 'economic and social conditions' rather than the more generic reference to 'living conditions' in the ICESCR. The right to improvement of socio-economic conditions reflects the fact that Indigenous peoples have long been discriminated against in these areas. In this way, Article 21(1) should be read as a prohibiting discrimination in these areas, and as requiring, as set out in Article 21(2), 'effective measures' and 'where appropriate, special measures' for Indigenous peoples. Article 21 thus has both positive and negative elements.

Moreover, given the threefold notion of survival contained within the UNDRIP, economic and social rights of Indigenous peoples should be seen not only as rights to basic goods and services, but as the underlying means to social flourishing as distinct peoples. They are thus, in the true sense of the word, economic, social, and *cultural* rights. They also underpin the development rights discussed above.

It is clear that the major UN human rights treaty monitoring bodies are interpreting States' international obligations with due regard to Indigenous peoples' particular socio-economic rights. For example, in its General Comment 21, the CESCR stated that human rights must be given effect in ways that are culturally appropriate. Specifically referencing Indigenous peoples, the Committee noted that it had:

> ... in many instances referred to the notion of cultural appropriateness (or cultural acceptability or adequacy) in past general comments, in relation particularly to the rights to food, health, water, housing and education ... The Committee wishes to stress in this regard the need to take into account, as far as possible, cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed.[266]

The HRC reflects the cultural needs of Indigenous peoples, and the inherent tie to subsistence means and therefore to economic, social, and cultural rights in cases such as *Angela Poma Poma v Peru*,[267] where it held that deprivation of water for grazing which

[265] Emphasis added.
[266] CESCR, General Comment 21 (n 215) para 16(e).
[267] *Poma Poma v Peru*, UN Doc CCPR/C/95/D/1457/2006 (27 March 2009).

supported the community's traditional subsistence agriculture breached Article 27 of the ICCPR.[268]

3.2.2 Specific Focus on the Right to Health as Economic, Social, and Cultural Right

As part of the UNDRIP's overall framework as to the Indigenous dimensions of ESC rights, Article 24 provides added emphasis on Indigenous peoples' right to health and other social services, already referenced explicitly in Article 21(1). This reflects health as a key determinant of social well-being.[269] But the Article also focuses importantly on the *cultural* dimensions of this right in paragraph 1, including the right to *traditional* medicines and health practices such as 'vital medicinal plants, animals and minerals'. Article 24 then makes a transition in the last clause of the first paragraph to a more generic formulation of Indigenous peoples' 'right to access, without discrimination, to all health and social services', and in Article 24(2) to the restatement within the context of the UNDRIP of the same overall right to health which is set forth in Article 12 of the ICESCR, *in addition* to the special protections for traditional practices in Article 21(1).

It is clearly significant in interpreting the UNDRIP that the cultural dimensions of Indigenous health rights are prioritized by being put in the first paragraph of Article 24, while the more general formulation of the right to health familiar from the context of Article 12 of the ICESCR is in the second. This logic, which puts the cultural dimensions first, is convergent with examples from domestic law. For example, the Bolivian government has been insistent on protecting (and restricting) the production and use of the coca leaf for traditional health-related practices, as a medicinal plant, which would fall under the protection of Article 24(1).[270] Interestingly, in the OAS Declaration's provision on the right to health, the order is reversed, premising the right in international law. However, overall the OAS Declaration maintains the strong focus of the UNDRIP on the importance of the right to health for Indigenous peoples.[271]

Article 24 connects crucially to provisions on non-discrimination.[272] It implies that non-discrimination is a necessary but not sufficient condition for compliance with the UNDRIP, which must be complemented by *both* 'effective' and, 'where appropriate', 'special' measures. States cannot claim that they are adequately addressing Indigenous rights to health simply by offering the same services to Indigenous peoples that are available to everyone; they must *also* shape and target the health services they provide to the specific health-related characteristics and needs of Indigenous peoples, just as Article 14 of the UNDRIP requires fulfillment of *both* of these dimensions (generality, 'effective' measures; and specificity, 'special' measures) in the context of State compliance with Indigenous peoples' right to education.[273]

[268] ibid para 8. [269] ILA, Interim Report (n 13) 29.

[270] See A Heitzeneder, 'The Coca-Leaf: Miracle Good or Social Menace: Cultural and Identity Rights of Andean Indigenous Peoples in International Law and in Context with the International Drug Conventions' (Vienna 2010), <http://othes.univie.ac.at/12287/1/2010-11-04_0421153.pdf> accessed 24 October 2017; S Pfeiffer, 'Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing' (2013) 5 Goettingen J Int'l L 287; R Cortés, 'The Condemned Coca Leaf', *New York Daily News* (13 January 2013), <http://www.nydailynews.com/opinion/condemned-coca-leaf-article-1.1238569> accessed 24 October 2017. Ritual purposes are protected under UNDRIP Arts 31 and 34. See Xanthaki, Chapter 10, this volume.

[271] OAS Declaration (n 8) Art XVIII. [272] See further Gover, Chapter 7, this volume.

[273] See Graham and Van Zyl-Chavarro, Chapter 13, this volume.

Attention to the intertwined cultural, social, and economic aspects of health rights of Indigenous people has been given by the UN treaty monitoring bodies. For example, in a special Statement on the Rio +20 Conference on the Green Economy,[274] the CESCR has noted that there are important linkages between biodiversity conservation, potential advances in pharmacology and medicine, and the enjoyment of Indigenous peoples' right to health and to cultural knowledge.[275] Likewise, the Committee on the Rights of the Child has directly invoked Article 24 of the UNDRIP in its General Comment on the Rights of Indigenous Children,[276] noting that:

> Health-care workers and medical staff from indigenous communities play an important role by serving as a bridge between traditional medicine and conventional medical services and preference should be given to employment of local indigenous community workers. States parties should encourage the role of these workers by providing them with the necessary means and training in order to enable that conventional medicine be used by indigenous communities in a way that is mindful of their culture and traditions.[277]

Social, cultural, and economic development issues are, thus, all caught up in a right to health as expressed in Article 21(1) and (2). The order of ideas pursued in the drafting of Article 24 signals that the UNDRIP's intention is to ensure that State health policies for Indigenous peoples respect and protect autonomous expressions of this right *and, at the same time*, ensure their overall access to the same health services which are provided to everyone. Full compliance with Article 24 thus requires due attention to both of these intertwined dimensions.

3.2.3 Conclusions on the UNDRIP and Economic, Social, and Cultural Rights

The UNDRIP, particularly Articles 21 and 22 discussed in this chapter, strengthens human rights standards on economic, social, and cultural rights in two main ways. First, the connection between economic, social, and *cultural* rights is immediately obvious in the case of Indigenous peoples, which requires a contextual and holistic understanding of economic and social goods as not merely basic needs, but as the preconditions for cultural survival, development, and flourishing. As such, the UNDRIP provides a platform to strengthen economic and social rights standards for all, by recapturing the often ignored, but more often crucial, cultural dimension of all socio-economic goods. Second, the UNDRIP advances the right to health specifically, and makes explicit the complementarity of health systems—both Indigenous and State-driven—that are necessary for its enjoyment. By insisting on these contextual understandings of economic, social, and cultural rights, the UNDRIP opens avenues for a richer understanding of these rights in international law.

3.3 The Rights of Indigenous People with Special Vulnerabilities

3.3.1 Introduction: Protecting Vulnerable Groups in International Law and the UNDRIP

Articles 21(2), 22, and 44 are concerned with groups often marginalized or discriminated against within *already* marginalized communities. These groups—women, children and youth, older persons, and those with disabilities—are often particularly vulnerable. It is also important to note that the vulnerable are often additionally subject to intersecting

[274] See n 217. [275] ibid para 6(f). [276] See n 213. [277] ibid para 52.

forms of discrimination (as, for example, female children or the elderly with disabilities), further increasing their vulnerability within a group. Articles 21(2), 22, and 44 therefore provide an important bulwark against an idealized interpretation of the UNDRIP that assumes that Indigenous communities are homogenous in their needs and desires. However, the provisions seek to move beyond distinctions where, for example, women's or children's rights are posited as opposed to the rights of Indigenous peoples as a whole. For example, rights of Indigenous women are crucially constructive of other rights in the UNDRIP. As Val Napoleon has noted, for example, without the equality of aboriginal women, self-determination can only ever be achieved for half of an Indigenous community.[278] It is, we note, questionable whether half a self-determined community can constitute a self-determined community at all.

Articles 21(2), 22, and 44 shed additional light both on the UNDRIP's approach to translating international human rights protections into the context of Indigenous peoples, and to the complex balance between the need for States to take 'effective' and/or 'special' measures to ensure them. Articles 21(2) and 22(1) emphasize the need for 'particular attention' to the rights and needs of especially vulnerable groups, such as 'indigenous elders, women, youth, children, and persons with disabilities'. The repetition between these two Articles as to the need to address the rights and needs of the groups which are enumerated is clearly significant in itself. The rights and needs of Indigenous children are highlighted additionally in Article 22(2), which requires States 'to take measures, *in conjunction with indigenous peoples*, to ensure that *indigenous women and children* enjoy ... *full protection and guarantees against all forms of violence and discrimination*'[279]—a right discussed in the section below.

These provisions are informed by, and are informing the further development of, human rights law at the international, regional, and domestic levels. For example, the CESCR has stated in General Comment 21 on the Right to Take Part in Cultural Life that women, children—and specifically Indigenous children—older persons, and persons with disabilities require particular protection of their right to take part in cultural life.[280]

As noted above, the IACtHR has constructed a right to a dignified life or *vida digna*. Importantly, this right places positive obligations on the State in the case of individuals and communities in particularly vulnerable situations, which include Indigenous peoples as a whole, but also children, pregnant women, and the elderly.[281] In the *Sarayaku* case, the IACtHR set out the following test for determining whether the State had positive obligations for violating the right to life in a specific case. Positive obligations will arise when:

> ... at the time the events occurred, the authorities knew or should have known about the existence of a situation that posed an immediate and certain risk to the life of an individual or of a group of individuals, and that they did not take the necessary measures available to them that could be reasonably expected to prevent or avoid such risk,[282]

and determined that the Sarayaku community had suffered equitable, 'non-pecuniary damages' that must be compensated, which were attributable to the effects on their 'health and safety' due to the unconsented oil exploration in their traditional territories which had been encouraged, facilitated, and subsidized by the State.[283]

[278] V Napoleon, 'Aboriginal Discourse: Gender, Identity, and Community' in Richardson et al (n 80) 235.
[279] Emphasis added. [280] CESCR, General Comment 21 (n 215) Pt E.
[281] See above text accompanying n 117. [282] *Sarayaku* (n 223) para 245.
[283] ibid para 58.

In the *Sarayaku* case, the Community argued that, during the period of food shortages and state of emergency, there were cases of illnesses that mainly affected children and the elderly, a situation described as 'fatal to the health of Sarayaku members who were prevented from having access to health care centers', which affected their right to life.[284] The Court makes specific reference to the effects of the situation on Indigenous elderly persons, as contemplated under Articles 21(2) and 22 of the UNDRIP.[285]

3.3.2 Women

Special protections for Indigenous women are emphasized in both Articles 21(2) and 22(1) and (2), but also in a separate provision, Article 44, which affirms that: 'All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.' Article 44 was one of the least controversial of all the Articles in the UNDRIP, and undoubtedly reflects existing international prohibitions on gender discrimination.

The UNDRIP's provisions on women's rights seek to overcome the perception of women's rights as opposed to Indigenous rights. Conventional interpretations are based on compartmentalization, hierarchy, and distinction, while Indigenous women conceive of women's human rights and collective rights 'as two parts of a coherent whole'.[286] This difference should be understood as an opportunity for a 'vibrant engagement, strengthening an intercultural, gendered understanding and application of human rights that both promotes the rights of indigenous women and enhances the human rights framework itself'.[287]

Recent policy analysis and scholarship within the UN system seeks to address these complexities beyond the universalist/relativist frame that is traditionally applied to such issues, and provides important additional guidance for interpreting and assessing the implications of Articles 21, 22, and 44 of the UNDRIP, in an understanding of women's rights and Indigenous rights as 'inextricably linked'.[288]

According to the United Nations' Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the UNPFII, 'indigenous women seek to find points of alignment between international human rights instruments and local values and practices that uphold women's rights, thus promoting both gender equality and cultural identity as two crucial bases for the full enjoyment of human rights.'[289]

While the starting point should be clearly understood as that all Indigenous women enjoy the human rights and equality due to women everywhere, as Article 44 clearly states, Articles 21 and 22 provide opportunities to think of the relationship between women's human rights and the Indigenous rights of a group in more collaborative and interdependent ways than has previously been the case, and as such provide an important impetus for moving the human rights of all women forward both practically and conceptually.

[284] ibid para 67. [285] ibid.

[286] UN Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the UNPFII, 'Gender and Indigenous Peoples' Human Rights: Briefing Note 6' (New York, February 2010) 1, <http://www.un.org/esa/socdev/unpfii/documents/BriefingNote6_GREY.pdf> accessed 24 October 2017.

[287] ibid.

[288] See ibid and UNICEF et al, Breaking the Silence on Violence against Indigenous Girls, Adolescents and Young Women: A Call to Action Based on an Overview of Existing Evidence from Africa, Asia Pacific and Latin America' (UNICEF May 2013), <http://www.unfpa.org/resources/breaking-silence-violence-against-Indigenous-girls-adolescents-and-young-women> accessed 25 November 2017.

[289] Briefing Note 6 (n 286) 2.

3.3.3 Children and Youth

International law seeks to protect Indigenous children as particularly vulnerable members within their own communities and to recognize their particular vulnerabilities to activities taking place over their communities as a whole.

The UN Committee on the Rights of the Child (CommRC, or the Committee) has made a major contribution to the development of the rights of the child in line with the UNDRIP, with General Comment 11 in 2009 specifically on Indigenous Children and Their Rights under the Convention, which makes explicit reference to the rights of the Indigenous child under the UNDRIP.[290] In addition, the Commission's General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights notes that Indigenous children's rights under the CRC on the right to life, survival, and development (Article 6) are particularly at risk where their land is sold or leased to investors, leading to the deprivation of access to natural resources, subsistence, and cultural heritage.[291] The Committee further notes that Indigenous children may have particular difficulty in making themselves heard, a right under Article 12 of the CRC.[292] The Committee has thus taken the lead in fleshing out the interpretation of the rights of children under the UNDRIP, taking a contextual and holistic approach that demonstrates the inherent links between the enjoyment of children's rights and their ability to enjoy their traditional cultures, in community with their peoples, on their traditional lands. The IACtHR, by recognizing children and Indigenous peoples as specifically vulnerable, has also made a contribution to furthering their protection in international human rights law through the concept of the *vida digna* discussed above.[293]

While the Committee considers all those under the age of 18 as children, Indigenous youth have received specific additional attention. A 2013 report of the international expert group meeting on Indigenous youth[294] specifically considered the meaning of Article 21 of the UNDRIP in this regard.[295] It recognized enormous challenges facing Indigenous youth from urbanization, gang activity, and militarization, to sexual health, malnourishment, and homelessness.[296] The report stressed the need for Indigenous youths' right to identity to overcome deracination and colonial dispossession,[297] and stressed the need for Indigenous youth to enjoy rights to participation, inter-cultural education, language rights, and access to justice and social services, for example.[298] The report highlights the multiple issues that face Indigenous youth, not all of which equally face Indigenous children of younger ages, and which justify the inclusion of youth as a particularly vulnerable category of persons in the UNDRIP.

3.3.4 Older Persons

The UNDRIP is the only major international human rights instrument that highlights a concern for the rights of elders as an especially vulnerable or protected group in its text,

[290] CommRC, General Comment 11 (n 213).

[291] CommRC, General Comment 16: State Obligations Regarding the Impact of the Business Sector on Children's Rights, UN Doc CRC/C/GC/16 (17 April 2013) para 19.

[292] See also CommRC, General Comment 12: The Right of the Child to Be Heard, UN Doc CRC/C/GC/12 (1 July 2009) paras 21, 87.

[293] Text accompanying nn 117, 278.

[294] UNPFII, Indigenous Youth: Identity, Challenges and Hope: Articles 14, 17, 21 and 25 of the UNDRIP. Report of the International Expert Group Meeting, UN Doc E/C.19/2013/3 (12 March 2013).

[295] ibid para 1. [296] ibid para 11. [297] ibid. [298] ibid paras 44–63.

and the Declaration's recognition of this in Articles 21(2) and 22(1) may in fact play a role in helping lay the foundation for the eventual emergence of a specific instrument focused on the rights of elders within the UN system. It is widely recognized that elders play a special role in Indigenous and tribal societies as leaders and/or as custodians or sources of spiritual guidance, traditional knowledge, and wisdom,[299] and it may be that Indigenous peoples' contribution to the wider recognition of their dignity and worth may make a similar kind of contribution in this context, to the role that Indigenous notions as to the defence of Mother Earth as a living organism have made to environmentalist movements and to the concept of sustainable development, as discussed above. The OAS Declaration, however, makes only one mention of elders or older persons, in Article XXVII on Labor Rights, which obliges States to take immediate and effective measures to eliminate exploitative labour practices, with specific mention of children, women, and elders.[300]

Guidance as to issues related to the special vulnerabilities of Indigenous elders may also be obtained from CEDAW General Recommendation 27, which focuses on issues relating to the rights and needs of older women and the protection of their human rights.[301] There is also a CEDAW General Recommendation 18 (1991) involving women with disabilities.[302]

3.3.5 Persons with Disabilities

In a 2014 report, the UNPFII notes that in some Indigenous cultures, there is no equivalent translation of the term 'persons with disabilities'.[303] As such, attitudes to, and understandings of, disability may differ substantially within and across Indigenous societies. Accordingly, the report stresses that the UNDRIP and the UN Convention on the Rights of Persons with Disabilities (CRPD) must be read together to give a culturally sensitive meaning to the protection of Indigenous peoples with disabilities.[304]

Indigenous persons with disabilities are entitled to all rights included in the CRPD; nevertheless, despite the closeness in time between the adoption of the UNDRIP and the CRPD, there has until recently been little attention to the rights of Indigenous peoples with disabilities.[305] In fact, the UNPFII has noted that Indigenous people with disabilities remain in effect 'invisible' in UN discussions and work on Indigenous peoples.[306] Symptomatically, perhaps, the CRPD includes only one reference to Indigenous peoples,

[299] See, eg, L Holmes, 'Heart Knowledge, Blood Memory, and the Voice of the Land: Implications of Research among Hawaiian Elders' in GJ Sefa Dei, BL Hall, and D Goldin Rosenberg (eds), *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World* (University of Toronto Press 2000); NN Wane, 'Indigenous Knowledge: Lessons from the Elders—A Kenyan Case Study' in ibid.

[300] OAS Declaration (n 8) Art XXVII(2).

[301] CEDAW, General Recommendation 27: Older Women and Protection of Their Human Rights, UN Doc CEDAW/C/2010/47/GC.1 (19 October 2010).

[302] CEDAW, General Recommendation 18: Disabled Women, UN Doc A/46/38 (4 January 1991).

[303] UNPFII, Study on the Situation of Indigenous Persons with Disabilities, with a Particular Focus on the Challenges Faced with regard to Full Enjoyment of Human Rights and Inclusion in Development, UN Doc E/C.19/2013/6 (5 February 2013) para 19.

[304] ibid paras 10–11.

[305] See ibid and UN Inter-Agency Support Group on Indigenous Peoples' Issues, 'Rights of Indigenous Peoples/Persons with Disabilities: Thematic Paper towards the Preparation of the 2014 World Conference on Indigenous Peoples', 2–4, <http://www.un.org/en/ga/president/68/pdf/wcip/IASG%20Thematic%20Paper_Disabilities.pdf> accessed 24 October 2017.

[306] UNPFII (n 303) para 16.

in its Preamble, despite evidence that in some countries Indigenous peoples are living with disabilities in far greater proportions than the general population.[307]

The UNPFII study on the situation of Indigenous persons with disabilities identified the major issues facing Indigenous peoples with disabilities as including: self-determination; participation in decision-making and consultation; access to justice; rights to education, language, and culture; access to health; enjoyment of an adequate standard of living; and the ability to live in the community.[308] Multiple or double discrimination is also explicitly acknowledged here, demonstrating the difficulty of separating out categories of vulnerability conceptually and in practice.[309] Indigenous children are mentioned, particularly in identifying that their special needs often result in their removal from the community,[310] an action that can infringe Article 7(2) of the UNDRIP which prevents any forced removal of children from an Indigenous community, and which represents customary international law.[311] Indigenous women with disabilities are also noted, particularly in connection to their higher risk of experiencing violence than those without disabilities.[312] The report stresses that the UNDRIP is a major legal framework for protecting the rights of Indigenous peoples with disabilities, and that other international human rights standards, notably the CRPD, must be read in light of it.[313]

It is clear that the international legal standards on Indigenous peoples with disabilities are nascent in character. However, it appears that the UNDRIP as a whole, and Articles 21 and 22 in particular, will be important guides in any developing law.

3.3.6 Conclusions on Indigenous Persons in Situations of Particular Vulnerability

The multiple and often overlapping and intersecting vulnerabilities of Indigenous children, youth, women, older persons, and persons with disabilities is clear from the UN reports and initiatives in this area. These facts, and the sometimes only recent, and overall to date insufficient, attention to their redress, mean that the UNDRIP provisions here are sorely needed. In the best interpretation, Articles 21, 22, and 44 will be used to provide special measures and sweeping policy changes that will overcome systemic discrimination and marginalization. To date, however, the legal efforts in this area remain nascent and limited in overcoming histories of dispossession, colonialism, and social breakdown that have exacerbated the violations experienced by the most vulnerable.

3.4 Prohibition of Violence against Women and Children

3.4.1 The Context of Violence and Discrimination Experienced by Indigenous Women and Children

In recent years, a number of high-profile reports of endemic abuse of Indigenous women and children have focused international attention on the need for an end to violence against them. For example, a 2007 report into high levels of child abuse in Australia's Northern Territory aboriginal communities led to a controversial national government 'intervention'.[314] Recently, a CEDAW enquiry into the murder and disappearance of

[307] ibid paras 1–8. [308] ibid. [309] ibid paras 29–30. [310] ibid para 46.

[311] See further Hohmann, Chapter 6, this volume.

[312] UNPFII (n 303) para 49. See further HRC, Thematic Study on the Issue of Violence against Women and Girls and Disability, UN Doc A/HRC/20/5 (30 March 2012). See also discussion below in Section 3.4.

[313] UNPFII (n 303) paras 9–14.

[314] R Wild and P Anderson, 'Report of the NT Board of Inquiry into the Protection of Aboriginal Children from Child Abuse, Make Akelyernemane Meke Mekarle: Little Children are Sacred' (Australia 2007).

aboriginal women in Canada found that an aboriginal woman between the ages of 25 and 44 in Canada is five times more likely to die as a result of violence than a non-aboriginal woman.[315] Even Mexico's former Attorney General Arely Gomez (the first woman to occupy the position) has recently acknowledged that according to government data, which most advocates consider to be a vast underestimate, Indigenous women in that country confront twice as much risk of being victimized as non-Indigenous women, and similar patterns have been documented in Guatemala.[316]

A 2013 joint report issued by, among others, UNICEF, the UNFPA, and UN Women provides guidance as to the actual scale, diversity, and complexity of the violence against Indigenous and tribal women that Article 22(2) is focused on.[317] Overall, the report finds that violence against Indigenous women 'must be understood within the broader contexts of indigenous peoples' historic and continuing marginalization and discrimination, violations of their collective and individual rights, displacement, extreme poverty and often-limited access to culturally appropriate basic services and justice'.[318]

The UNICEF report emphasizes the multi-dimensional character of such violence:

> Its dimensions include physical, sexual and psychological/emotional violence in the family and community, as well as such violence perpetrated or condoned by the State. Specific forms and manifestations include domestic violence, child marriage, forced pregnancy, honour crimes, FGM/C, femicide, non-partner sexual violence and exploitation, sexual harassment, trafficking and violence in conflict situations.[319]

Indigenous women and children experience high levels of violence and abuse from both *inside* and *outside* their own communities,[320] resulting from their marginalization and poverty within greater society, and from individual and systemic discrimination by perpetrators and by those supposed to protect these vulnerable groups, such as the police and law-makers.[321]

Indigenous peoples in general are highly vulnerable to serious human rights violations, particularly those related to struggles for hegemony over their territories, resources, and traditional forms of knowledge, practices, and relationship to nature.[322] Indigenous women are often targeted for some of the most violent abuses, including femicide, rape, and other forms of sexual and gender violence and abuse, which arise precisely because women play such an important role in many Indigenous cultures in terms of the reproduction of their cultures, languages, knowledge, and practices through child-bearing, child-rearing, and education, and in cultural and spiritual leadership roles.[323] Under such circumstances, women may be singled out for sexual and other forms of violence that

[315] CEDAW, Report of the Inquiry concerning Canada, UN Doc CEDAW/C/OP.8/CAN/1 (30 March 2015) para 95.

[316] 'Top Officials Take on Violence against Indigenous Women and Girls in North America', <http://www.indianz.com/News/2016/10/17/top-officials-take-on-violence-against-i.asp> accessed 24 October 2017; A Beltrán and L Freeman, 'Hidden in Plain Sight: Violence against Women in Mexico and Guatemala' (Washington Office on Latin America March 2007).

[317] UNICEF et al, 'Breaking the Silence on Violence against Indigenous Girls, Adolescents and Young Women' (UNICEF May 2013).

[318] ibid iv. [319] ibid 3. See also HRC, Thematic Study (n 312) para 18.

[320] CEDAW, Report on Canada (n 315) para 96.

[321] ibid paras 132–80 for the litany of failings in Canada's law enforcement response to missing and murdered aboriginal women.

[322] See A Shah, 'Rights of Indigenous People—Global Issues' (16 October 2010), <http://www.globalissues.org/article/693/rights-of-indigenous-people> accessed 24 October 2017.

[323] Centro de Derechos de la Mujer de Chiapas, AC (CDMCH), Grupo de Mujeres de San Cristóbal de Las Casas AC (COLEM), 'Shadow Report to the CEDAW: Mexico: Discrimination and Lack of Access to Justice

involve convergent modes of femicide and genocide as a way to intimidate and silence their communities, and even as part of an effort to annihilate them and movements in defence of their rights, as distinct communities or sectors.[324] At the same time, it is often Indigenous women who play active leadership roles or who are perceived as potential leaders who are singled out for sexual or other forms of violence within the context of efforts to repress such movements.[325]

It is precisely, however, in contexts such as Bolivia and Mexico's Indigenous Zapatista movement where important advances in the construction of alternative public policies at the national and local levels which deepen the recognition of Indigenous rights have at the same time produced the most notable successes in addressing the rights of Indigenous women, and in generating their participation and leadership in such processes.[326]

Issues of gender equality and discrimination against women pose difficult challenges in many Indigenous and tribal communities, often because of the disproportionate impact on women and girls of colonial legacies and neo-colonial, neoliberal policies, and the ways in which such legacies and effects often become intertwined with essentialist, frozen conceptions of 'tradition'.[327] As a result, Indigenous and tribal cultures are often stereotyped as fostering the unequal treatment of women, including engrained patterns of domestic violence and sexual abuse, as if they reflected inherent cultural traits attributable to Indigenous identity.[328] At the same time, many practices that may in fact under certain circumstances promote such inequalities cloak themselves in the supposed legitimacy of 'tradition', and promote resistance to efforts towards greater equality for women by associating such initiatives with invasive, pro-Western agendas.[329] Such approaches easily fall into the trap of framing the rights of women, including those of Indigenous women, in opposition to, or in destructive, zero-sum, tension with, the collective rights of Indigenous peoples. Articles 21, 22, and 44 of the UNDRIP instead insist upon an understanding of individual Indigenous rights and the rights of Indigenous peoples as inherently intertwined. As a recent UN report directed by Indigenous experts put it, 'in all societies there are practices to keep, practices to change and practices to reconsider. While indigenous peoples continue to value and perpetuate their culture and way of life, we should not be exempt from this type of reflection.'[330]

As such, the prefatory reference in Article 22(2) to the requirement that States take compliance measures to protect Indigenous women and children against violence and discrimination 'in conjunction with indigenous peoples' is significant. This language at

for Women in Chiapas, Mexico' (San Cristóbal de Las Casas May 2012), <http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/CDMCH_COLEM_for_the_session_en.pdf> accessed 24 October 2017.

[324] See, eg, the context of the 1997 Acteal Massacre in the Mexican region of Chiapas, where thirty-six of the forty-five victims were Indigenous women and girls who had been forcibly displaced from their home communities, targeted by government-backed paramilitary forces because they were accused of allegiance to the Zapatista rebels (ibid 16–29).

[325] ibid.

[326] See S Rouseau, 'Indigenous and Feminist Movements at the Constituent Assembly in Bolivia: Locating the Representation of Indigenous Women' (2011) 46 Latin American Research Rev 5 (Bolivia); RA Hernández Castillo, 'Zapatismo and the Emergence of Indigenous Feminism' (2002) XXXV(6) Rep Race & Identity 39 (Chiapas).

[327] See generally IWGIA, Gender and Indigenous Women: Position Paper and Strategy (IWGIA 1999) 9, as cited in MNL Zardo 'Gender Equality and Indigenous Peoples' Right to Self-Determination and Culture' (2013) 28 American University Int'l L Rev 1053, 1056; for a critical analysis of the interaction between tradition and sexism, see Napoleon (n 278) 234–36.

[328] IWGIA, ibid. [329] ibid. [330] UNICEF (n 317) iv.

minimum conveys a double-edged approach to the issue of violence against Indigenous women and children. On the one hand, the insistence on joint action between the State and Indigenous peoples in this context strongly suggests a framework of complementary obligations and duties which apply both to the State *and* to Indigenous communities in their systems of autonomy and self-government. This underlines the importance the UNDRIP attributes to the protection of Indigenous women and children from violence as an imperative and priority for Indigenous authorities. At the same time, the emphasis on joint, convergent action suggests that unilateral action by States in the absence of such cooperation should be avoided. This seeks to respond to the long history of abuses by States, evidenced in concerted interventions into the family life of Indigenous and tribal peoples in contexts such as the 'stolen generations' of forcibly removed aboriginal children in Australia[331] and that of Native American residential schools in the United States and Canada.[332] The Australian Federal Government's response to child abuse in the Northern Territories has been criticized also in this respect. A suite of racially discriminatory law reforms that implicated all aspects of daily life in the communities was imposed without consultation,[333] indicating the distance States still need to travel in fulfilling the aims and standards of the UNDRIP.

UNICEF's 2013 report[334] provides important conceptual guidance for navigating the complexities of the intersectionality emphasized in Articles 21(2) and 22 of the UNDRIP, as well as regarding the challenges of applying the emphasis on sexual and gender equality affirmed in Article 44 within the context of Indigenous peoples and communities. The report's recommendations include calls for the collection of empirical evidence to address the 'statistical silence' around violence against Indigenous girls and women, which is a worldwide problem, but particularly acute in the African region; the need to address the structural, underlying risk factors that lead to violence against Indigenous women and children, which include poverty, discrimination, and the very lack of adequate social and economic conditions these provisions of UNDRIP seek to redress; measures to tackle impunity for perpetrators, and to promote values and practices within Indigenous communities that serve as protective factors, and for adequate redress and enforcement of laws; and improvements in social welfare services so that front-line support is available, accessible, appropriately resourced, and age, gender, and culturally appropriate.[335] Calls for more resource and coordination in policy implementation are also important.[336]

The CEDAW enquiry into missing and murdered Aboriginal women in Canada mirrors these calls, stressing the need for both equal treatment by State actors and law enforcement agents, as well as the underlying need to overcome stereotypes and redress

[331] See Human Rights and Equal Opportunity Commission, 'Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (HREOC 1997).

[332] A Smith, 'Soul Wound: The Legacy of Native American Schools', *Amnesty International Magazine* (26 March 2007), as quoted in AT EagleWoman, 'The Ongoing Traumatic Epxerience of Genocide for American Indians and Alaskan Natives in the United States: The Call to Recognize Full Human Rights as Set Forth in the UN Declaration on the Rights of Indigenosu Peoples' (2015) 3(2) American Indian LJ 424, 445 (United States); Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliarion Commission of Canada' (TRC 2015); TRC, 'Canada, Aboriginal Peoples and Residential Schools: They Came for the Children' (TRC 2012).

[333] See A Cowan, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) Pacific Rim L & Policy J 247, 250–52; Wild and Anderson (n 314).

[334] UNICEF (n 317). [335] ibid. [336] ibid.

historical injustices and the legacies of colonialism.[337] All of these factors must be taken into account as part of a comprehensive approach to securing and monitoring the implementation and enforcement of Articles 21, 22, and 44.

3.4.2 Legal Standards and Interpretations on Violence against Women in the Wake of the UNDRIP

Discrimination against women and girls contravenes the existing corpus of international law. However, it is clear that more specific responses are needed to address the structural violence that underlies personal, individual experiences of violence by Indigenous women and girls.

In this respect, the Inter-American Court of Human Rights has decided a series of important cases which seek to respond to violence against women and girls. Two cases decided in 2010 by the Court have interpreted the implications of the Belém do Pará Convention, the *Case of Rosendo-Cantú and Others v Mexico*[338] and the *Case of Fernández Ortega and Others v Mexico*.[339] The two cases involved Indigenous women from the Mexican region of Guerrero who were victims of rape in two different incidents involving military personnel engaged in operations combining counter-insurgency efforts with US-backed anti-drug campaigns (in this instance, intended to promote the eradication of the cultivation of poppies, coca, and/or marijuana).[340]

The cases were litigated before the UNDRIP was adopted and so the UNDRIP is not cited or explicitly interpreted by the Court. But the Court's interpretations of the complex interrelationship between relevant provisions of the CEDAW, the CRC, the Convention of Belém do Pará, and the Inter-American Convention to Prevent and Punish Torture,[341] and other dimensions of international and inter-American law in the context of sexual violence against Indigenous women and young girls, provides important guidance for the interpretation of the meaning and reach of Articles 21, 22, and 44 in the UNDRIP.

In both cases, the IACtHR found the Mexican State responsible for multiple violations of the Inter-American Convention on Human Rights as well as the Belém do Pará Convention and the Inter-American Convention to Prevent and Punish Torture, ruling among other things that the rapes committed in both cases amounted to a form of torture because of the circumstances under which they were committed.[342] The Court also described the intertwined vulnerabilities of each of the women involved because of their dual and convergent status as Indigenous women,[343] which was further exacerbated in terms of an added vulnerability in the case of Rosendo-Cantú because she was a minor at the time the rape was committed.[344]

The Court highlighted Rosendo-Cantú's vulnerability as an Indigenous woman based on her language and identity,[345] as it also did in the *Fernández Ortega* decision,[346]

[337] CEDAW, Report on Canada (n 315) Pt X (recommendations).

[338] *Case of Rosendo-Cantú and Others v Mexico* (Preliminary Objection, Merits, Reparations, and Costs), IACtHR Series C No 216 (31 August 2010).

[339] *Case of Fernández Ortega and Others v Mexico* (Preliminary Objection, Merits, Reparations, and Costs), IACtHR Series C No 215 (30 August 2010).

[340] See Pérez-Bustillo and Hernández-Mares (n 88) 246–52.

[341] Adopted 9 December 1985, entered into force 28 February 1987, OAS Treaty Series No 67, reprinted in OEA/Ser.L/V/82 Doc 6 Rev 1, 83.

[342] *Rosendo-Cantú* (n 338) para 87, see also paras 20–25; *Fernández Ortega* (n 339) paras 40, 24–29.

[343] *Fernández Ortega* (n 339) paras 73, 81; *Rosendo-Cantú* (n 338) paras 103, 245.

[344] *Rosendo-Cantú* (n 338) paras 103, 245.

[345] ibid para 185.

[346] *Fernández Ortega* (n 339) para 223.

and also relied in *Rosendo-Cantú* on two General Comments of the Committee on the Rights of the Child[347] and on Article 19 of the American Convention, to affirm Rosendo-Cantú's right as a 'girl' to special protection.[348] The Court also noted how the Mexican judicial process regarding cases of rape involving Indigenous women denied her right of access to the judicial system, as well as her right as a child (at the time) to be heard.[349]

In the *Rosendo-Cantú* case, the Court also emphasized expert witnesses' testimony from former UN Special Rapporteur Rodolfo Stavenhagen and psychologist Clemencia Correa that Indigenous women in rural regions of Mexico confront extreme degrees of vulnerability to the presence of military personnel in their communities due to 'institutional violence by the military'.[350] The Court accepted that 'indigenous women continue to suffer consequences from patriarchal structures blind to gender equity particularly within institutions such as the Armed Forces and police whose members are trained to defend the Nation and to combat or attack criminals, but who are not sensitized to the human rights of the communities or of women.'[351] In both cases, the Court ordered a series of what it characterized as collective measures of multicultural, multilingual reparation including the publication of the Court's judgment in newspapers in the Indigenous language (Me'paa) spoken by both women, and special measures in terms of education and training in both Spanish and Me'paa to help prevent rampant sexual violence against Indigenous women.[352]

The recently adopted OAS Declaration on the Rights of Indigenous Peoples includes Article VII(2), which recognizes 'that violence against Indigenous peoples and persons, particularly women, hinders or nullifies the enjoyment of all human rights and fundamental freedoms'. States, meanwhile, must 'adopt the necessary measures, in conjunction with indigenous peoples, to prevent and eradicate all forms of violence and discrimination, particularly against indigenous women and children' (in Article VII(3)), and in Article XXX on the right to peace, security, and protection, the Declaration notes that States 'shall take special and effective measures in collaboration with indigenous peoples to guarantee that indigenous women, children, live free from all forms of violence, especially sexual violence, and shall guarantee the right to access to justice, protection, and effective reparation for damages incurred to the victims'. Article XXX in particular reflects the fact that Indigenous women are often subjected to violence in times of conflict and unrest, which is especially relevant in contexts such as Colombia and Mexico.

These cases and the developments at the OAS are welcome, but the embrace of the UNDRIP by other UN actors, such as the Special Rapporteur on Violence against Women and the CEDAW Committee, as well as domestic governments, their military, and their police forces, is also necessary given both the overwhelming evidence of the violence experienced by Indigenous women, and the intersectional and multiple nature of the discrimination they face.

[347] *Rosendo-Cantú* (n 338) para 202, referencing CommRC, General Comment 5: General Measures of Implementation for the Convention on the Rights of the Child (Arts 4 and 42 and para. 6 of Art. 44), UN Doc CRC/GC/2003/5 (27 November 2003); CommRC, General Comment 12 (n 292).

[348] *Rosendo-Cantú* (n 338) para 202. [349] ibid para 201. [350] ibid paras 70–71.

[351] ibid para 71.

[352] *Fernández Ortega* (n 339) paras 223, 243, 247; *Rosendo-Cantú* (n 338) paras 225, 226, 228, 229.

3.5 Special Measures

The references in Articles 21(2), 22, and 44 of the UNDRIP to the particularized vulnerabilities of specific groups and to the need for preferential measures along the lines of affirmative or positive action or positive discrimination are key. From this perspective, the issue of special measures and their appropriate character includes the emphasis in Article 22 on the 'rights and special needs' of the same sectors specified in Article 21(2), and underlines the importance of focusing on the same especially vulnerable groups highlighted in Article 21(2). Article 22(2) in turn stresses the need for the 'full protection' of such groups against all forms of violence and discrimination (including upon the basis of gender as emphasized by Article 44).

Special measures are discussed in detail by Kirsty Gover in Chapter 7 of this volume. It is clearly the case that the UNDRIP reflects existing international law, which accepts State obligations for special measures to redress the effects of discrimination and to overcome disadvantage and marginalization. However, as Gover notes, questions remain. For example, it is unclear whether special measures for Indigenous peoples under the UNDRIP are confined to those groups mentioned in Article 22, or whether they encompass Indigenous people and peoples on a broader basis. In line with an organic understanding of vulnerability and of State obligations under international human rights law, it is better to see the UNDRIP's inclusion of special measures as open to redressing vulnerabilities more broadly. However, States may resist this understanding as they resisted the inclusion of special measures during the negotiations, as detailed in Section 2. The OAS Declaration, positively, uses the phrase 'special measures' with regard to women and children (in Article XXX(4)(c)), but extends special measures to all Indigenous people under Article XXVII(1) on labour rights, which states that 'states shall take all special measures to prevent, punish and remedy the discrimination to which indigenous peoples and persons are subjected.'

A second question concerns the character of special measures. For example, 'interventions' such as Australia's response to child abuse in the Northern Territories[353] and its discriminatory imposition of alcohol restrictions over the Palm Island Community[354] were imposed without consultation and should be seen as lacking when measured against the needs for participation and Indigenous-driven self-determination in the UNDRIP, even, or perhaps particularly in the case of, redressing violence against the vulnerable, as true solutions must involve the whole community.

The status and scope of special measures under the UNDRIP, and its contribution to more general law in this area, remain to be seen, but the reader should refer to Chapter 7 in this volume to assess the state of the law at the time of writing.

4. Conclusion

The UNDRIP symbolizes the potential emergence of a historic new pact between Indigenous peoples and the international system which reflects important hopes and aspirations, but also confronts multiple barriers to effective implementation which are inherent in the origins, characteristics, structures, and contradictions of that system itself. This goes to the heart of the complex chemistry between the Declaration and

[353] See above, n 332. [354] See further Gover, Chapter 7, this volume.

other international norms and structures within which it is necessarily embedded. On the one hand, the Declaration must be understood and interpreted within the context, and against the backdrop, of the overall contemporary international system, but on the other hand, several of its provisions conflict, or fit at best uneasily, with long-standing assumptions and practices which are characteristic of that system. Multiple complexities arise here which must be navigated.

The provisions analysed in this chapter reflect this tension. Some aspects of Articles 20, 21, 24, and 44 reflect a clear consensus in existing international law. The equality of men and women in Article 44 is a case in point. It is also uncontroversial that Indigenous peoples enjoy socio-economic rights as do all other individuals. These conclusions should be so obvious that they do not need stating, but the UNDRIP was in part fought for because they had not proved self-evident in many political contexts. More radically, there is also now strong support for an inherent connection between the socio-economic and cultural rights of Indigenous peoples which recognizes inherent connections to traditional land and territory as the basis not only for individual survival, but cultural survival, development, and flourishing.

The IACtHR's key cases on Indigenous rights together constitute the most advanced interpretations of Indigenous rights issues in the world. The ACommHPR has also made important strides in this direction. In addition, as this chapter shows, some of these approaches have been specifically incorporated into the work of UN and other international agencies and international financial institutions such as the UNDP, the Inter-American Development Bank, and the World Bank. Many parallel developments that accord with the UNDRIP are also in evidence, even when they do not directly reference it (eg the work of the CEDAW on violence against Indigenous women).[355]

Nevertheless, the negotiating history of the provisions considered here demonstrates that some of the core issues addressed in these Articles remain contested. The right to development itself, let alone a vision of development in harmony with Indigenous world-views, remains controversial and resisted by States.

It is likely that the provisions addressed in this chapter will remain central for Indigenous individuals and peoples in the coming decades. Accordingly, it is likely that some of the areas now nascent—such as the law on Indigenous peoples with special vulnerabilities—will experience considerable development over time. Social movements grounded in Indigenous communities will play a crucial role in the further development and implementation of existing international legal standards regarding their rights, and in their deepening in terms of Indigenous world-views and demands.

It can only be hoped that Indigenous peoples will achieve self-determined development and adequate standards of living, and cease to be vulnerable, such that these rights become unimportant. That would be the true success of the UNDRIP in this area.

[355] CEDAW, Report on Canada (n 315).

PART VI

INTERNATIONAL ASSISTANCE, REPARATIONS, AND REDRESS

Chapter 18. Legal Implementation and International Cooperation and Assistance

Articles 37–42

Willem van Genugten and Federico Lenzerini

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 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.

1. Introduction

The present chapter focuses on Articles 37 to 42 of the UNDRIP. Summarizing and paraphrasing them, they relate to: the right to the recognition of, and actual compliance with, all agreements Indigenous peoples have made with States, either in the past or with present governments (Article 37); the obligation of States to take all measures needed to achieve the ends of the UNDRIP (Article 38); the right of Indigenous peoples to all assistance and forms of cooperation needed in order to fully realize the rights contained in the UNDRIP (Article 39); the right of Indigenous peoples of access to justice in order to find fair and quick solutions for conflicts with States or other parties, as well as to effective remedies (Article 40); the duty for all intergovernmental organizations, but the United Nations in particular, to do whatever they can to contribute to the full realization of the UNDRIP (Article 41); the duty of the United Nations to promote the full application of the UNDRIP and follow up on its effectiveness (Article 42). Taken together, the focus of the six Articles is on the issues of *(legal) implementation and international cooperation and assistance*, in addition to *access to justice and to remedies* (Article 40).

1.1 Implementation and International Cooperation and Assistance: Giving Substance to Promises to Indigenous Peoples

The Articles in discussion provide that States have to take their UNDRIP promises to Indigenous peoples seriously, by incorporating them into their national legislation, by translating them into national practices (judicial and non-judicial), and by offering all kinds of cooperation and assistance in order to make the UNDRIP provisions a reality for all Indigenous peoples worldwide. The latter 'duty to cooperate and to assist' is comprised of a variety of measures to be taken by States, from the task to develop and maintain effective remedial mechanisms in case of conflicts to the obligation to support Indigenous peoples in whatever way and through whatever channel needed to fully realize the rights granted to them in the UNDRIP. Apart from the relevant substantive Articles of the UNDRIP, the UNDRIP Preamble should also be taken seriously, to guide interpretation to the UNDRIP itself.

As a 'precursor' to Article 37, the Preamble states that the UN General Assembly (GA) *recognizes* 'the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States', while the GA *considers* that such texts 'are, in some situations, matters of international concern, interest, responsibility and character', as well as 'the basis for a strengthened partnership between indigenous peoples and States'. Further to that, in relation to Article 38, States are *encouraged* by the GA 'to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned', while as to Articles 41 and 42 it is *emphasized* 'that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples' and *believed* 'that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field'.

All the foregoing gives content and context to the tasks of States to actively implement the obligations arising from the UNDRIP, and to do so in close cooperation and consultation with Indigenous peoples themselves, as well as in an intensified interplay with

the United Nations, while the latter also has an autonomous role to play in order to fully realize the UNDRIP rights and obligations. At the end of the Preamble, the UNDRIP is proclaimed to be 'a standard of achievement to be pursued in a spirit of partnership and mutual respect'. The 'standard of achievement' terminology is well known from and most likely inspired by the 1948 Universal Declaration of Human Rights (UDHR), and the history of the UDHR might serve as a loadstar for the UNDRIP as well. While the UDHR is a Declaration, it is now generally assumed that large parts of it have developed into customary international law. In the years of the UN discussions on the UDHR (1946 to 1948), the development of a legally binding human rights instrument was a bridge too far for many States, but time has done and is still doing its work. One of the effects is that the UN Universal Periodic Review, created in 2006 by the United Nations in order to assess the human rights practices of all UN Member States, uses the UDHR as one of 'the bases of the review'.[1] This is particularly relevant for those States who did not ratify, or only partly ratified, the later human rights conventions; for them, the UDHR is the standard. A similar process of development can be envisioned with regard to the UNDRIP.

1.2 Linking Articles 37 to 42 of the UNDRIP to Other Rules of International Law

The overall drafting history of the UNDRIP is amply presented and discussed in this volume. In a previous, very enlightening description and analysis of the process of its adoption, Asbjørn Eide, being elected in 1982 as the first Chairman of the UN Working Group on Human Rights of Indigenous Populations, qualified the first years of the drafting process as a shift of focus, from integration (and sometimes assimilation) to self-determination.[2] It is a well-known way of framing the transition in thinking about the rights of Indigenous peoples. Eide also states that '[c]oncerns with rights of indigenous peoples disappeared from international law during the period of classic, positivist international law as it evolved from the end of the Napoleonic wars to the Second World War'; he added that 'the treatment of indigenous peoples was generally considered a matter of internal affairs, with no role for the international community'.[3] Here, we see a direct link to Articles 37 to 42 of the UNDRIP, which clearly claim that the treatment of Indigenous peoples is *no longer* a matter of exclusive internal affairs: States undoubtedly keep the first and primary obligations to respect the rights of Indigenous people(s), but the international community of States claims the space to interfere if situations so require and to see whether States do indeed implement the obligations following from the UNDRIP, and does offer a variety of international cooperation and assistance in order to make the UNDRIP a worldwide reality.

The language used in Articles 37 to 42 is in many ways inspired by, and sometimes literally copied from, existing human rights instruments. Before entering a detailed description of the historical development of Articles 37 to 42 in Section 2 of this chapter, it can be observed that the UNDRIP, first of all, is clearly linked to the UN Charter, with its underlining of the right to self-determination of peoples in Articles 1(2) and 55,

[1] See UN Human Rights Council Res 5/1 (18 June 2006) Annex, Art 1.

[2] A Eide, 'Rights of Indigenous Peoples—Achievements in International Law during the Last Quarter of a Century' in *Netherlands Yearbook of International Law 2006*, vol XXXVII (TMC Asser Press 2007) 155–212, 163–67.

[3] ibid 160.

while Articles 55 and 56 also stipulate that the 'United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' (Article 55), and that '[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55' (Article 56).

Further to that, the UNDRIP terminology is in many ways linked to and copied from international human rights law, but that part is covered by Chapter 3, this volume. It can be said that human rights law has no equivalent to Article 37, while the message of Article 38 is not unique: there is an overlap with, for instance, Article 7 of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which states that '[t]he rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.' Although, as will be seen below, several differences exist between the literal wording of the two Articles as well, the spirit is the same: States have to translate the promises of the Declaration into national legislation and into national practices. Also, as to 'the international cooperation and assistance parts' of Articles 37 to 42 of the UNDRIP, a range of similarities can be found to international human rights law—for instance, to the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Its Article 9 states that '[t]he specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in the present Declaration, within their respective fields of competence.'[4] The issue of international co-operation and assistance will be taken up in Section 3 of this chapter.

The third domain of overlap with pre-existing international law relates to the International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples in Independent Countries of 1989. Large parts of this Convention 'overlap' with the provisions of the UNDRIP. In the context of Articles 37 to 42, reference can be made to Indigenous peoples (plural) as rights-holders and, specifically, to the rights of Indigenous peoples (again plural) to 'effective remedies for all infringements of their individual and collective rights' (Article 40) and to the need for States to 'give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned' (ibid). Further to that, however, ILO Convention 169 does not offer building blocks in relation to the key of Articles 37 to 42. The only meaningful reference can be made to Article 32 of the ILO Convention, being itself the full content of its Part VII on 'Contacts and Co-operation across Borders'; such provision states that '[g]overnments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.' The adoption of the UNDRIP will further enforce the obligations following from the ILO Convention, and vice versa. It is well known, however, that ILO Convention 169

[4] Declaration adopted by the UN General Assembly, Res 47/135, 18 December 1992. For a reference to it in the context of the drafting history of the UNDRIP, see UN Doc E/CN.4/1997/102 (10 December 1996) para 295.

has been ratified by twenty-two States only.[5] Therefore, the said 'mutually reinforcing' interaction will be limited. This notwithstanding, the combination of the UNDRIP and ILO Convention 169 is very relevant for at least the Latin American context, knowing that fifteen out of twenty-two ratifications relate to that part of the world.[6]

Below, it will be argued that the huge support for the UNDRIP, including for Articles 37 to 42, contributes to the recognition of the customary international law character of parts of these Articles. This consequently sharpens the customary international legal character of ILO Convention Articles as well, meaning that Indigenous peoples worldwide can use parts of both texts as sources of (customary international) law, also outside the twenty-two States that have ratified ILO Convention 169.

2. The Drafting History of Articles 37 to 42

It is interesting to observe that Asbjørn Eide, in the article mentioned above, while discussing a variety of controversial issues coming up in the drafting history of the UNDRIP, does *not* mention any issue in the domain of Articles 37 to 42.[7] The real controversies clearly did not relate to this part of the UNDRIP. This is confirmed by a key African Union (AU) paper about one of the latest UNDRIP drafts. The AU restricted its criticism to the well-known list of controversial issues: definition of Indigenous peoples; self-determination; ownership of land and resources; establishment of distinct political and economic institutions; national and territorial integrity.[8] Nevertheless, looking at a range of documents presented over the course of nearly twenty years, it becomes clear that Articles 37 to 42 have undergone numerous minor revisions. What follows is an overview of the most important suggestions for revision and actual changes, and the outcomes of the debates.

2.1 Article 37

In the first draft of the UNDRIP, adopted in 1994 by the (then still existing) UN Sub-Commission on Prevention of Discrimination and Protection of Minorities,[9] Article 37 (then still Article 36) was formulated as follows:

[5] See <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314> accessed 20 October 2017.

[6] See also remarks by S James Anaya, made during a plenary session of the 2012 Annual Meeting of the American Society of International Law, Proceedings, vol 106 (March 2012) 529. On the application of ILO Convention 169, see also ILO, *Application of Convention No. 169 by Domestic and International Courts in Latin America: A Casebook* (ILO 2009). This Casebook contains summaries of judicial decisions from a number of Latin American countries, as well as a selection of relevant judgments and reports from the Inter-American human rights system. The introduction sets out the context of the national legal systems of the countries concerned and gives an overview of the types of cases selected. See also ILO, International Labour Standards Department, *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169* (ILO 2009).

[7] Eide (n 2).

[8] African Union Assembly, Eighth Session, Decision on the United Nations Declaration on the Rights of Indigenous Peoples, Doc Assembly/AU/9 (VIII) Dec 141 (30 January 2007). Also see the *Advisory Opinion* on the Draft Declaration adopted by the African Commission on Human and Peoples' Rights at Its Forty-First Ordinary Session held 16–30 May 2007 in Accra, Ghana, extensively discussed in W van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104(1) AJIL 29–65.

[9] See the Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-Sixth Session, Geneva, 1–26 August 1994; UN Docs E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (28 October 1994).

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

The final Article 37 reads as follows:

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Comparing the two texts, one sees three differences. The words 'according to their original spirit and intent' were deleted. The same applies for the words '[c]onflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned'. Further to that, a new section was added: 'Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.'

Canada was the first State to suggest that the words 'original spirit and intent' should be deleted, emphasizing that there would be 'only one of a number of factors that needed to be considered when dealing with such treaties'.[10] In others words, one should either choose a full description of the criteria that need to be taken into account while interpreting treaties, or delete that specific reference. Nevertheless, the words 'original spirit and intent' continued to appear in the draft Declaration until 2005,[11] while they disappeared without any further argumentation in the draft Article 37 (then still Article 36), as presented in 2006 by the Chair of the open-ended Inter-Sessional Working Group on a Draft UNDRIP (hereinafter, 'the Working Group').[12]

As to the deletion of the option of international bodies looking at conflicts and disputes in relation to treaties, agreements, and other constructive arrangements if the national level is unable to provide for settlements, a number of governments observed that conflicts and disputes concerning these treaties 'would not be appropriate ... to be subject to international consideration'.[13] Canada, for instance, observed that 'treaties with the indigenous people of Canada were domestic rather than international agreements and disputes over their interpretation or implementation should therefore be dealt with in domestic forums'.[14] The United States argued along the same lines, stressing that these treaties, although 'legally enforceable', do not 'give rise to rights under international law'.[15] As a counterweight, Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland offered an alternative text: '[c]onflicts and disputes which cannot otherwise

[10] UN Doc E/CN.4/1997/102 (10 December 1996) para 285.
[11] See, eg, the 2005 Chairman's Proposal, UN Doc E/CN.4/2005/89/Add.2 (1 April 2005).
[12] UN Doc E/CN/4/WG.15/CRP. 1 (22 March 2006).
[13] UN Doc E/CN.4/1996/84 (4 January 1996) para 94. See also UN Doc E/CN.4/2003/92 (6 January 2003) Annex.
[14] UN Doc E/CN.4/1997/102 (10 December 1996) para 285. [15] ibid para 292.

be settled, should be submitted to competent national bodies or processes for negotiation and resolution, or, where they do not operate or are unreasonably prolonged, to international bodies agreed to by all parties.'[16] According to the records, 'many indigenous organizations'—for instance, the Grand Council of the Crees and the International Indian Treaty Council[17]—similarly argued that such treaties are international agreements and 'that disputes concerning these treaties should therefore be submitted to international bodies',[18] but it is clear that in the end they did not win this specific dispute.

The new section, stating that '[n]othing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements', was tabled in November 2004 by the Indigenous Caucus at the Organization of American States. Apart from the tense used—'diminish or eliminate' became 'diminishing or eliminating'—the proposal was broadly accepted and did reach the final version of Article 37 of the UNDRIP.

Looking at the negotiation history of Article 37, the most important difference between the first draft and the final text relates to the absence of the option to submit conflicts about treaties, agreements, and other constructive arrangements 'to competent international bodies'. The focus is placed first of all on the national mechanisms as the ones competent to solve such conflicts.

2.2 Article 38

In the 1994 draft of the UNDRIP, Article 38 (then still Article 37) was formulated as follows:

> States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

The final Article 38 reads as follows:

> States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

There are quite some differences between the two versions, but the message is nearly the same. The most striking difference relates to the addition of the words 'in cooperation with' after 'in consultation with'. The most significant commonality between the two versions relates to the use of the words 'shall' and 'include in national legislation'/'including legislative measures'.

As to the words 'in consultation with', it will not come as a surprise that a number of NGOs and Indigenous organizations, such as the World Council of Indigenous Peoples, did immediately come up with a plea for language such as 'with the full participation and the free and informed consent of indigenous peoples'.[19] The words 'in cooperation with', looking as a compromise solution, were added at the very final stage only, via the Summary of Proposals of the Chairman of the Working Group.[20]

[16] UN Doc E/CN.4/WG.15/CRP.1 (6 September 2004).
[17] UN Doc E/CN.4/1997/102 (10 December 1996) paras 294, 296.
[18] ibid. See also UN Doc E/CN.4/2004/81 (7 January 2004) paras 103, 107.
[19] UN Doc E/CN.4/1995/WG.15/4 (10 October 1995) para 29.
[20] UN Doc E/CN.4/2005/WG.15/CRP.1 (22 March 2006).

With regard to the words 'shall' and 'include in national legislation'/'including legislative measures', it can be observed that, in the period 1994 to 2007, several States and other participants in the debate used this Article and these specific words to express their (either negative or positive) feelings on the type of obligations following from the wordings chosen. One can see two 'extremes': States such as Japan[21] and France[22] emphasized that the Declaration is not legally binding and that one should not use words that suggest that the provisions do entail hard obligations. Also, the four States that at first voted against the UNDRIP—the United States, Canada, New Zealand, and Australia—basically did so, inter alia, because of the wording of Article 38. Their argumentation will be looked at more systematically below, in Section 4. Again, other States argued that it is 'at the discretion of States to set fiscal and policy priorities and that a non-binding instrument could not infringe upon this discretion'.[23] At the other end of the spectrum, States such as Finland,[24] Colombia,[25] Chile,[26] and Brazil[27] suggested reducing the wording of Article 38 to a minimum. In the end, their position would be the dominant one.

2.3 Article 39

In the 1994 draft of the UNDRIP, Article 39 (then still Article 38) was formulated as follows:

> Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

The final Article 39 reads as follows:

> Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

One can observe only minor differences between the two texts. The deletion of the words 'to pursue freely their political, economic, social, cultural and spiritual development' might look somehow controversial, but that aspect is very well covered by 'the enjoyment of the rights contained in this Declaration', and thus for instance by Article 3—according to which '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'—as well as by Article 33, paragraph 1, stating that 'Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.'

According to several reports, 'some States' argued that international law 'does not create a legal obligation to provide financial support for the development of indigenous culture'.[28] They did do so on a variety of grounds. Certain States, for instance, Chile,[29]

[21] UN Doc E/CN.4/WG.15/2/Add.1 (13 November 1995) para 2.
[22] UN Doc E/CN.4/1997/102 (10 December 1996) para 289.
[23] UN Doc E/CN.4/1996/84 (4 January 1996) para 95.
[24] UN Doc E/CN.4/1997/102 (10 December 1996) para 286.
[25] ibid para 287.
[26] ibid para 290.
[27] ibid para 291.
[28] See, eg, UN Doc E.CN.4/1996/84 (4 January 1996) para 97.
[29] UN Doc E.CN.4/1997/102 (10 December 1996) para 300.

asked for more clarity on what the word 'assistance' actually means, while Japan tabled the same request, stating that more clarity was required 'from the viewpoint of equality under the law'.[30] Venezuela went a step further, through stating that the wording of the Article 'might imply that indigenous people could obtain international cooperation without going through the competent State organs'.[31] The United States did do something similar by arguing that it could accept 'a text providing that resource transfers should be encouraged by States and that States may as a matter of discretion agree to provisions of such assistance'.[32] The same message against externally *imposed* international obligations to assist was tabled by Brazil, through a plea for the addition of the words 'in accordance with national legislation'.[33] Also, other contributors to the debate, such as Canada, warned against the 'open-ended obligation to fund indigenous development', while it thought that 'a progressive, flexible approach would be more appropriate'.[34] The final text, however, *determines* such an open-ended right, and its corollary open-ended obligation for States, which, in any event, is to be interpreted in a flexible way. Time will tell in this respect. In Section 3, we will come back to the concept and legal state of the art of international cooperation.

2.4 Article 40

In the 1994 draft of the UNDRIP, Article 40 (then still Article 39) was formulated as follows:

> Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

The final Article 40 reads as follows:

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

The similarities between the draft as it stood at the beginning of the negotiating process (1994) and the one adopted at the end (2007) are clear. The words 'mutually acceptable' were replaced by 'just', the words 'or other parties' were added, and the expression 'shall take into consideration' was replaced by 'shall give due consideration to'. Also, the words 'and international human rights' were added. Those changes were inspired by 'several governments', as one of the reports of the Working Group makes clear. Instead of 'mutually acceptable', they stated that 'they would prefer language which emphasized that disputes would be solved through negotiations or existing legal mechanisms', while 'some States' also noted that they could 'not support a provision giving indigenous people the rights to opt out of the national legal system'.[35] Both of these amendments led to the

[30] ibid para 306. [31] UN Doc E.CN.4/1997/102 (10 December 1996) para 301.
[32] ibid para 304. [33] ibid para 305. [34] ibid para 303.
[35] UN Doc E/CN.4/1996/84 (4 January 1996) para 97.

replacement of the more mandatory 'shall take into consideration' with 'shall give due consideration to'.

Some States also discussed the status of the legal systems of Indigenous peoples they have to respect, often claiming that such a status might be in contradiction to their Constitutions. Argentina, for instance, took that position, by stating that '[r]eferences to indigenous "legal systems" are deemed to be contrary to basic principles of the Argentine legal system and institutional system, such as equality before the law, the independency of the judiciary, the right to defence by trial and to due process, and other fundamental guarantees contained in article 18 of the Constitution.'[36] In reaction, 'a few indigenous organizations' argued that, on the contrary, 'the reference to indigenous legal systems should be strengthened'.[37] They also underlined the need to establish international mechanisms to solve conflicts 'owing to the inability of national legal systems to resolve conflicts between indigenous peoples and States'.[38] The latter position did not make it to the final wording of Article 40, while the Article also sticks to the notion that the traditional Indigenous legal systems deserve 'to be taken into due consideration' 'only'. However, together with, inter alia, Article 38 of the UNDRIP, in practice the expression 'due consideration' will most likely lead to a level of attention for and acceptance of Indigenous legal systems which comes close to the more mandatory language preferred by many participants to the debate.

The expressions 'or other parties' and 'and international human rights', finally, were added upon an initiative by Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland.[39] Those words have not been contested.[40] The addition of the latter expressions had the purpose of underlining the importance of the individuality of human rights, alongside the collective aspects expressed and underlined in the UNDRIP as well. In the end, the changes in Article 40 overall relate to bringing the Article in line with the rest of the UNDRIP.

2.5 Article 41

In the 1994 draft of the UNDRIP, Article 41 (then still Article 40) was formulated as follows:

> The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, *inter alia*, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

The final Article 41 reads as follows:

> The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, *inter alia*, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Over the course of more than twenty years, some attempts were undertaken to slightly amend the Article, but none of these got enough support to change its wording. The

[36] UN Doc E/CN.4/1995/WG.15/2 (10 October 1995) para 18. [37] ibid.
[38] ibid para 98. [39] UN Doc E/CN.4/2004/WG.15/CRP.1 (6 September 2004).
[40] UN Doc E/CN.4/2004/WG.15/CRP.4 (14 October 2004); UN Doc E/CN.4/2005/89/Add.2 (1 April 2005).

most striking aspect of the debate was that 'some governments' supported a greater commitment by the United Nations, while 'many governments' argued 'that the role of the Organization in realizing and implementing the declaration had to be more specifically defined'.[41] In the end, this did not happen. No changes appeared in the final wording of the Article.

2.6 Article 42

In the 1994 draft of the UNDRIP, Article 42 (then still Article 41) was formulated as follows:

> The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

The final Article 42 reads as follows:

> 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.

Contrary to the final Article 41, nearly all wordings of Article 42 changed over time. This, however, should not be misinterpreted; in the end, the message remains the same and survived all debates: the United Nations is the key body to watch as regards all States living up to the obligations following from the Declaration. The real novelty of the adopted text relates to the introduction of the Permanent Forum on Indigenous Issues, while the words 'including at the country level' and 'follow-up the effectiveness' also deserve some attention.

Already at the very beginning of the debate on this Article, attention was drawn to resolutions adopted by the UN General Assembly and the Commission on Human Rights on the establishment of a permanent forum for Indigenous peoples.[42] From that moment on, the issue of the Permanent Forum was at the table. However, during one of the debates in the Commission on Human Rights about reports of the Working Group, 'some governments', although according to themselves supportive of the idea of a permanent forum, started discussing the question of whether or not the Forum should be included in the Declaration, while 'many other governments' were against the inclusion in the Declaration 'of a reference to the creation of a body with special competence to monitor compliance with a non-binding instrument'.[43] Nevertheless, and among other things, due to the strong support by 'several indigenous organizations',[44] the Permanent Forum became a feature of the Article, emphasizing its role among other UN bodies by adding the word 'including', although avoiding compliance terminology.

The words '[i]ncluding at the country level' and 'follow-up the effectiveness' were added upon an initiative by, again, Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland.[45] They thus underlined the need of interaction between the

[41] UN Doc E/CN.4/1996/84 (4 January 1996) para 99.
[42] GA Res 48/163 and Commission of Human Rights Res 1994/28, referred to in UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994) para 115.
[43] UN Doc E/CN.4/1996/84 (4 January 1996) para 99. [44] ibid.
[45] UN Doc E/CN.4/2004/WG.15/CRP.1 (6 September 2004).

national and international levels, while they tabled the follow-up clause 'to help ensure the Declaration is a living instrument'.[46] Doing so, the Article again reflects the words of the Preamble of the UNDRIP, stating that the Declaration is a standard of achievement to be pursued in a spirit of partnership.

2.7 The Drafting of Articles 37 to 42: The Relationship with National Law

During the UNDRIP negotiations, on numerous occasions States tried to add clauses such as 'in accordance with national legislation', 'in accordance with provisions of national laws', 'subject to the applicable legal system', 'where applicable', as well as on exercising rights with 'respect for national boundaries and the principle of national and territorial integrity'. The AU, for instance, suggested at the very last stages of drafting the UNDRIP to add such clauses to its Preamble and to, inter alia, Articles 37 and 39. In the AU proposal, Article 39, for instance, should have been worded as: 'Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation *in accordance with national laws*, for the enjoyment of the rights contained in this Declaration.'[47] The proposal, however, did not receive much support outside the AU context. Protests against such clauses often came from Indigenous organizations, such as the Aboriginal and Torres Strait Islander Commission, which declared that '[s]uch an approach conflicts with the purpose of international human rights standard-setting', as well as that 'the Declaration must not be allowed to become an instrument to protect the status quo in States.'[48] As the final text of Articles 37 to 42 of the UNDRIP shows, no such clauses were accepted.

3. Deepening the Exegesis of Articles 37 to 42 of the UNDRIP

3.1 Article 37—Honouring Treaties: Evaluating Obstacles in Current International Law

In Section 2.1 we observed that States prefer to see the treaties, agreements, and other constructive arrangements of Article 37 as 'domestic rather than international agreements'. Especially the word 'treaty', however, has a rather specific meaning in modern-day international law, while numerous consequences are attached to that, by, inter alia, the 1969 Vienna Convention on the Law of Treaties (VCLT). This sub-section gives further substance to Article 37 of the UNDRIP by addressing the findings of the former UN Special Rapporteur on Treaties with Indigenous Peoples, Miguel Alfonso Martínez,[49] including the way he links them to modern-day international law, and by also charting out the way the drafters of the UNDRIP have reacted to and embraced his work. At the end of this section, references will also be made to the relevant parts of the reports

[46] UN Doc E/CN.4/2004/WG.15/CRP.2 (6 September 2004).

[47] See, inter alia, African Union Assembly, Eighth Session, Decision on the United Nations Declaration on the Rights of Indigenous Peoples, Doc Assembly/AU/9 (VIII) Dec 141 (30 January 2007) *passim* (emphasis added).

[48] UN Doc E/CN.4/2001/NGO/54 (23 January 2001) 3.

[49] UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999).

prepared by the Committee on the Rights of Indigenous Peoples of the International Law Association (ILA).[50]

As regards the UN Special Rapporteur on Treaties with Indigenous Peoples, the story goes back to the late 1980s. In particular, following a recommendation by José Martínez Cobo in his trendsetting 'Study of the Problem of Discrimination against Indigenous Peoples',[51] the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities decided in 1987 to commission a 'Study on Treaties Concluded between Indigenous Peoples and States'.[52] In 1988, the study was expanded by the Human Rights Commission to, in short, a 'Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations'.[53] The latter words have been used later on in Article 37 of the UNDRIP.

The key conclusions of the UN Rapporteur are that 'no sound legal argument[s] [exist] to sustain the argument that [indigenous peoples] have lost their international juridical status as nations/peoples', as well as that Indigenous peoples/nations who have entertained treaty relationships with non-Indigenous settlers and their continuators rightly argue 'that those instruments ... continue to be valid and applicable to their situation today'.[54] While offering numerous examples and illustrations of violations of such treaties, the Rapporteur also touches on one additional difficulty: the fact that Indigenous practices of treaty-making have often been *entirely oral in nature*, not leading to the elaboration of written documents. In addition, according to him, it has often been 'extremely difficult for the indigenous parties to follow all aspects of the negotiations fully through translators (who most likely were not always perfectly accurate), not to mention the fine print in the written version submitted to them, in an alien language, by the non-indigenous negotiators'.[55] Next to that, he observes that such treaties have been used 'on many occasions' by the non-Indigenous side 'as tools to acquire "legitimate title" to the indigenous lands by making the indigenous side formally "extinguish" those and other rights', or that treaties on occasion have been 'used to force indigenous peoples to bargain away their ancestral and treaty rights'.[56] Having said that, the Rapporteur also deals with situations where there have been no treaties at all: 'The fact that some of them did not have juridical relations with the colonial powers—in many cases, during the early stages of a colonizing project, simply because the newcomers did not happen to cross their path—does not appear sufficient reason to establish such a drastic differentiation between their rights and the rights of those who did.'[57] He also stresses that '[for] those indigenous people who never entered into formal juridical relations, via treaties or otherwise, with non-indigenous powers (as did other indigenous peoples living in the same territory) [and who] wish to claim for themselves juridical status also as nations, it must be presumed until proven otherwise that they continue to enjoy such status', while 'the burden to prove otherwise falls on the party challenging their status as nations.'[58]

[50] Interim Report, presented at the 2010 biennial ILA meeting in The Hague; Final Report presented at the 2012 biennial ILA meeting in Sofia. Both reports can be found at the ILA website: <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> accessed 20 October 2017.

[51] UN Doc E/CN.4/Sub.2/1986/0, paras 388–92. [52] Res 1987/17 of 2 September 1987.

[53] UN Commission on Human Rights Res 1988/56: (9 March 1988). The full title was: 'An outline on the possible purposes, scope and sources of a study to be conducted on the potential utility of treaties, agreements and other constructive arrangements between indigenous populations and Governments for the purpose of ensuring the promotion and protection of the human rights and fundamental freedoms of indigenous populations.'

[54] UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) paras 265, 273. [55] ibid para 281.

[56] ibid para 282. [57] ibid para 285. [58] ibid para 288.

In summary, for now following the line of thought of the Special Rapporteur, the treaties, agreements, and other constructive arrangements between Indigenous peoples and non-Indigenous settlers and their continuators would still be valid. And, most importantly, in the eyes of the Rapporteur, the burden of proof falls on the party that challenges the legality and legitimacy of all this. Many States might have thought otherwise during the drafting process of the UNDRIP, but we found no evidence of that. The reason might be that they did not want to touch upon this sensitive issue or, alternatively, that they thought that such discussions could better take place at the national level. The latter is what happened and happens in daily reality, as becomes clear from a number of cases, mentioned here by their names only, inter alia, the South-African *Richtersveld* cases (2001 and 2003), the Australian *Mabo v Queensland* case (1992), and the Canadian cases of *R v Van der Peet* (1996) and *Degamuukw v British Columbia* (1997).[59]

From the perspective of present international law, the phenomenon of the *inter-temporal rule* is particularly important. The starting point is the *clausula rebus sic stantibus*: one should first of all ascertain how the agreements in discussion came into existence, what the intentions of the parties have been, and whether or not they had the legal power to adopt agreements. In the famous *Islands of Palmas (Netherlands v United States of America)* case (1928), before the Permanent Court of Arbitration, arbitrator Max Huber emphasized, inter alia, two aspects: the non-retroactive application of rules; and the need to take the evolution of the law into account when assessing the continued existence of a right.[60] In 1975, the Institut de Droit International adopted a resolution on the interplay between the two aspects, affirming that States and other subjects of international law have the power to establish the temporal sphere of application of norms, and may therefore attribute to them a retroactive effect. In the absence of a clear indication, 'the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it.'[61] It follows that, while the legality or illegality of historical events is to be judged according to the law in force at the time in question, the continuing effects of those events can also be evaluated on the basis of more recent standards.

The Rapporteur's assumptions have not been seriously contested during the drafting history of the UNDRIP, which, however, does not necessarily mean that States did share them. As stated, they might have had their reasons to remain silent on this. The same holds true for their lack of reaction with regard to some of the consequent inferences the Rapporteur added to his observations, some of which are directly relevant for the present and future application of Article 37 of the UNDRIP. One such observation is that 'the fulfillment, in good faith, of legal obligations that are not in contradiction with the Charter of the United Nations' is considered 'one of the tenets of present-day positive international law and one of the most important principles ruling international relations, being, as it is, a peremptory norm of general international law (*jus cogens*)'.[62]

[59] See, in more detail, M van der Linden, *The Acquisition of Africa (1870–1914): The Nature of Nineteenth-Century International Law*, defended as PhD thesis at Tilburg University, the Netherlands, in November 2014 (on file with the first author; a commercial edition is in preparation), *passim*, esp ch 9, 222–46.

[60] ibid 223.

[61] See Institut de Droit International, Session of Wiesbaden, 'The Intertemporal Problem in Public International Law' (1975) 1, <http://www.idi-iil.org/app/uploads/2017/06/1975_wies_01_en.pdf> accessed 6 November 2017.

[62] See van der Linden (n 59) 277.

Another link concerns the Rapporteur's reference to Article 26 of the VCLT, ie *pacta sunt servanda*.[63] He observes that the Convention concerns not only the development of new rules and concepts in international law, but also 'the codification of those which had survived the test of time and were, in 1969 [at the moment of adoption of the Vienna Convention], already part and parcel of international law, either as customary law or as positive law as embodied in a number of already-existing bilateral and/or multilateral international instruments'.[64] These observations were not contradicted by States for obvious reasons: none of them would argue against 'fulfilment of obligations in good faith' and '*pacta sunt servanda*'. And, again, States might have thought that the 'legal fights' would take place at the national level, with the possibility of taking into consideration all the facts of the cases at hand and, if applicable, recent agreements that might have (partially) overruled the original ones. As to the latter, some States might have felt support from the International Court of Justice (ICJ), as expressed, inter alia, in its judgment in the *Land and Maritime Boundary between Cameroon and Nigeria* case (2002) in a conflict on the 1884 secession treaty between Great Britain and a number of native rulers and a successive treaty (1913) between Great Britain and Germany. The key to the ICJ's reasoning, as far as relevant here, has been 'that the 1884 treaty, transferring sovereignty over the [contested] Bakassi Island to Britain, established a colonial protectorate, which [the Court of Justice] considered to be a legal means to acquire title to territory'.[65] The consequence of all this has been that Great Britain, later on, in 1913, had the legal power to adopt a new treaty, with Germany, on the boundaries between Nigeria and Cameroon.

The Rapporteur also states that the content of Article 27 of the VCLT ('[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty') was already a rule of international law 'at the time when the process leading to the disenfranchisement and dispossession of indigenous peoples' sovereign attributes was under way, despite treaties to the contrary concluded with them'.[66] In the words of the Rapporteur:

> Treaties without an expiration date are to be considered as continuing in effect until all the parties to them decide to terminate them, unless otherwise established in the text of the instrument itself, or unless they are duly declared to be null and void. This is a notion that has been deeply ingrained in the conceptual development, positive normativity and consistent jurisprudence of both municipal and international law since Roman Law was at its zenith more than five centuries ago, when modern European colonization began.[67]

In 1999, the findings of the Rapporteur were endorsed by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (composed of independent experts, not of States' representatives).[68] The Sub-Commission also observed that 'his approach and key conclusions are still applicable and have not been tested seriously during the [first years of the] drafting process of UNDRIP.'[69] Later on, the (then) Commission of Human Rights, composed of States' representatives and being the first UN body to discuss the issue after finalization of the work of the Sub-Commission, 'took note' of the Rapporteur's report and requested the High Commissioner for Human Rights 'to seek information from Governments, non-governmental organizations and indigenous people's organizations on the report and the broader issues it raises', possibly

[63] ibid. [64] ibid 268. [65] ibid 229. [66] ibid 269. [67] ibid 272.
[68] Res 1999/22, UN Doc E/CN.4/Sub.2/1999/54 (10 November 1999). [69] ibid para 3.

followed by a seminar discussing the findings of the consultation.[70] This clearly was a way of embracing the findings of the Special Rapporteur and the Sub-Commission, while allowing States to come up with their views on issues of direct interest to them. The seminar took place in Geneva in December 2003, and did not lead to major criticisms or new viewpoints as to Article 37 (then still draft Article 36).[71]

The ILA Committee on the Rights of Indigenous Peoples also paid ample attention to the issue of the treaties.[72] In its 2010 interim report, the Committee combined a theoretical approach with three case studies—Canada, New Zealand, and the United States—adding to that that the selection of these cases has far more extensive relevance than just among these three States. European powers, for instance, negotiated many treaties with Indigenous peoples in many other States and regions, such as West Africa, India, Malaysia, and Latin America. In addition, the Committee observes that treaty-making is not only about the past, especially the period of colonization, but also about the present. The Committee illustrates this by referring to the fact that, for instance, Canada has negotiated nineteen new treaties since 1975. Further to that, the Committee states that 'implementation of recent indigenous rights jurisprudence can itself lead to agreements that obtain the benefit of Article 37 protection.'[73] The Committee does not draw overall conclusions on the scope and meaning of Article 37, but the remarks elaborated on the United States come close to that:

> In sum, the argument can be maintained that indigenous peoples' treaties with the U.S.—and possibly with other nations—retain their original character as international legal agreements, with the attendant consequences of customary international law governing their validity, interpretation and termination. Such a re-characterization of these treaties, which constitutes, in fact, a return to their roots, may not result in adverse consequences to the indigenous nations involved, as protective rules regarding interpretation against the drafter, in particular the *contra proferentem* rule [in short: if a clause in a document turns out to be ambiguous, it should be explained in favor of the party that did not insist on incorporation of that clause], are not unknown to international treaty law.[74]

The viewpoint of the Committee is clear and can be linked to Martinez's observations on, for instance, the applicability of the VCLT and the rule *pacta sunt servanda*, in a way as discussed above, including the need to take the evolution of the law and the balancing of old and new interests into account when assessing the continued existence of a right.

In conclusion, as a whole, the final text of Article 37 of the UNDRIP does not allow space to see the treaties, agreements, and other constructive arrangements as 'pieces of paper only' that can be neglected for free. They can be seen in many ways as instruments that have to be treated in the way 'modern international treaties' have to be dealt with. Which is not to say, as made clear above, that they are the only 'lodestars' when it comes to solving conflicts. In working on the solution of conflicts, one will have to look at the

[70] Res 2002/63, UN Doc E/CN.4/2002/200 (25 April 2002), adopted without a vote, and HRC Decision 2003/117 (25 April 2003).

[71] As to the findings of the 2003 seminar, see <http://www.ohchr.org/EN/Issues/IPeoples/Pages/SeminarTreaties.aspx> accessed 20 October 2017. As to a second seminar on the same issue, organized in Hobbema, Alberta, Canada in November 2006, see, inter alia, the Information note and other documents, mentioned on the same website.

[72] Interim Report (n 50), 30–36, Section written by the Committee members BW Morse, CJ Ioms Magallanes, and S Wiessner.

[73] ibid 30. [74] ibid 35–36.

historical documents, but also at the facts of the cases at hand, including the evolution they have undergone, and later additional agreements, if any.

3.2 Article 38—the Duty to Take Measures to Achieve the Ends of the UNDRIP

The duty to take 'the appropriate measures, including legislative measures, to achieve the ends of this Declaration', established by Article 38 of the UNDRIP, is to be interpreted with the necessary degree of flexibility in order to meet the peculiar needs of the Indigenous communities concerned in each specific case. Implementing the Declaration should not focus on abstractly reproducing its norms on paper in the context of domestic law, but rather on operationalizing them, giving concrete realization to such provisions according to the real needs of the Indigenous peoples concerned. It follows that the reference made by Article 38 to 'legislative measures' has just an exemplificative purpose—as clearly shown by the use of the term 'including'—while the specific measures to be taken must be selected on a case-by-case basis, depending exactly on those needs. The requirement that the relevant measures are taken 'in consultation and cooperation' with the communities concerned confirms that they are to be structured on the basis of such needs, as nobody may know what are the needs of a given Indigenous community better than the community itself. With regard to the said requirement, the words 'consultation' and 'cooperation' indicate that, strictly speaking, governments have 'only' a duty to consult and collaborate in good faith with the representatives of the communities concerned, without being bound to adopt exactly the measures requested by them. In practice, however, such a discretionary power may become void in concrete cases; in fact, if, as said above, the measures to be taken are those which may effectively allow that the Declaration is properly implemented, it would be inappropriate to replace the measures requested by the representatives of Indigenous peoples with others decided by the government, primarily because the latter would hardly be effective to the same extent as the former in view of ensuring realization of the community's needs.

In any event, the degree of 'bindingness' of the duty established by Article 38 of the UNDRIP—as well as its implications in terms of the freedom of States to select the specific measures to be taken for implementing such a provision—actually depends on whether or not the provision in point may be considered as having a compulsory character. In this respect, considering that Article 38 is a provision of a Declaration—which, in itself, has no binding force—the only avenue for considering it as mandatory would be to prove that it reproduces a principle of customary international law. If one takes a brief look at the degree of implementation at the domestic level of the provisions of international law on Indigenous peoples, it is easy to see that, while in a number of States it has reached a quite satisfactory level, the legislation of many others is not equipped with rules sufficient to ensure appropriate implementation of such provisions. It would consequently appear that the provision of Article 38 could not be considered as corresponding to a rule of customary international law. However, in our view, it is not proper to treat Article 38 of the UNDRIP in the same manner as a provision of a substantive character. In fact, Article 38 is an 'operational' provision and, as such, is strictly connected to the substantive rules to which it is aimed at giving operation. It follows that Article 38 corresponds to a rule of customary international law with regard to the part calling for the achievement of the substantive provisions of the UNDRIP corresponding on their

turn to rules of customary international law. Article 38 specifies the obligation of States to properly achieve the Articles of the Declaration proclaiming the rights of Indigenous peoples to self-determination, to autonomy or self-government, to recognition and preservation of their own cultural identity, to traditional lands and natural resources, and to reparation and redress, as well as to have treaties and other agreements honoured—which are the ones corresponding to rules of customary international law.[75] With regard to the other ends of the Declaration, Article 38 has simply a hortatory character, by virtue of which in principle States remain free to decide what the 'appropriate measures' (including legislative ones) are and what concrete forms they should take. In the meantime, Article 38 of the UNDRIP is, as is the case with other Articles of the UNDRIP, regularly referred to in a variety of States, as well as in a variety of types of document (judgments, policy papers especially) and in relation to a variety of topics.[76]

3.3 Article 39—International Cooperation and Assistance

As clearly emerges from its text, Article 39 of the UNDRIP not only bestows on Indigenous peoples the right to have access to financial and technical assistance from States and through international cooperation, but it also stipulates that such an assistance is considered to be a prerequisite to enable Indigenous peoples to fully enjoy their rights contained in the other Articles of the Declaration.[77]

The wording of Article 39, as finally approved, makes no use of the term 'development'. Instead, it utilizes the expressions 'assistance' and 'cooperation', which may be either 'financial' or 'technical'. In this regard, Article 39 of the UNDRIP differs from its precursor, Article 38 of the 1993 Draft Declaration, which expressly referred to development, through stating that 'Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, *to pursue freely their political, economic, social, cultural and spiritual development* and for the enjoyment of the rights and freedoms recognized in this Declaration.'[78] However, despite the disregard for the term 'development' in the provision in point, financial and technical assistance or cooperation is mainly ensured within the framework of 'international development law'. For that reason, the ILA Committee chose to use the term 'development' as the key to dealing with the overly broad issue of international cooperation and assistance.[79] More specifically, it referred to the Declaration on the Right to Development, adopted by the UN General Assembly in 1986, which in itself is based on existing human rights law, such as 'achieving progressively the full realization [of economic, social and

[75] See ILA Res 5/2012, 'Rights of Indigenous Peoples', <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> accessed 20 October 2017.

[76] See, eg, 'The Indigenous Environment Database' on past and present issues of violations of the UNDRIP in relation to the natural environment: <https://theindigenousenvironment.wordpress.com/tag/undrip-art-38/> accessed 20 October 2017.

[77] This sub-section—as well as Sub-section 3.5 below—is based on the Interim Report of the ILA Committee, 36–39. The draft was written by the first author of the present chapter and Rainer Hofmann, together with the non-Committee members Juri Alistair Gauthier and Camilo Pérez Bustillo, and has been shortened and edited for the Interim Report by the Rapporteur of the Committee, Federico Lenzerini.

[78] See Draft United Nations Declaration on the Rights of Indigenous Peoples, as completed by the Working Group on Indigenous Populations in 1993, UN Doc E/CN.4/Sub.2/1993/29, Annex I, and adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities with Res 1994/45 of 26 August 1994 (emphasis added).

[79] Interim Report (n 50), 36.

cultural rights]', worded in Article 2 of the 1966 International Covenant on Economic, Social and Cultural Rights and General Comments adopted by the UN Committee on Economic, Social and Cultural Rights.[80]

Development and its corollary—international cooperation and assistance—clearly play a significant role in relation to many UNDRIP Articles, be it in the domain of environmental protection, demilitarization, the right to self-determination, child labour, or means of subsistence. Numerous UNDRIP Articles also clarify that the safeguarding of the distinct identity of Indigenous peoples does not consist in the conservation of a *status quo*, but is an open-ended process: it is not limited to revitalize, maintain, control, practise, and protect past and present forms of their identities, but Indigenous peoples also have the right to further develop these identities and to national and international assistance thereto, where needed and asked for by themselves. They can do this on their own, but with the assistance of States, if needed—as expressed in Article 39 (as well as, as explained in Sub-section 3.5 below, with the assistance of the United Nations, its organs, and its specialized agencies, pursuant to Article 41 of the UNDRIP). However, it should be mentioned that the scope of the assistance provided for in Article 39 of the UNDRIP has been limited to 'the rights contained in this Declaration', whereas a text proposed by some States during the drafting process aimed to extend it to 'the rights contained in this Declaration *and in other international human rights instruments*'.[81] Furthermore, the UNDRIP vests the right to development in Indigenous peoples as collectives (in Article 39) and focuses on States and international organizations as duty-bearers.

Looking at Article 39 of the UNDRIP with 'right to development eyes', one can take two paths: first, the path of a *substantive* right to assistance and development, the substance being formed by all provisions of the UNDRIP (Article 39 included); and second, the path of a *procedural* right to assistance/development, aiming at implementing the other rights of Indigenous peoples enshrined in the UNDRIP, through the channels of Article 39 (as well as Article 41). Both approaches can be found in and applied to the UNDRIP. As a consequence, the interpretation of Article 39 can be relatively clear and simple. It does not draw a picture of a utopian situation, but plainly asks States to provide Indigenous peoples with the necessary financial and technical assistance to enable them to fully enjoy the rights contained in the other Articles of the UNDRIP. This builds on similar provisions in numerous major UN documents, recognizing that Indigenous peoples deserve special attention on the long road of practising their right to self-determination. An example is provided for by the 1995 Copenhagen Declaration on Social Development, in which States commit to create a framework for action to '[r]ecognize and support indigenous people in their pursuit of economic and social development, with full respect for their identity, traditions, forms of social organization and cultural values'.[82] But States cannot do that alone, nor would that be desirable in the context of the rights of Indigenous peoples. The key words, also used in the UNDRIP itself, are 'cooperation' and 'partnership' rather than 'development aid' or similar words. The words chosen by Article 39 do reflect the need to assist, but with the 'self' of self-determination of Indigenous peoples

[80] See esp General Comment 3: The Nature of States Parties' Obligations (Art. 2, para. 1), UN Doc E/1991/23 (1991).

[81] See the amended text tabled by Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland in UN Doc E/CN.4/2004/WG.15/CRP.1 (6 September 2004) 13, and the explanatory comments thereto, UN Doc E/CN.4/2004/WG.15/CRP.2 (6 September 2004) 9 (emphasis added).

[82] UN Doc A/CONF.166/9 (14 March 1995) para 26(m).

as a starting point and end goal. And while States cannot nor should want to do it alone, Indigenous peoples cannot do it alone either. The huge task embodied in the provision in point is that it requires cooperation from the entire international community, particularly from international organizations such as the United Nations and its Permanent Forum on Indigenous Issues; in this respect, Article 39 is strictly linked with subsequent Article 41, which is discussed below in Sub-section 3.5.

3.4 Article 40—Access to Justice and Remedies

Article 40 affirms the right of Indigenous peoples to effective remedies for all violations of their rights, both of individual and collective character. The particular significance of this provision rests in the fact that the right in point extends to infringements of *collective* rights, which—differently from individual rights—are safeguarded only partially, fragmentarily, and in most cases indirectly[83] by international instruments on human rights.

The rights included within the scope of application of Article 40 are, first of all, those contemplated by the UNDRIP itself. However, it is possible that the provision in point extends its applicability also to rights not expressly provided by the Declaration. This is the case for at least two reasons. First, if the drafters of the Declaration had the intention to limit the protection accorded by Article 40 to the rights enlisted by the UNDRIP only, this would have been stated explicitly. Second, Article 43 of the Declaration affirms that '[t]he rights recognized herein constitute the *minimum standards* for the survival, dignity and well-being of the indigenous peoples of the world' (emphasis added). This implies that the peoples concerned can also have further rights, depending on the national contexts, which would then fall within the scope of application of Article 40.

Article 40 is the only provision included in the UNDRIP in which the term 'remedies' is used. Etymologically speaking, the meaning of the singular of this term is quite broad: '[a] means of counteracting or removing an outward evil of any kind; reparation, redress, relief; legal redress'.[84] This would mean that said word, in this provision, could also be interpreted as being tantamount to 'reparation' or 'redress', thus implying that Indigenous peoples have a right to redress for any infringement of their individual and collective rights. In reality, the fact that a different term is used with regard to all other provisions on reparations included in the Declaration, ie 'remedy' in place of 'redress', indicates that in the context of Article 40 the term 'remedy' is to be interpreted restrictively to mean 'access to justice', without necessarily implying that it must be automatically followed by a form of reparation. The correctness of this conclusion is confirmed by the circumstance that, according to the *travaux préparatoires*, while the other provisions related to reparatory aspects were the object of intense discussion and worries by a number of delegations,[85] the text of Article 40 was subjected to relatively little discussion only, seemingly confirming the perception by States that its scope of application only implies a right of access to justice.

This said, however—leaving aside the fact that in some instances appropriate access to a court may in itself represent a form of reparation[86]—one must consider that in the text

[83] See, eg, Art 27 of the International Covenant on Civil and Political Rights, 999 UNTS 171.

[84] See *Oxford English Dictionary*, online version, <http://www.oed.com/> accessed 20 October 2017.

[85] See Chapter 19, by Federico Lenzerini, this volume.

[86] See, consistently, the position of the Inter-American Court of Human Rights, expressed, eg, in *Case of the Moiwana Community v Suriname*, Series C No 124, Judgment of 15 June 2005, paras 45 and 192; *Case of the Yakye Axa Indigenous Community v Paraguay*, Series C No 125, Judgment of 17 June 2005, para 200; *Case*

of Article 40 the term 'remedies' is accompanied by the word 'effective'. The resulting expression (ie 'effective remedies') inescapably implies that these remedies must be of such a kind that the authority entrusted with their administration must be actually capable of ascertaining with objectivity, as well as with reasonable certainty and efficiency, whether the infringement claimed by the Indigenous person or community concerned has actually taken place and to order, if it has been so established, that adequate and enforceable redress is ensured in favour of the victim(s). These are the minimum requirements that must be met by a remedy in order to be 'effective'. In other words, for 'remedies' to be 'effective', it is necessary that they ordinarily allow the concerned person or community to obtain that the truth is disclosed and that the wrongs suffered, if any, are satisfactorily repaired through adequate redress.

With regard to the time-related aspect, the possible application *ex tunc* of the provision in point is probably to be excluded, in light of the unambiguous formulation of Article 40. This does not prevent, however, that the right of Indigenous peoples to reparation may cover certain wrongs they have suffered in the past, if this is prescribed by other provisions of international law (eg Article 28 of the UNDRIP) or if their effects continue at present.

A provision with the same purpose and content of Article 40 is included in the American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016, in its Article XXXIII, which states that:

> Indigenous peoples and persons have the right to effective and appropriate remedies, including prompt judicial remedies, for the reparation of all violations of their collective and individual rights. The states, with full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right.[87]

As may easily be noted, the text of this provision—although its purpose and scope are equivalent to those of Article 40 of the UNDRIP—is more circumstantiated and better drafted than the latter. First, it rightly makes reference to '[i]ndigenous peoples and *persons*', as the holders of individual rights are not the peoples themselves, but the individual members of such peoples. Second, it specifies that the effective and appropriate remedies referred to in the first part of the provision must be granted 'for the *reparation*' of the violations of the rights of Indigenous communities and individuals. Therefore, Article XXXIII of the American Declaration explicitly confirms the conclusion reached with regard to Article 40 of the UNDRIP at the interpretative level, namely, that a remedy is 'effective' only when it allows the victim(s) to receive adequate and effective reparation for the wrong(s) suffered.

According to the Inter-American Court of Human Rights, in order for the right in point to be effectively enjoyed, States are bound to recognize the legal personality of Indigenous peoples. In the case of the *Saramaka* people in Suriname, of 2008, the Court emphasized that it is not sufficient that legal personality is granted only to the members of Indigenous communities individually, because the 'decisions pertaining to the use of ... individual property [rights] are up to the individual and not to the Saramaka people in accordance with their traditions';[88] therefore, such personality is to be recognized in favour of the

of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and Their Members v Panama, Series C No 284, Judgment of 14 October 2014, para 210.

[87] Available at <http://www.narf.org/wordpress/wp-content/uploads/2015/09/2016oas-declaration-indigenous-people.pdf> accessed 2 February 2018.

[88] See *Case of the Saramaka People v Suriname*, Series C No 172, Judgment of 28 November 2007, para 169.

community as a whole, which in this way 'will be able to fully enjoy and exercise their right to property, in accordance with their communal property system, and the right to equal access to judicial protection against violations of such right'.[89] This—according to the Court—'is a natural consequence of the recognition of the right of members of indigenous and tribal groups to enjoy certain rights in a communal manner'.[90] In the instant case, the State's failure to comply with the said requirement:

> ... has resulted in a violation, to the detriment of the members of the Saramaka people, of the right to the recognition of their juridical personality pursuant to Article 3 of [the ACHR] in relation to their right to property under Article 21 of such instrument and their right to judicial protection under Article 25 thereof, as well as in relation to the general obligation of States to adopt such legislative or other measures as may be necessary to give effect to those rights and to respect and ensure their free and full exercise without discrimination, pursuant to Articles 2 and 1(1) of the Convention [itself].[91]

In addition, according to the Court, as Indigenous peoples are to be ensured 'effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs',[92] it is also essential that States establish 'an effective means with due process guarantees ... for them to claim traditional lands'.[93]

One notable feature of Article 40 of the UNDRIP is that it requires that decisions concerning Indigenous peoples are to be taken through giving 'due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights', hence presupposing a need for interaction between legal layers. Without going into a theoretical debate on legal pluralism, and knowing that elsewhere in this book the relation between the UNDRIP and international human rights law is elaborated upon, we deem it opportune to bear certain important considerations in mind, when looking at these issues from the perspective of the need to *effectively* implement the UNDRIP and not take international human rights law as the *only* lodestar.[94]

In particular, what is most necessary to bear in mind relates to the need of interpreting Indigenous law according to its own meaning and in its own context and setting. Indigenous law is often looked at with the eyes of existing international law, but international human rights lawyers should not make the same mistakes as the colonial powers once did, by considering Indigenous law as legal *terra nullius*, or something that has to be assimilated instead of to be respected in its own right. What has often been said about Indigenous peoples as such also relates to their legal systems. It is mandatory to first try to understand 'the customs, traditions, rules and legal systems of the indigenous peoples' (Article 40 of the UNDRIP), instead of looking at them as 'things to overcome as soon as possible', as is often done. The South African Constitutional Court, for instance, has underlined that Indigenous/customary law 'should be accommodated, not merely tolerated'.[95] In the words of the Court:

[89] ibid para 171. [90] ibid para 172. [91] ibid para 175.

[92] See *Yakye Axa* (n 86) para 63.

[93] ibid para 96. See also *Case of the Xákmok Kásek Indigenous Community v Paraguay*, Series C No 214, Judgment of 24 August 2010, para 142.

[94] The observations are based on the article by van Genugten (n 8), as well as on his writing entitled 'The Universalisation of Human Rights: Reflections on Obstacles and the Way Forward' in S Zweegers and A de Groot (eds), *Global Values in a Changing World* (KIT 2012) 205–36.

[95] See, eg, the Judgment of 15 October 2004 as to the combined cases CCT 49/03, *Nonkululeko Letta Bhe, the Women's Legal Centre Trust and Others v Magistrate Khayelitsha, the President of the Republic of South Africa*,

This approach avoids the mistakes which were committed in the past and which were partly the result of the failure to interpret customary law in its own setting but rather attempting to see it through the prism of the common law or other systems of law. That approach also led in part to the fossilization and codification of customary law which in turn led to its marginalization. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances.[96]

Having said that, Indigenous law should of course not be looked at in a naive and romantic way. In the words of Christa Rautenbach, Willemien du Plessis, and Gerrit Pienaar, professors at the Law School of the North-West University, *in casu* in relation to land rights:

Although the concept of communal land tenure often benefits a community, it is normally to the disadvantage of rural women. In this regard, unmarried women have been in the worst situation and were often excluded from the allocation of land tenure rights. Furthermore, the romanticized and sentimental ideas of a harmonious and unitary community understate the fragmentation and internal conflicts in many communities due to overpopulation and a severe pressure on land and resources as a result of previous forced removals under apartheid legislation, which was detrimental particularly to women.[97]

In light of these and similar reflections, the question arises on whether and to what extent Indigenous peoples' customary law is in conformity with international human rights law, both on paper and in practice; this is, in fact, a central aspect in discussing the content and scope of Article 40 of the UNDRIP. Again, our view is that the investigation of whether and to what extent parts of customary Indigenous law are in contradiction with international human rights law should be resolved on a case-by-case basis. This is in the end about balancing legal systems at a macro level and specific rules at a micro level, while also—apart from really urgent cases—allowing time for legal operators to do their work. A key question always coming up in this context relates to the balancing of the interests of the individual and the community as a whole. Within the UNDRIP one can find many examples in which precedence is given to collective rights, while, according to international human rights law, in most cases the rights of the individual have to be given priority, at least in principle, over the interests of the community. Our view is that—when it comes to Indigenous peoples—the latter should be given much space in line with a range of UNDRIP Articles, knowing that the UNDRIP itself is equipped with many 'locks on the door' in case one might want to abuse the notion of 'the interest of the collectivity' at the expense of the human rights of individuals. Article 40 is in fact a key example of this, as it speaks *expressis verbis* about access for Indigenous peoples to 'effective remedies for all infringements of their individual and collective rights'. The need of balancing the necessity of devoting appropriate respect and consideration for Indigenous peoples' culture and customary law with that of ensuring proper protection of the individual human rights of members or non-members of Indigenous communities is generally addressed

the Minister for Justice and Constitutional Development and Others; CCT 69/03, *Charlotte Shibi v Mantabeni Freddy Sithole, the Minister for Justice and Constitutional Development and Others*; and CCT 50/03, *South African Human Rights Commission and Women's Legal Centre Trust v the President of the Republic of South Africa, the Minister for Justice and Constitutional Development and Others*, para 41.

[96] ibid para 43.

[97] See C Rautenbach, W du Plessis, and G Pienaar, 'Is Primogeniture Extinct like the Dodo, or Is There Any Prospect of It Rising from the Ashes? Some Comments on the Evolution of Customary Succession Laws in South Africa' (2006) 22 South-African J Human Rights 117.

by Article 46, paragraph 2 of the UNDRIP. This provision stresses that '[i]n the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected', also specifying that '[t]he exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.' The wording of the latter sentence clearly confirms our position that collective rights of Indigenous peoples may be sacrificed in the name of individual rights only in cases where the very basic human rights of the person are under serious threat.

The foregoing leads to an implication which should be stressed, namely that, in cases when a collective right of Indigenous peoples—or their customary law—is to be sacrificed in the name of fundamental human rights of an individual nature, the integrity of the cultural identity of the community concerned is in principle threatened. However, in assessing this problem, one should not forget that Indigenous law is *living law*, with a capacity to grow in its own right and to adapt itself to changing circumstances. Again, the words of the South African Constitutional Court are enlightening: 'Indigenous law is not a fixed body of formally classified and easily ascertainable rules ... by its very nature it evolves as the people who live by its norms change their patterns of life.'[98] Indigenous law has throughout history 'evolved and developed to meet the changing needs of the community'.[99] What needs to be emphasized, according to the Court, is that, 'because of the dynamic nature of society, official customary law as it exists in the text books and in the [indigenous] act[s] is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognizes and acknowledges the changes which continually take place.'[100] It follows that Indigenous peoples' customary law, being in constant evolution, may have the capacity to adapt to the requirements of international human rights law without necessarily betraying the essence of the cultural identity of the community concerned.

3.5 Article 41—International Cooperation and Assistance by the United Nations and Other Intergovernmental Organizations

The provision of Article 41 is closely connected with Article 39 of the UNDRIP, with the only significant difference being that the actors involved are States, with regard to the latter, and the organs and specialized agencies of the UN system and other intergovernmental organizations, as regards the former. For this reason, the reflections already developed in Sub-section 3.3 above may be considered as extending, *mutatis mutandis* and where appropriate, to Article 41.

In general, the message conveyed by the Article in point is that financial and technical assistance, as well as international cooperation aimed at ensuring the enjoyment by Indigenous peoples of the rights contained in the UNDRIP, is due not only by States, but also by the relevant international organisms. In other words, Article 41 extends to relevant institutions within the UN system and other international organizations the duty of

[98] See Judgment of 15 October 2004 (n 95) para 81. [99] ibid. [100] ibid para 86.

providing financial and technical assistance, through international cooperation, in favour of Indigenous peoples.

As previously stressed with regard to Article 39, Article 41 of the UNDRIP also entails a double-channelled right to assistance and development in favour of Indigenous peoples, the first being represented by the channel of a *substantive* right to assistance and development (the substance being formed by all provisions of the UNDRIP), and the second by that of a *procedural* right aiming at implementing the other rights of Indigenous peoples enshrined in the UNDRIP. The reason for entrusting international organizations—in addition to States—with such a multifaceted obligation consists in ensuring *effectiveness* in the protection and promotion of the rights of Indigenous peoples as established by the UNDRIP. In fact, when it comes to international cooperation which has to translate in terms of *financial cooperation* and *technical assistance*, it is unlikely that States wish and/or can do it alone, while not even Indigenous peoples can do it alone. The huge tasks embodied in the UNDRIP require cooperation from the entire international community, particularly from international organizations such as the United Nations, its organs, and its specialized institutions. The drafters of the UNDRIP have been well aware of this, as shown by the multiplicity of actors involved in such an action, namely, 'States' (Article 39) and '[t]he organs and specialized agencies of the United Nations system and other intergovernmental organizations' (Article 41). All relevant actors are urged and obliged to take all actions needed and fitting within their mandates to make the rights embodied in the UNDRIP a reality.

On a general note, it can be added that, apart from the obviously relevant organizations already mentioned, according to the text of Article 41 each and every (international) organization might in one way or another be relevant for practising the UNDRIP and thus have to deal with the question of to what extent and in what way it can contribute to the fulfilment of the Declaration, substantively or procedurally. Among the relevant actors, some of them regularly refer to the UNDRIP while conducting their tasks, including in particular the World Bank, the ILO, and UNESCO. In fact, Article 41 of the UNDRIP is formulated in a rather open way, linking expressions like 'shall contribute to the full realization of [UNDRIP]' to 'financial cooperation and technical assistance' (in other words, to development cooperation). The Article thus clearly 'orders' the 'organs and specialized agencies of the United Nations system and other intergovernmental organizations' mentioned in Article 41 to take action, but the Article also leaves much space as to the specific means to be chosen, while, in addition, actions in this domain are also only partly guided by positive international law. International financial institutions (IFIs), in particular, such as the World Bank and the International Monetary Fund (IMF), regularly refer to international legal and quasi-legal instruments, while (still) underlining that they are not bound by them in a strictly legal way.[101] In addition, we think that IFIs, while referring to the UNDRIP, should not 'pick and choose' at random the aspects that fit them best. In a recent letter to the President of the World Bank Group, the Special Procedures Mandate-Holders of the UN Human Rights Council (HRC) have reacted to the World Bank's draft Environmental and Social Framework (ESF), among other things focusing on the incompatibility—a word used by the mandate-holders—of some of the Bank's Environmental and Social Standards with international human rights

[101] See recently W van Genugten, *The World Bank Group, the IMF and Human Rights: A Contextualised Way Forward* (Intersentia 2015).

standards. This relates, according to the mandate-holders, inter alia, to such issues as the 'free, prior, and informed consent', which according to them is made concrete in a way that would contradict the UNDRIP, and that would give space to an 'arbitrary denial of the human rights of indigenous peoples by the Borrowers'.[102]

Having said that, in the work of the organs and agencies addressed in Article 41 of the UNDRIP, one can find an increasing number of references to the UNDRIP itself, often without any limitations. Clear examples are provided by, for instance, UNESCO, which regularly refers to the UNDRIP in general and translates the relevant UNDRIP Articles into its standard-setting and practical work particularly in the fields of cultural and linguistic diversity, education, the concept of the knowledge society, ICT practices, social inclusion, and sustainable development.[103]

Similar considerations apply to ILO, in relation to the key competences of the Organization. The ILO often refers to the UNDRIP—regularly alongside references to its own Indigenous and Tribal Peoples' Convention (ILO Convention 169, several times referred to above)—while focusing on the need 'to secure decent work for indigenous peoples, in line with their rights and aspirations'.[104] It is interesting to observe that, similar to the UNDRIP, also ILO declarations, although they 'do not have legally binding status', reflect views 'which must be taken into account by all members in good faith', and that 'differences in legal status of UNDRIP and Convention 169 should play no role in the practical work of the ILO and other international agencies to promote the human rights of indigenous peoples through advocacy, capacity building, research or other means.'[105] We could not agree more.

The practice just referred to may certainly be subsumed within the meaning of the term 'technical assistance' (broadly interpreted) used by Article 41 of the UNDRIP. Even more than that, however, it may be considered as part of the global action aimed at 'promot[ing] respect for and full application of' the rules provided for by the Declaration, therefore establishing a close interconnection between the provision in point and the subsequent Article 42.

3.6 Article 42 of the UNDRIP—the Duty to Work on the Full Realization of the UNDRIP by All Relevant UN Bodies

This provision, on the duty ('shall') of the United Nations and all its organs and bodies to promote respect for and full application of the provisions of the Declaration, as well as to follow up on its achievement, completes the set of rules included in the UNDRIP aimed at promoting its respect, realization, and effectiveness. In order to make it possible, in addition to financial cooperation and technical assistance (which may be provided, respectively, by States—pursuant to Article 39—and international organizations—by virtue of Article 41), it is essential to promote respect for its provisions as well as any kind of measure which is likely to support the translation of its standards into their effective enjoyment in the real world in favour of the addressees of the UNDRIP. Article 42 is

[102] Letter dated 12 December 2014, p 15. See <http://www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf> accessed 20 October 2017.

[103] See p 15 of <http://www.unesco.org/new/en/indigenous-peoples/related-info/undrip/> accessed 20 October 2017, and a range of follow-up URLs.

[104] See p 1 of <http://www.un.org/en/ga/president/68/pdf/wcip/IASG%20Thematic%20paper_%20Employment%20and%20Social%20Protection%20-%20rev1.pdf> accessed 2 February 2018.

[105] ibid 2.

therefore an open-ended provision, both under the perspective of the specific measures it potentially encompasses, as well as under the viewpoint of the bodies and institutions included among the actors called to take action.

With regard to the first aspect, it is virtually impossible to draw an extensive list of the actions possibly included within the scope of Article 42. As examples, one may refer to State reports, on-site visits, organization of meetings and conferences, distribution of informative materials, teaching in schools, festive events, TV, radio, or internet broadcasting, and public petitions, as well as whatever action is suitable for improving awareness of Indigenous peoples' rights within civil society. Of course, these and other activities will need to be carried out by the different actors within their respective contexts and depending on their respective possibilities. In this regard, the strict link existing between Articles 42 and 41 of the UNDRIP (as well as Article 39, when it comes to States) is self-evident, as most (if not the totality) of such activities need financial support, and therefore fall within the scope of 'financial cooperation' advocated by the latter.

As for the bodies and institutions included among the actors falling within the scope of Article 42 of the UNDRIP, the letter of the provision only refers to the 'United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States' (which must act—as just stressed—within the realm of their respective competences and scope of action). However, taking into consideration the spirit, scope, and purpose of the UNDRIP—as well as its universal applicability—it is reasonable to extend the obligation arising from Article 42 to international organizations and organs not belonging to the UN system. Among them, a key contribution may be provided by those belonging to the business sector. Companies, in particular, might play a major role in effectuating large parts of the UNDRIP (or, on the contrary, in blocking the execution of manifold UNDRIP rights). Although they are not explicitly mentioned by Article 42, they substantially fall within its scope of application, as is also confirmed by recent practice. For example, recently, the UN Global Compact—with as of now over 10,000 corporate participants and other stakeholders from over 130 countries, promising to practice ten key principles in the areas of human rights, labour, environment, and anti-corruption[106]—has taken up the challenge and took the initiative to develop the 'United Nations Declaration on the Rights of Indigenous Peoples: A Business Reference Guide' (at the moment of writing, still an 'exposure Draft').[107] It states that 'indigenous peoples are often uniquely vulnerable to business activities' and that there is often 'a lack of properly articulated legal rights protecting indigenous peoples and their cultures at the State level'.[108] Based on a number of such observations, the Global Compact then formulates some very striking rights-based policy commitments. One of them reads as follows:

> ... Companies should develop an indigenous peoples' rights policy, or include a specific section on indigenous peoples' rights in their human rights policy or overall code of conduct. In either case, the policy should fully recognize the rights of indigenous peoples as set out in the UNDRIP, and commit the company to, at a minimum, respecting the rights, and to actively supporting and advancing the rights where possible. The policy should reference the UNDRIP and other relevant

[106] See <http://www.unglobalcompact.org/AboutTheGC/index.html> accessed 20 October 2017.

[107] See <http://www.unglobalcompact.org/docs/issues_doc/human_rights/UNDRIP_Business_Reference_Guide.pdf> accessed 6 November 2017.

[108] ibid Introduction.

State-level and international law, legislation and regulation relating to human rights or specifically indigenous peoples' rights, including notably ILO Convention No.169. Indigenous peoples should be involved in the development of the policy.[109]

Furthermore, according to the Global Compact Draft Guide, '[a]ny policy commitment made in relation to human rights and Indigenous peoples should include how the business enterprise will seek to obtain the free, prior and informed consent of Indigenous peoples, and respect, protect and fulfill all the rights and obligations contained in the UN Declaration on the Rights of Indigenous Peoples', while businesses should also consider '*legal jurisdiction issues* (the company's approach to indigenous peoples' rights where State laws and regulations differ from indigenous peoples' rights under international instruments such as the UNDRIP)'.[110] Other sections relate a '*rights-focused due diligence* to enable the business to identify, prevent, mitigate and account for how they address its impacts on the rights of relevant indigenous peoples'.[111] Although formulated in an open way, the language used in the Draft Guide is promising to our mind. In the words of the Guide itself: 'The UNDRIP is not itself legally binding (except to the extent that it reflects customary international law). However, it does establish an international standard for States and other parties, including businesses, to meet.'[112]

Doing so, the Global Compact takes a positive path as to the plight of Indigenous peoples, as does the World Bank's International Finance Corporation Performance Standard 7 of 2012,[113] which promotes sustainable investment by the private sector in Indigenous peoples' lands. Having the object of 'promot[ing] sustainable development benefits and opportunities for Indigenous Peoples in a culturally appropriate manner', such an instrument recommends that '[p]rivate sector projects ... create opportunities for Indigenous Peoples to participate in, and benefit from project-related activities that may help them fulfill their aspiration for economic and social development'.[114] Performance Standard 7 applies to 'communities or groups of Indigenous Peoples who maintain a collective attachment, i.e., whose identity as a group or community is linked, to distinct habitats or ancestral territories and the natural resources therein [as well as] to communities or groups that have lost collective attachment to distinct habitats or ancestral territories in the project area'.[115] In particular, in the event that a development project 'may significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples lives, priority will be given to the avoidance of such impacts'; when these impacts are unavoidable, the free, prior, and informed consent of the affected communities must be obtained.[116]

To a similar extent, the UN Guiding Principles on Business and Human Rights, adopted in 2011,[117] declare, inter alia, that 'States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other

[109] ibid 14. [110] ibid 15 (emphasis added). [111] ibid 17 (emphasis added).

[112] ibid 5.

[113] See <http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES> accessed 20 October 2017.

[114] ibid 2. [115] ibid 6.

[116] ibid 16. On the concept of free, prior, and informed consent, see also B. Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers 2014).

[117] See <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 20 October 2017.

relevant barriers that could lead to a denial of access to remedy' (Principle 26), adding to that, in their Commentary to the Principle just mentioned, that '[e]ffective judicial mechanisms are at the core of ensuring access to remedy', as well as that 'States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable.' In addition, it is observed in the Commentary that '[l]egal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example ... certain groups, such as indigenous peoples ... are excluded from the same level of legal protection of their human rights that applies to the wider population.' Stating the issue this way, the UN Guiding Principles take as a starting point that equal treatment of Indigenous peoples is the key standard, which in many States would indeed be a huge way forward. The Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, established in 2011 by the HRC to, shortly said, help the UN Guiding Principles to be implemented,[118] will also pay special attention to the plight of Indigenous peoples.[119]

This practice comes to fill a gap in Article 42 (as well as in Articles 39 and 41) of the UNDRIP by including the business sector, being the player par excellence in the domain of international cooperation and development as to the realization of the purposes of the UNDRIP. In practice, this will often be done within the format of public–private partnerships—individual States or international organizations such as the United Nations representing the 'public' and companies representing the 'private'—but in the meantime it is also broadly accepted that companies are also directly bound by (key standards in) the domain of human rights law. However, even if one does not accept that, States and international organizations cannot 'look away' from their obligations following from, *in casu*, the UNDRIP, if doing business with business subcontractors.

4. The Legal Significance of Articles 37 to 42 of the UNDRIP under the Perspective of Customary International Law

Given the nature of the present book, the issue of the legal character of the UNDRIP is discussed in a variety of chapters in this volume. The present section intends to add some specific reflections in relation to Articles 37 to 42. Our investigation, however, first needs to be contextualized, by developing a few observations on the legal status of Declarations in general.

Originally, the United Nations tended to see a Declaration as a 'formal and solemn instrument', only suitable 'for rare occasions when principles of great and lasting importance are being enunciated'.[120] And, although such occasions are no longer that rare—knowing that the United Nations have adopted about 100 'universal human rights instruments', one-quarter of them being labelled as Declarations[121]—the particular instrument of a Declaration creates 'a strong expectation that members of the international community

[118] UN Doc A/HRC/RES/17/4 (6 July 2011).

[119] Discussed during a meeting with the Working Group in Geneva on 14 February 2013; not yet on paper.

[120] UN Doc E/CN.4/832/Rev.1 (1962) para 105, reflecting a 1962 statement of the UN legal adviser.

[121] Counting based on <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx> accessed 20 October 2017.

will abide by it' and 'consequently, in so far as the expectation is gradually justified by state practice, [that] a declaration may become recognized as laying down rules binding upon states'.[122] The latter refers to customary international law.

Article 38 of the UNDRIP, ordering States to take appropriate steps, including the adoption of legislative measures, to achieve the ends of the Declaration, is a perfect provision illustrating that 'not legally binding' versus 'legally binding' is not a watershed difference, but rather reflects a continuum.[123] The mandatory language of Article 38 ('shall') means that States not living up to this wording are doing more than simply neglecting a political statement or a statement 'of principles of great and lasting importance'. The four States originally voting against the Declaration explained their votes partly by referring to the legal character of the Declaration, also in relation to Article 38. And, although later on they successively changed their approach and officially endorsed the Declaration, their arguments deserve attention and discussion, because they may keep coming again to the surface. Canada, for instance, stated that:

> ... the provisions in the Declaration on lands and territories [are] overly broad, unclear and capable of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into question matters that had been settled by [internal Canadian] treaty [law].[124]

Therefore, the Canadian argument not only questions the legal character of the UNDRIP in an abstract sense, but also tables the issue of the exact scope of a number of Articles and the consequences thereof. Canada also made other critical remarks on the participation and consultation processes foreseen in, inter alia, Article 38 of the UNDRIP, by stating that '[w]hile Canada had a strong consultative process, reinforced by the Courts as a matter of law', 'the establishment of complete veto power over legislative action for a particular group would be fundamentally incompatible with Canada's parliamentary system.'[125] This links to what has been said above (in Section 2, as regards the drafting history of Article 40) on the incompatibility with national constitutions. The Australian statement accompanying its vote against the Declaration questioned the presumed customary international law character of the UNDRIP:

> As the Declaration did not describe current State practice or actions that States considered themselves obliged to take as a matter of law, it could not be cited as evidence of the evolution of customary international law. The Declaration did not provide a proper basis for legal actions complaints, or other claims in any international, domestic or other proceedings.[126]

Further to that, the Australian government noted that, 'in seeking to give indigenous people exclusive rights over property, both intellectual, real and cultural', 'the Declaration did not acknowledge the rights of third parties, in particular the rights of third parties to access indigenous land, heritage and cultural objects where appropriate under national law.' The same government also noted, as did Canada and other States, 'that the Declaration placed indigenous customary law in a superior position to national law'.[127] In addition, according to Australia, 'customary law [is] not "law" in the sense that modern democracies used the

[122] UN Doc E/CN.4/832/Rev.1 (1962) para 105.

[123] See W van Genugten, R van Gestel, M Groenhuijsen, and R Letschert, 'Loopholes, Risks and Ambivalences in International Lawmaking: The Case of a Framework Convention on Victims' Rights' in *Netherlands Yearbook of International Law 2006*, vol XXXVII (n 2) 109–54, 123–26.

[124] Quote taken from GA/10612, 13 September 2007. [125] ibid (no page numbers available).

[126] ibid. [127] ibid.

term, but [is] based on culture and tradition', while it would prefer 'to read the whole of the Declaration in accordance with domestic laws, as well as international human rights standards'.[128] Similar words accompanied the vote by the United States ('[t]he Declaration, if it were to encourage harmonious and constructive relations, should have been written in terms that were transparent and capable of implementation'[129]) and New Zealand. The latter State declared to be unable 'to support a text that included provisions that were so fundamentally incompatible with its democratic processes, legislation and constitutional arrangements'.[130] Furthermore, New Zealand stated that 'the history of the negotiations on the Declaration and the divided manner in which it had been adopted demonstrated that the text did not state propositions that were reflected in State practice, or which would be recognized as general principles of law.'[131]

However, shortly after its adoption by the GA, the four States originally voting against the Declaration reviewed their positions. Australia did do so in 2009, and Canada, New Zealand, and the United States in 2010. They 'discovered', one might say, that staying on the side-line is worse than active engagement. While joining the collective support for the UNDRIP, each of them also explained what they are doing themselves internally as regards the plight of Indigenous peoples and how their domestic policy in the field is linked to the legal obligations arising from the UNDRIP. A good example of the latter is provided by New Zealand:

> In moving to support the Declaration, New Zealand both affirms those rights and reaffirms the legal and constitutional frameworks that underpin New Zealand's legal system. Those existing frameworks, while they will continue to evolve in accordance with New Zealand's domestic circumstances, define the bounds of New Zealand's engagement with the aspirational elements of the Declaration.[132]

By using the words 'aspirational elements', New Zealand repeats its views on the legal character of the UNDRIP, Article 38 included. Canada, among others, did do the same by (still and again) stating explicitly that the Declaration 'does not reflect customary international law nor change Canadian laws'.[133] While doing so, Canada did not refer to specific UNDRIP Articles, but to the UNDRIP at large. However, its reasoning clearly relates to a range of elements of the Articles 37 to 42 as well, especially those elements that seem to create new legal obligations for all UN Member States, Canada included.

Canada, and other States using the same approach, have emphasized that the UNDRIP does not reflect customary international law. The ILA Committee on the Rights of Indigenous Peoples—of which the present authors were members (what follows reflects their personal views as well)—spent quite some time discussing the question of whether and to what extent the UNDRIP can indeed be seen to reflect customary international law.[134] The Committee came to the following overall conclusion:

> ... it is opportune to make clear that it is not important to investigate whether the relevant rules of customary international law actually correspond, in their precise content, to the provision

[128] ibid. [129] ibid. [130] ibid (emphasis added). [131] ibid.

[132] Ministerial Statements — UN Declaration on the Rights of Indigenous Peoples—Government Support, 20 April 2010. See <https://www.parliament.nz/mi/pb/hansard-debates/rhr/document/49HansD_20100420_00000071/ministerial-statements-un-declaration-on-the-rights-of> accessed 20 October 2017.

[133] See 'Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples', <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> accessed 20 October 2017.

[134] See Interim Report (n 50), 43–52 and Final Report (n 50), 28–29.

of UNDRIP in their actual formulation. By its own nature a declaration of principles, even when its content partially reproduces general international law, has in fact also a propulsive force, aimed at favouring further evolution of its subject matter for the future. What is really significant for the present enquiry is that the adoption of UNDRIP, after more than twenty years of negotiations, confirms that the international community has come to a consensus that indigenous peoples are a concern of international law, which translates into the existence of customary rules of binding force for all States irrespective of whether or not they have ratified the relevant treaties (which, on their part, taken together bind virtually all countries in the world). Therefore, it is today indisputable that 'customary norms concerning indigenous peoples and their pull toward compliance' are actually a reality in the context of the contemporary international legal order.[135]

It is important to emphasize that this conclusion does *not* really conflict with the declarations of the four States originally voting against the UNDRIP concerning the status of customary international law of the Declaration. In fact, while such States referred to the UNDRIP taken as a whole, the position supported by the Committee simply advocates that only a limited part of its provisions corresponds to rules of customary international law. In other words, the question of whether the label of customary international law can be attached to the Declaration can never be answered positively for the Declaration as a whole, but should be based on a careful assessment—on an Article-by-Article basis, or even sub-sections thereof—of the ICJ criteria and the (developing) international legal doctrine on customary international law. This conclusion is confirmed by ILA Resolution 5/2012,[136] adopted virtually unanimously and with no opposition, which states that, while the Declaration 'as a whole cannot yet be considered as a statement of existing customary international law ... it includes several key provisions which correspond to existing State obligations under customary international law'.[137] Among such a limited catalogue of rules corresponding to customary international law, the right to have treaties and other agreements honoured (relating to Article 37 of the UNDRIP) and the 'right to reparation and redress' (proclaimed, inter alia, by Article 40 of the UNDRIP) are included.

In light of the foregoing, and further elaborating on the conclusions reached by the ILA Committee, one can therefore safely assume that at least some elements included in the provisions of Articles 37 to 42 of the UNDRIP have a customary law character. We would presume *prima facie* that this is the case for both elements of Article 37 ('the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements', and the rule according to which '[n]othing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in [such] treaties'). As to both elements, it can be argued that the *opinio juris* and State practice requirements are already fulfilled or, at least, are clearly emerging, be it under the conditions attached to it above.

With regard to Article 38, as previously stressed, the obligation of States to take the appropriate measures, including legislative measures, to achieve the ends of the UNDRIP corresponds to a rule of customary international law with regard to the part calling for the achievement of the substantive provisions of the UNDRIP corresponding in their turn to rules of customary international law (ie those proclaiming the rights of Indigenous peoples to self-determination, autonomy or self-government, recognition and

[135] Interim Report (n 50), 51. [136] See ILA Res 5/2012. [137] See para 2.

preservation of their own cultural identity, traditional lands, and natural resources, and reparation and redress, as well as to have treaties and other agreements honoured).[138]

As for Article 39, while it states that Indigenous peoples have 'the right to have access to financial and technical assistance', one may wonder what such a statement means in the case of lack of political will to provide such assistance or in the case of the non-availability of sufficient financial and technical means to use the available resources in a non-discriminatory manner. Here, the *opinio juris* as well as State practice are often (still) lacking. As previously emphasized, the right to 'access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes' (Article 40), on the other hand, certainly qualifies for the status of customary international law, as observed among others by the ILA Committee on the Rights of Indigenous Peoples. Article 41, on international assistance, is not controversial, either from a political or from a legal perspective. In fact, as shown above, together with Article 42, it is the only Article among Articles 37 to 42 which does *not* use the word 'right' or refer to law-related matters, such as legislative measures. That implies that the drafters of the Article did not mean to create a legally enforceable right to assistance, although the provision might evolve in that direction. Given the fact that the United Nations and other international organizations are the duty-holders of Article 41, it would in any case not be easy to apply the traditional customary law standards. The same holds true with regard to Article 42: the role of the United Nations, including the Permanent Forum on Indigenous Issues, is about a duty to do 'everything one can' to make the UNDRIP a reality for all Indigenous people(s) worldwide rather than an enforceable rule of customary international law.

In any event, the legal status of the rules enshrined by the UNDRIP is the object of a continuous evolutionary process. In this respect, it is interesting to observe that several governments and/or domestic judicial bodies have started to make use of the Declaration immediately after its adoption. For example, in a famous judgment, delivered by the Supreme Court of Belize,[139] it is argued that the Declaration contains 'principles of general international law', as well as that the Declaration 'is of such force that the defendants, representing the Government of Belize, will not disregard it'.[140] This means, in other words, that one cannot support the UNDRIP for free in the context of the UN General Assembly and forget about that vote in favour, or also about the overwhelming support which has characterized the adoption of the Declaration, as soon as it comes down to difficult and nasty law suits.

5. Conclusion—Articles 37 to 42 of the UNDRIP: From Aspirations to Real Effects on the Ground

Despite numerous discussions, during the course of over twenty years of negotiations leading to the adoption of the UNDRIP, it has become clear that Articles 37 to 42 do not

[138] See Section 3.2 above.

[139] See <https://www.elaw.org/content/belize-aurelio-cal-et-al-v-attorney-general-belize-supreme-court-belize-claims-no-171-and-17> accessed 6 November 2017. The case was brought to our attention by S James Anaya, Professor at the University of Arizona and Chair of the previously mentioned ILA Committee.

[140] Supreme Court of Belize, Claim No 171 of 2007, Judgment read out by its Chief Justice, 18 October 2007, paras 131–32. For some old cases and other references to the Draft Declaration, see 'Successes Related to the Draft U.N. Declaration on the Rights of Indigenous Peoples' in Assessing the International Decade, Joint Submission to the OHCHR by a Number of Indigenous Organizations in Consultative Status with ECOSOC (March 2004).

belong to the most controversial provisions included in the Declaration, neither from a political nor from a legal perspective. Apart from some realistic concerns, tabled by the drafters of the UNDRIP and reflected upon in this chapter as one of the selected issues, Article 37 recognizes that treaties, agreements, and other constructive arrangements between States and Indigenous populations do actually reflect legally important entitlements that have to be honoured by applying the standards of modern treaty law, while taking into consideration the facts of cases at hand and later developments, and including the interests of other parties than the original ones. In addition, the UNDRIP might be a Declaration 'only', but it cannot be simply considered as 'just another' non-binding instrument. Article 38 of the UNDRIP has been chosen to illustrate this, by focusing on the meaning of the word 'shall', and on the way in which States look at the implications thereof. Further to that, it has been amply illustrated that large parts of Articles 37 to 42—particularly Article 37, relating to the right that treaties concluded with Indigenous peoples are honoured and respected by States, and Article 40, proclaiming the right of Indigenous communities to access to justice and remedies—do have a customary international law character, while other parts also reflect more than moral or political commitments 'only'. This chapter also makes it clear that Articles 37 to 42, as well as the rest of the UNDRIP, should not be read in isolation from other parts of international law, while in addition it is emphasized that the Declaration must be seen as a *living instrument*, playing a non-static role in further developing and strengthening the legal position of Indigenous peoples in interacting with the societies at large within which they live. Finally, the Articles on international cooperation and assistance serve as a restatement of already existing mandates and obligations, but also as a reminder to the United Nations and each and every other international organization to do their very best to fully realize the UNDRIP in order to ensure its *effectiveness* in the real world, being a standard of achievement for *all* actors worldwide. Unless they prefer to do so, Indigenous peoples should never walk alone.

Chapter 19. Reparations, Restitution, and Redress

Articles 8(2), 11(2), 20(2), and 28

*Federico Lenzerini**

Article 8(2)

States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of forced assimilation or integration;
(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 11(2)

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 20(2)

Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 28

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.

1. Introduction: The Complex Dynamics of Reparations for Indigenous Peoples

Beyond any philosophical or purely legal discourse, the *raison d'être* of human rights consists in providing the necessary conditions for the realization of the paramount value of human dignity in the real world, that is to say, allowing individuals to enjoy—*effectively*—the

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concrete prerogatives into which human rights provisions translate. The mere recognition of human rights on paper—although representing the first essential step on the path for their effective achievement—is in itself void if not accompanied by the necessary institutions and means to ensure their enforcement in the event of breaches. In this respect, it is axiomatic that the concepts of 'rights' and 'justice' are two elements of the same complex legal reality, in which they contextually depend upon each other. Indeed, rights are not effective when justice is not ensured in the event of their infringement, and justice remains unrealized when effective enjoyment of the basic rights of the individual is not ensured. As epitomized by the Inter-American Court of Human Rights (IACtHR), the obligation to repair human rights breaches represents 'a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility'.[1] It is for this reason that access to justice, reparations, restitution, and redress play a vital role in the dynamics of human rights, including collective rights recognized to minorities and Indigenous peoples.

The complexity which usually denotes the dynamics of reparation for human rights breaches attains a particularly high degree when the victims of such breaches are Indigenous peoples. This is especially due to the holistic vision of life of those peoples, in the context of which spiritual and social values usually have a significance which greatly overcomes any consideration for economic interests. This reality is, of course, the paramount element to be considered when programmes of reparations are carried out in favour of Indigenous communities, in the sense that it is essential to go beyond the classical Western-shaped language and conception of reparation, at least under a twofold perspective. First, in the Western world, reparation is essentially conceived as compensation to *individuals*, while with regard to Indigenous peoples it has a real sense only to the extent that it assumes a *collective* significance. Second, according to the Western vision, monetary compensation is commonly considered the only—or at least the paramount—goal to be achieved in order to ensure effectiveness of reparation itself. In the case of Indigenous peoples, material reparation is usually inadequate to ensure effective redress for the pain suffered, especially when it takes the form of compensation. For example, compensation is absolutely inadequate in cases of dispossession of Indigenous lands; as is well known, the Motherland has for most Indigenous communities a spiritual significance that no amount of money—irrespective of its size—may even get close to equalizing. As emphasized by Indigenous representatives before the UN Working Group established in accordance with the Commission on Human Rights Resolution 1995/32, owing to the special nature of their relationship to their lands,

> ... financial compensation did not provide adequate redress for the loss incurred. The notion of 'just and fair' compensation for indigenous peoples did not merely mean compensation based on 'fair market value' as indigenous peoples' lands, territories and resources were not simply real estate. On the contrary, the profound relationship that indigenous peoples had with their lands and territories had critical social, economic, political, cultural and spiritual dimensions. In some cases, the return of land was the only means by which to provide redress and restore a people's ability to survive as a distinct people. In terms of compensation, States were reminded of the unique and particular status of land rights possessed by indigenous peoples. Indigenous peoples

[1] See *Case of the Plan de Sánchez Massacre v Guatemala*, Series C No 116, Judgment (19 November 2004) para 52, <http://www.corteidh.or.cr/docs/casos/articulos/seriec_116_ing.pdf> accessed 23 October 2017.

were distinct peoples who possessed a special, unique, particular and spiritual connection to the land and in some cases no other redress but restoration could be adequate.[2]

Therefore, in the case of dispossession of Indigenous ancestral lands, the only effective form of reparation is usually *restitutio in integrum*, while monetary compensation is generally to be considered as *ultima ratio* in most situations of reparation for Indigenous peoples. This said, it is essential to keep in mind that it is impossible to define the means through which programmes of reparations for Indigenous peoples are to be managed on the basis of predetermined schemes. On the contrary, it is essential to adopt a flexible approach based on the awareness that the specific measures of reparations to be adopted must be decided on a case-by-case basis, in light of what is appropriate to *effectively* restore the wrongs suffered in the concrete case according to the perception of Indigenous peoples themselves. Consistently, there may be situations in which, due to the specific circumstances of the case, even *restitutio in integrum* may not represent the best practicable means of reparation, or may even be inadequate when the relevant human rights breaches take place in an environmental context characterized by social inequality or other structural situations incompatible with the individual and collective dignity of Indigenous peoples. In such situations, in fact, *restitutio in integrum*—that is, re-establishment of the previous situation and elimination of the effects produced by the violation—would simply recreate the pre-existing unacceptable social structure representing a fertile ground for human rights breaches to flourish. Rectification of the pre-existing situation—aimed at removing the social and cultural roots favouring perpetration of human rights abuses—would therefore be essential.[3] This approach has been adopted—although with regard to a situation not relating to Indigenous peoples specifically—by the IACtHR, in a case concerning the murder of three women taking place in a social context characterized by a pattern of gender-related violence making the frequency of dreadful abuses and slaughter of women particularly recurrent.[4] In that case, the Court noted that:

> ... bearing in mind the context of structural discrimination in which the facts of this case occurred ... the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, *re-establishment of the same structural context of violence and discrimination is not acceptable.*[5]

The Court, therefore, considered that the specific reparatory measures to be implemented were to be tailored taking into account the need—in addition to repairing the specific damages suffered by the victims in the instant case—to remove the root causes leading to the violations.[6]

[2] See Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, UN Doc E/CN.4/2002/98 (6 March 2002) para 81.

[3] For an assessment of the concept of 'transformative reparation', see R Rubio-Marín, 'Gender and Collective Reparations in the Aftermath of Conflict and Political Repression' in R Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge University Press 1999) 381, 398f.

[4] See *Case of González and Others ('Cotton Field') v Mexico*, Series C No 205, Judgment (16 November 2009), <http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf> accessed 1 November 2017.

[5] ibid para 450 (emphasis added).

[6] ibid paras 451ff. These measures included: the obligation by the respondent State to investigate the facts of the case and identify, prosecute, and, if appropriate, punish those responsible for the violations; measures of satisfaction (including the publication of the judgment, the issuance of a public act to acknowledge international responsibility, and the commemoration of the victims of gender-based murder through erecting a monument) and guarantees of non-repetition (including the creation of a web page containing the necessary personal information of all women and girls disappeared in the area in the last 16 years and who are still missing, creation

In general terms—leaving aside the specific case of dispossession of land which has *actually* taken place—in most instances in which Indigenous peoples are to be repaired for other kinds of wrongs, *immaterial* reparation usually represents the most valuable form of redress. For example, in cases in which outsiders claiming a right to property over Indigenous lands use violent means in order to persuade the members of the community concerned to leave their territory, recognition of the customary rights of the community over the land and setting-up of the conditions in order to avoid such intromissions happening again in the future constitutes a form of reparation,[7] which for the people concerned is much more effective than compensation for the material damages possibly suffered as result of the invasion of their land by the said outsiders.

More generally, for Indigenous peoples the special significance of immaterial reparations is consequent to the fact that, in many instances, human rights breaches lead not only their members to feel physical and psychological pain at the individual level, but also to destroy the spiritual identity and even the socio-political construction of the collectivity—producing harmful consequences that usually perpetuate at the intergenerational level—since the inherent order of the universe surrounding them is affected. As a consequence, beyond material restitution, immaterial reparations are essential to reinstate this order and allow the community concerned to properly continue its collective existence. Such kinds of reparation include, but *may not be limited to* the following. (1) Recognition of wrongs by the State or other perpetrators, as well as, to a related extent, recognition and implementation in favour of the community concerned of the rights that have been denied through committing such wrongs. This entails an implicit recognition before the whole society that the treatment suffered by Indigenous peoples was wrong and, *a fortiori*, a commitment to avoid repetition of such behaviour in the future. (2) Disclosure of truth, which—as emphasized by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1997—is 'not simply the right of any individual victim or his nearest or dearest to know what happened, a right to the truth ... [but] also a collective right, drawing upon the history to prevent violations from recurring in the future'.[8] Through disclosure of truth, governments are forced to face the reality, no longer having the possibility of escaping their responsibility. This process encompasses implicit admission of guilt as well as implicit commitment to avoid recurrence of the wrongs perpetrated. (3) To a similar extent as disclosure of truth, *apology* presupposes recognition that the behaviour for which one apologizes was wrong and, *a fortiori*, an implicit guarantee of non-repetition. (4) Punishment of the perpetrators provides victims with a sense of justice, makes them feel that the society as a whole has taken seriously the tort

or updating of genetic databases for the comparison of genetic information from the bodies of unidentified women or girls deprived of life in the area with missing persons on a national level, as well as training with a gender perspective for public officials and the general public of the area); rehabilitation (through appropriate and effective medical, psychological, or psychiatric treatment—immediately and free of charge—in favour of all persons next of kin of the victims); and compensation (including both pecuniary and moral damage: 'damage to the victims' life project' was not granted in the instant case for the reason that 'reparation for harm to the life project is not in order when the victim is deceased, since it is impossible to restore the individual's reasonable expectations of realizing a life project' (ibid para 589)).

[7] See SJ Anaya, 'Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law—the *Maya* Cases in the Supreme Court of Belize' in F Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press 2008) 567, 567f.

[8] See Final Report of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities on the 'Question of the Impunity of Perpetrators of Human Rights Violations', UN Doc E/CN.4/Sub.2/1997/20 (26 June 1997) para 17.

they have suffered, and restores the social order broken by the wrong. (5) Psychosocial reparations in general—shaped according to the specific peculiarities of each concrete case—allow victims to fully recuperate their place in the society to which they belong.[9]

These complex dynamics of reparations for Indigenous peoples are incorporated in the text of the UNDRIP to an extent which—in the end—is quite satisfactory, as it was hard to expect that a UN declaration, which by its nature is to be approved by political representatives of States, could do more in this respect. In the UNDRIP there are in fact a number of provisions which deal—in general terms or concerning specifically particular matters—with reparation, remedies, and access to justice, specifically Articles 8(2), 10, 11(2), 12(2), 20(2), 28, 29(3), 32(3), and 40. However, the present chapter will concentrate on the most significant ones—namely, Articles 8(2), 11(2), 20(2), and 28—the others being covered by other chapters included in the present volume. The genesis, significance, and impact of those provisions on general international law will be discussed in the following sections.

2. The Drafting History of the Provisions concerning Reparation, Restitution, and Redress Included in the UNDRIP

2.1 The First Steps

During the seemingly endless discussions leading to the adoption of the UNDRIP by the UN General Assembly (GA) in 2007—lasting twenty-two years since the first set of principles was prepared by the UN Working Group on Indigenous Populations in 1985[10]—the topic of redress, restitution, and compensation was constantly at the centre of the debate developed within the different bodies of the United Nations involved in the drafting process of the Declaration. Although no reference to the issue of reparation was included in the first bare seven principles elaborated in 1985, in 1988 the Chair of the Working Group, Erica-Irene Daes, prepared a more detailed draft composed of twelve preambular paragraphs and twenty-eight principles.[11] Principle 15, in particular, affirmed that Indigenous peoples had:

> The right to reclaim land and surface resources or where this is not possible, to seek just and fair compensation for the same, when the property has been taken away from them without consent, in particular if such deprival has been based on theories such as those related to discovery, *terra nullius*, waste lands or idle lands. Compensation, if the parties agree, may take the form of land or resources of quality and legal status at least equal to that of the property previously owned by them.

A right to 'just and fair compensation' was also contemplated by Principles 16, 17, and 18 with regard—respectively—to: actions resulting 'in the destruction, deterioration or pollution of [indigenous peoples'] land, air, water, sea ice, wildlife or other resources without free and informed consent of the indigenous peoples affected'; 'programmes

[9] See N Gomez, 'Indigenous Peoples and Psychosocial Reparations: The Experience with Latin American Indigenous Communities' in Lenzerini (n 7) 143ff.

[10] See UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985) Annex II.

[11] See UN Working Paper by Ms. Erica-Irene A. Daes Containing a Set of Draft Preambular Paragraphs and Principles for Insertion into a Universal Declaration of Indigenous Rights (21 June 1988), available at <http://www.nzdl.org> accessed 23 March 2013.

for the exploration or exploitation of mineral and other subsoil resources pertaining to [indigenous peoples'] traditional territories' carried out without obtaining their free and informed consent; and the cases in which Indigenous peoples are deprived of their traditional means of subsistence. These provisions remained substantially unchanged in the first revised text of the Draft Declaration examined by the Working Group in 1989 (now consisting of thirty Articles),[12] with the notable exception of Article 17. The new version of this provision made explicit reference to a right of Indigenous peoples to be consulted by States 'prior to the commencement of any large-scale projects ... in order to enhance the projects' benefits and to mitigate any adverse economic, social, environmental and cultural effect'; in addition, the text of the final sentence of Article 17 now read '[j]ust and fair compensation *shall* be provided for any such activity or adverse consequence undertaken' in place of '[j]ust and fair compensation *should* be provided for any such activities undertaken' as included in the 1988 version.[13] The new thirty Articles of the Draft Declaration were formally sent to governments for comments in 1990.[14]

In 1993, a further revised text was agreed at first reading by the members of the Working Group and revised by Erica-Irene Daes;[15] it now consisted of nineteen preambular paragraphs and forty-two operative paragraphs. This new text broadly expanded the number and scope of provisions devoted to reparation-related aspects. First, operative paragraph 6 affirmed that:

> Indigenous peoples have the collective and individual right to be protected against ethnocide and cultural genocide, including the prevention of and *redress* for: (a) Removal of indigenous children from their families and communities under any pretext; (b) Any action which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities; (c) Any form of forced assimilation or integration by imposition of other cultures or ways of life; (d) Dispossession of their lands, territories or resources; (e) Any propaganda directed against them.[16]

For the first time, a general right to redress for a number of wrongs of which Indigenous peoples had been victim in the past—and sometimes continued to be victim at present—was included in the Draft Declaration's text. In addition, operative paragraph 9 contemplated the right of Indigenous peoples to just and fair compensation (and, where possible, with the option of return) in the event of relocation from their lands or territories. This provision was developed by operative paragraph 25 which—elaborating on Article 15 of the 1989 text—stated that:

> Indigenous peoples have the right to the restitution of lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent and, where this is not possible, to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands and territories at least equal in quality, size and legal status.

[12] See UN Doc E/CN.4/Sub.2/1989/33 (15 June 1989). [13] Emphases added.

[14] See Report of the Working Group on Indigenous Populations on Its Eighth Session, UN Doc E/CN.4/Sub.2/1990/42 (27 August 1990).

[15] See Revised Working Paper Submitted by the Chairperson-Rapporteur, Ms. Erica-Irene Daes, Pursuant to Sub-Commission Res 1992/33 and Commission on Human Rights Res 1993/31, UN Doc E/CN.4/Sub.2/1993/26 (8 June 1993).

[16] Emphasis added.

Furthermore, operative paragraph 11 provided for the rights of Indigenous peoples to the 'restitution of cultural, religious and spiritual property taken without their free and informed consent or in violation of their laws'.

With regard to the right of Indigenous peoples to retain their means of subsistence, operative paragraph 19 restated and expanded the provision included in Article 18 of the 1989 version, reiterating that '[i]ndigenous peoples who have been deprived of their means of subsistence are entitled to just and fair compensation.'

The provision of Article 17 of the 1989 draft was transposed into operative paragraph 28 of the 1993 text. Reintroducing the structure of Principle 17 of the 1988 version, this paragraph affirmed the right of Indigenous peoples 'to require that States obtain their free and informed consent prior to the commencement of any projects on their lands and territories', adding that, '[p]ursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.'

Finally, operative paragraph 37 included another provision of general character of special significance, as it provided for the right of Indigenous peoples 'to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, *as well as to effective remedies for all infringements of their individual and collective rights*'.[17] On the basis of this provision, the principle according to which Indigenous peoples have a right to a remedy for *whatever* kind of infringement of their rights (including collective rights) was established.

Needless to say that the innovative character and broad scope of these provisions became the target of some criticism by a number of States, fearful that the recognition of such prerogatives in favour of Indigenous peoples could result in excessive restriction of their sovereign powers. Already in 1993, the Canadian observer before the Working Group on Indigenous Populations noted that draft Article 25, through 'establishing a principle of restitution of land, [was] problematic for Canada which had devised a system of negotiated settlements (comprehensive land claims agreements) with indigenous people'.[18]

2.2 The Sub-Commission Text

The Draft Declaration was finally adopted, in 1994, by the Sub-Commission.[19] In comparison with the 1993 text, some notable changes occurred in the Sub-Commission draft, also with regard to reparation-related provisions.

First, operative paragraph 6 of the 1993 text became Article 7 of the 1994 Draft, with a somehow different text:

> Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of assimilation or integration by other cultures

[17] Emphasis added.

[18] See Report of the Working Group on Indigenous Populations on Its Eleventh Session, UN Doc E/CN.4/Sub.2/1993/29 (23 August 1993) para 70.

[19] See Res 1994/45 of 26 August 1994.

or ways of life imposed on them by legislative, administrative or other measures; (e) Any form of propaganda directed against them.

Second, operative paragraph 11 of the 1993 text was transposed into Article 12 of the 1994 version, with the addition of the words 'traditions and customs' after the term 'laws'.

Third, operative paragraph 25 of the 1993 text became Article 27 of the 1994 draft, with some stylistic and substantial adjustment. The new text read as follows:

> Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. 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.

2.3 The Debate before the Ad Hoc Working Group on the Draft Declaration

Discussions concerning the reparations-related provisions included in the Draft Declaration obviously continued after its approval by the Sub-Commission, particularly before the ad hoc Working Group on the Draft Declaration established in accordance with the Commission on Human Rights Resolution 1995/32.

In 1996, for example, a number of governments claimed that, in respect of Article 12 of the Draft Declaration, the term 'restitution' needed to be clarified, while others 'stated that they could not agree to an open-ended obligation of restitution of cultural and similar property since this was not at present a rule of international law'.[20] The issue of restitution of cultural, intellectual, religious, and spiritual property was then intensely debated during the 1997 Session of the Working Group. In particular, the delegate of Sweden stated that also 'her Government had some difficulties with regard to "restitution" as found in article 12';[21] to a similar extent, the representative of Australia expressed 'a general concern with regard to the feasibility and practicality of restitution concerning past acts',[22] while the US delegate reiterated that 'the wording of article 12 was overbroad, in particular the open-ended obligation of restitution of cultural and similar property which at present was not a rule of international law'.[23] Norway also did not miss the occasion of restating that the term 'restitution' in Article 12 needed to be clarified.[24] The supposed undefined meaning of such a term was also raised in 2001, when some governmental delegates stated that 'a variety of problems [existed] with the implications of restitution, such as whether it meant return of property or compensation, and what kind of compensation should be provided if the object was broken or lost. Another main problem was that restitution could lead to conflict with the rights of third parties or the national interest.' Several governments, therefore, proposed that the term 'restitution' was replaced by 'return', while others suggested that 'the detailed meaning of and limits on the term "restitution" and on the rights of third parties should be defined in future conventions or

[20] See Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32 of 3 March 1995, UN Doc E/CN.4/1996/84 (4 January 1996) para 74.

[21] See Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, UN Doc E/CN.4/1997/102 (10 December 1996) para 76.

[22] ibid para 83. [23] ibid para 90. [24] ibid para 94.

other binding international instruments and in national legislation, so that these rights could be further developed in conformity with the declaration.'[25]

Other provisions of the Draft Declaration concerning redress and compensation were also the object of discussion. With regard to Article 7, in the 1997 Session Australia stated that the 'meaning and scope of the term "redress"' needed to be clarified.[26] Also in 1997, Canada and Japan concentrated their attention on Article 21: while the former government 'asked for clarification on how far back the right to compensation applied, considering that usually international law was not applicable retroactively',[27] the latter simply affirmed that the issue of 'compensation was regulated under national law'.[28] Then, in the 2004 Session of the Working Group, an undefined governmental delegate suggested that the word 'compensation' be replaced by 'redress', as '"compensation" was specifically related to financial aspects and ... the word "redress" would allow a broader range of options'.[29]

One of the provisions of the Draft Declaration with regard to which, during the meetings of the Working Group, the debate was particularly fervent was undoubtedly Article 27. In 1997, the representative of France stated that his government 'had serious difficulties with article 27 because of the legal and practical implications of the phrase "compensation shall take the form of lands, territories and resources equal in quality, size and legal status"'.[30] At the same session, Sweden called for clarification with regard to 'the possible retroactive application of compensation',[31] while the delegate of the United States 'doubted ... whether restitution was a viable means for resolving [the issues of the right of ownership and possession of indigenous lands or property and of the need for adequate legal procedures to ensure that claims of confiscation or use were fairly resolved] in most States'.[32] Subsequently, in 1999, the representative of Canada expressed a very intriguing position, stating that 'the draft declaration's precise restitution criteria were unnecessarily limiting and ... that article 27 could include a number of alternatives for providing fair and just consideration to the satisfaction of the indigenous groups concerned'; therefore, she proposed that the Article 'should be expanded with a separate provision for providing adequate processes for dealing with land claims'.[33] While *prima facie* this statement could appear to chase the purpose of offering more alternatives to Indigenous communities deprived of their lands than access to restitution or compensation *only*, one could maliciously think that the real intent of the government concerned was to have a more flexible provision that would actually allow States to dispose of a wider margin of movement in deciding the measures to be adopted when Indigenous peoples are deprived of their lands and to avoid restitution or compensation when this would be inconvenient to them. At the same session, the representative of Malaysia, after emphasizing that 'land and resources were key issues in the draft declaration', expressed his idea that the scope of the term 'compensation' 'required further clarification'.[34] Then, in 2003, the representative of New Zealand proposed to 'change the word "restitution" to the word "redress" and to

[25] See Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, UN Doc E/CN.4/2001/85 (6 February 2001) para 147.

[26] See UN Doc E/CN.4/1997/102 (n 21) para 185. [27] ibid para 231. [28] ibid para 239.

[29] See Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, UN Doc E/CN.4/2004/81 (7 January 2004) para 97.

[30] See UN Doc E/CN.4/1997/102 (n 21) para 272. [31] ibid para 273. [32] ibid para 281.

[33] See Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, UN Doc E/CN.4/2000/84 (6 December 1999) para 96.

[34] ibid para 98.

delete the last sentence of the article',[35] while the Australian delegate 'expressed concern about the sweeping retrospective nature of article 27', although recognizing that 'applied prospectively the article was useful for governing the future relationship between indigenous peoples and States'. The same concern was shared by the United States, asserting that the Article 'was vague in regard to the terms "compensation" and "restitution"', but at the same time expressing agreement 'that current lands should be protected and where lands were confiscated in the future indigenous peoples could be compensated'. Canada, finally, declared that it agreed with Article 27 in principle, but not with 'the current language', suggesting that 'procedures for the resolution of unresolved claims' should be included in the text.[36] The intensity of the debate surrounding Article 27 during the whole mandate of the Working Group on the Draft Declaration is epitomized by its 2005 Report, in which '[a] general and in-depth discussion was [recorded concerning] the entire text of the article', focused in particular 'on the terms "reparation", "restitution" and "redress", which constituted the main *stumbling block* for delegations. On the one hand, several indigenous and governmental organizations preferred to retain the word "restitution", while other State delegations preferred the word "redress". Concern was expressed relating to the translation of the term "redress", as it had no direct equivalent in Spanish.'[37]

The discussion on reparation for breach of land rights also involved the related Article 10. In particular, in 2002, certain delegations noted that the term 'compensation' could be interpreted 'in a restrictive manner to mean monetary compensation only'; they therefore suggested that 'the term "redress" might better address issues covered in article 10'. In explaining this position, one State representative added that 'compensation for loss of indigenous lands and territories needed to reflect the particular value and significance such lands had for indigenous peoples'.[38]

At the Tenth and Eleventh Sessions of the Working Group all this debate turned into a proposal—finally elaborated by the Chairman—that took into account the different concerns of governmental delegations and representatives of Indigenous peoples involved in the discussion.[39] For the purposes of this chapter, the most significant changes included in the proposal were the following: first, in Article 12, the sentence 'as well as the right to the restitution' was replaced by 'States shall provide effective mechanisms for *redress/redress through effective mechanisms, which may include restitution*';[40] second, in Article 21, the final sentence was replaced with 'entitled to just and fair *mechanisms for* redress, *through effective mechanisms*'; finally, Article 27 was transformed into the following formulation:

[35] The same proposal was advanced by one not better identified 'governmental delegation' during the 2004 Session of the Working Group; see UN Doc E/CN.4/2004/81 (n 29) para 118.

[36] See Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32, UN Doc E/CN.4/2003/92 (6 January 2003) para 34.

[37] See Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32 of 3 March 1995 on Its Tenth Session, UN Doc E/CN.4/2005/89 (28 February 2005) para 36 (emphasis added).

[38] See UN Doc E/CN.4/2002/98 (n 2) para 79.

[39] See Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32 of 3 March 1995 on Its Tenth Session, Addendum, UN Doc E/CN.4/2005/89/Add.2 (1 April 2005); Report of the Working Group Established in Accordance with Commission on Human Rights Res 1995/32 of 3 March 1995 on Its Eleventh Session, Summary, UN Doc E/CN.4/2006/79 (22 March 2006).

[40] Bold (not italics) was used in the original text with respect to all quotations reproduced in the list.

Indigenous peoples *and/or individuals* have the right to *submit/pursue claims for* redress, by means *that can include* of restitution or, when this is not possible, of a 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. *Whenever possible, and 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 relief/redress.*

2.4 The Text Approved by the Human Rights Council

On 29 June 2006, the new Human Rights Council (HRC) adopted the Draft Declaration.[41] The text of the HRC incorporated most of the proposals submitted by the Chair of the Working Group on the Draft Declaration in 2006; some changes in the numbering of the Articles also occurred.

First, Article 7 of the Sub-Commission text became Article 8 of the HRC draft. In addition, the part of the provision concerning the aspect of redress was included as a separate paragraph, introduced by the sentence 'States shall provide effective mechanisms for prevention of, and redress for'. Also, the word 'forced' was added in both letters (b) and (c), before—respectively—the terms 'population transfer' and 'assimilation'. Furthermore, letter (e) was replaced by the following formulation: '[a]ny form of propaganda designed to promote or incite racial or ethnic discrimination directed against them'.

Second, previous Article 12 became Article 11 of the new draft, and a specific paragraph was devoted to the remedial aspects, reading as follows: 'States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.'

Third, Article 21 of the previous draft became Article 20 of the new text; like for other similar provisions, the part concerning the aspect of reparation was put into an ad hoc paragraph, and the word 'compensation' was replaced by 'redress'.

Fourth, the formulation of Article 27 of the Sub-Commission text—which in the new version was numbered 28—was significantly changed. The new text read as follows:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a 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.

2.5 The Adoption of the Final Text by the General Assembly

Contextually with the adoption of the Draft Declaration, the Human Rights Council recommended its adoption to the GA.[42] The adoption was expected to take place in 2006, during the Sixty-First Session of the GA. Nevertheless, on 20 December 2006, the GA

[41] See Res 1/2 of 29 June 2006, UN Doc A/HRC/1/L.10 (30 June 2006) 58ff.
[42] See Res 1/2 (29 June 2006) para 2.

decided to 'defer consideration of and action on the United Nations Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon'.[43] This was due to the fact that the adoption was opposed by a number of governments, particularly the African States, supported and encouraged in particular by Australia, Canada, New Zealand, and the United States.[44] The matter was therefore referred until the end of the same GA session, in September 2007.

Since the beginning of 2007, the debate concerning the possible adoption of the Declaration reached its climax. In May 2007, the African Commission on Human and Peoples' Rights (ACommHPR) issued an Advisory Opinion on the Draft Declaration,[45] which took a position on land rights and gave its blessing to paragraph 1 of Article 28,[46] considered consistent with a number of provisions contemplated by African human rights treaties. On 17 May 2007, the African Union adopted a proposal for a revised version of the Draft Declaration including amendments to thirty of its forty-six provisions,[47] which was then presented to the President of the GA.[48] Among the said amendments, the African Group proposed the addition of the sentence '[s]ubject to the applicable legal system' at the beginning of letters (b) and (c) of Article 8 and the deletion of the sentence 'or ways of life imposed on them by legislative, administrative or other measures' in letter (d) of the same norm. Also, the proposal contemplated the addition of the sentence '[s]ubject to the provisions of national laws' at the beginning of paragraph 1 of Article 28.

After further discussion, on 13 September 2007, the issue of the possible adoption of the Declaration was opened at the plenary GA, in the context of which numerous delegations offered an explanation of their vote. Some of them, in particular, touched the provisions of the draft dealing with reparation-related aspects. Canada, for instance, stressed that 'the provisions in the Declaration on lands, territories and resources are overly broad and unclear and are susceptible of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into question matters that have already been settled by treaty in Canada';[49] this statement also covered Article 28, with regard to which the official position of the Canadian government was that 'Canada would have preferred the Declaration include confirmation that this article

[43] See Res 61/178 (20 December 2006) para 2.

[44] See UN Department of Public Information, Press Conference on Declaration of Indigenous Peoples' Rights (12 December 2006), <http://www.un.org/press/en/2006/061212_Indigenous.doc.htm> accessed 1 November 2017.

[45] See *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the ACommHPR at its Forty-First Ordinary Session (May 2007), <http://www.achpr.org/mechanisms/indigenous-populations/un-advisory-opinion/> accessed 1 November 2017.

[46] ibid para 35.

[47] The full text of the document is available as an Annex in W van Genugten, 'The African Move towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: The Substantive Arguments behind the Procedures', paper prepared for the Committee on the Rights of Indigenous Peoples of the International Law Association (1 March 2008), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103862> accessed 23 October 2017.

[48] See UN Department of Public Information, Press Conference on Permanent Forum on Indigenous Issues (24 May 2007), <http://www.un.org/News/briefings/docs/2007/070524_Tauli-Corpuz.doc.htm> accessed 23 October 2017.

[49] See UN Doc A/61/PV.107, GA Official Records, Sixty-First Session, 107th plenary meeting—Thursday, 13 September 2007, 10 am, p 13.

does not contemplate retroactive application, and could not be interpreted as applying to lands formerly held but over which rights were legally extinguished by treaty or other lawful means.'[50]

As regards New Zealand, the provisions on redress and compensation, in particular Article 28, actually represented one of the main reasons leading that government to vote against the adoption of the Declaration. These provisions were in fact considered

> ... unworkable in New Zealand despite the unparalleled and extensive processes that exist under New Zealand law in this regard. Again, the entire country would appear to fall within the scope of the article. The text generally takes no account of the fact that land may now be occupied or owned legitimately by others or subject to numerous different, or overlapping, indigenous claims. It is impossible for the State in New Zealand to uphold a right to redress and provide compensation for value for the entire country. And indeed, financial compensation has generally not been the principal objective of most indigenous groups seeking settlements in New Zealand.[51]

Another country voting against the Declaration—the United States—explained its position in a document that was made available to all delegates during the debate, stating, *inter alia*, that 'many of the declaration's provisions involving redress are set forth in a confusing manner and are ... unacceptable.'[52] Similar criticism was expressed by the Russian Federation, which decided to abstain in the voting: 'we cannot agree with the document's provisions relating in particular to the rights of indigenous peoples to land and natural resources, and to the procedure for compensation and redress.'[53]

Also some of the governments that voted in favour of the Declaration took the floor to clarify their position concerning certain reparation-related provisions included in the text. For example, Mexico—which strongly supported the Declaration—noted, however, that:

> The provisions of articles 26, 27 and 28 relating to ownership, use, development and control of territories and resources shall not be understood in a way that would undermine or diminish the forms and procedures relating to land ownership and tenancy established in our constitution and laws relating to third-party acquired rights. The procedures set out in articles 27 and 28 are subordinate to national legislation.[54]

In a similar vein, Sweden declared that:

> In the Swedish context, article 28 does not give the Sami the right to redress for regular forestry by the forest owner. Furthermore, the Swedish Government is of the opinion that its present legal system meets the general requirements in articles 27 and 28 and has presently no intention to adjust Swedish legislation in that regard.[55]

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was finally adopted by the GA on 13 September 2007,[56] with 143 votes in favour, 4 against (Australia, Canada, New Zealand, and the United States), and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, the Russian Federation, Samoa, and Ukraine). In relation to reparation-related provisions, the only change of significance

[50] See 'Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples', <http://www.turtleisland.org/discussion/viewtopic.php?t=4602> accessed 1 November 2017.

[51] See UN Doc A/61/PV.107 (n 49) 14.

[52] See USUN Press Release No 204(07), 13 September 2007, 'Observations of the United States with respect to the Declaration on the Rights of Indigenous Peoples', <https://www.ulapland.fi/loader.aspx?id=3f948c7b-2781-4c8c-bbbd-d137d6963617> accessed 1 November 2017.

[53] See UN Doc A/61/PV.107 (n 49) 16. [54] ibid 23. [55] ibid 25.

[56] See Res 61/295.

occurring in the final text of the Declaration in comparison with the draft adopted by the HRC concerned paragraph 2(d) of Article 8, the text of which was shortened to read '[a]ny form of forced assimilation or integration'.

3. Exegesis of the Relevant UNDRIP Provisions

3.1 Article 8(2)

Article 8(2) affirms the right of Indigenous peoples to redress for a number of practices suitable of threatening their cultural and ethnic identity and integrity as well as their way of life. This provision is clearly inspired by the consciousness that preservation of cultural identity and sense of belonging to the community is essential in order to ensure proper safeguarding of Indigenous peoples. It may also appear as a sort of *chapeau* for other provisions included in the UNDRIP, since the content of letter (c) is substantially reproduced in Article 10, while letter (b) echoes Article 28. However, it is particularly significant that these provisions have been included in the body of Article 8, because the list provided by paragraph 2 encompasses the main threats to the integrity of the value of Indigenous peoples' cultural and ethnic identity. Therefore, the reason why they attain an autonomous significance, in comparison with other similar provisions included in the Declaration, is that here their prohibition is exactly functional to ensure preservation of the said value.

There are many international provisions recognizing cultural rights of Indigenous peoples, of both general character and recognizing specific prerogatives in favour of Indigenous peoples that are essential to their cultural survival.[57] Among the former, one may cite Article 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR),[58] which—although contemplating a right of an individual nature—has been interpreted by the Human Rights Committee (HRComm) as necessarily implying the protection of a number of collective prerogatives of the community, the preservation of which is essential in order to ensure effective enjoyment by the members of the community itself of the right granted by the provision in point.[59] With regard to international treaties recognizing specific rights in favour of Indigenous peoples—with the clear purpose of allowing them to retain their cultural integrity—it is possible to make reference, among others, to the 1973 Polar Bears Agreement, allowing hunting of such bears performed 'by local peoples using traditional methods in the exercise of their traditional rights',[60] or to the 1979 Convention on Migratory Species, authorizing the taking of endangered migratory species when performed in order to 'accommodate the needs of traditional subsistence users of such species'.[61] In this respect, the added value of Article 8 of the UNDRIP is exactly that of explicitly contemplating a right to redress in the event that the actions listed by paragraph 2 are actually perpetrated, therefore leading Indigenous communities to seriously face destruction of their culture.

[57] See F Lenzerini, 'The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law' in Lenzerini (n 7) 73, 110 ff.

[58] 999 UNTS 171.

[59] See the discussion in Section 3.4 below.

[60] Agreement on Conservation of Polar Bears (1973), Art III(1), <http://sedac.ciesin.org/entri/texts/polar.bears.1973.html> accessed 23 October 2017.

[61] Convention on the Conservation of Migratory Species of Wild Animals, Art III(5)(c), <http://www.cms.int/en/convention-text> accessed 3 November 2017.

As for the term 'redress', it is certainly adequate in light of the purpose of Article 8(2). According to the *Oxford English Dictionary*, 'redress' means '[r]eparation or compensation for a wrong or consequent loss'.[62] It is therefore tantamount to 'reparation', which means 'the action of making amends for a wrong or harm done by providing payment or other assistance to the wronged party'.[63] The meaning of this term is broad enough to consider the provision under discussion as an open-ended rule implying that, when one of the actions listed by paragraph 2 is perpetrated, the specific kind of redress to be afforded is to be decided on a case-by-case basis, selecting the reparatory measure which appears as most appropriate to re-establish the pre-existing situation and/or to ensure effective redress for the victims, taking into primary account their own perception of the matter.

Finally, it is reasonable to assert that the provision in point cannot be the object of retrospective application. This opinion is induced by at least two reasons: (1) the use of the present tense (differently, for example, from Article 28, which explicitly refers to redress for traditional lands that '*have been* confiscated'[64]); and (2) the fact that the term 'redress' is immediately consequential to the word 'prevention', implying that States will have the duty to ensure redress only when they will fail—after the UNDRIP has been adopted—to prevent that the wrongs listed in paragraph 2 take place. This interpretation is also confirmed by the general reluctance by States to accept that the Declaration can be generally applied retrospectively—as is evident from the *travaux préparatoires*[65]—presupposing that in principle the UNDRIP is not applicable *ex tunc*, except when contrary evidence clearly emerges from the ordinary meaning of the terms used by a given Article.

3.2 Article 11(2)

As previously noted,[66] paragraph 2 of Article 11—corresponding to Article 12 in the Sub-Commission's adopted Draft Declaration—was made the object of a huge debate during the negotiations leading to the adoption of the UNDRIP. Several delegations did in fact complain, in particular, for the supposed indefinite meaning of the term 'restitution' and the possible problems of retrospective application of this provision. In addition, the paragraph in discussion is undoubtedly a very broad provision, on account of both the variety of property ('cultural, intellectual, religious and spiritual') to which it refers and the legal parameter to be evaluated in order to establish whether a violation occurred (ie Indigenous 'laws, traditions and customs'), which may be very hard to define in practice.

With regard to the remedial aspect,[67] however, the provision in point leaves a wide margin of appreciation to States, due to the very broad meaning of the term 'redress'. Restitution is therefore not mandatory, but only one of the possible practicable options—as is clear from the text of the provision, stating that redress '*may* include restitution'.[68] In this respect, the adopted formulation of Article 11(2) was modified in the HRC text, as draft Article 12 as approved by the Sub-Commission in 1994 affirmed *tout court* the right of Indigenous peoples to the restitution of the property concerned. With regard

[62] See online version, <http://www.oed.com/> accessed 23 October 2017. [63] ibid.
[64] Emphasis added. [65] See previous section. [66] ibid.
[67] Generally on this issue see A Vrdoljak, 'Reparation for Cultural Loss' in Lenzerini (n 7) 197ff.
[68] Emphasis added.

to this aspect, therefore, governments have been successful in weakening the scope of the provision in point, although Indigenous peoples retain a right to reparation for the loss of 'cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs'. This right is effective, as Article 11(2) affirms that redress is to be provided through *effective* mechanisms. In addition, the kind of reparation afforded must be adequate to allow the communities concerned to feel actually repaired for the wrong suffered according to their own perspective; this is consequential to the requirement that the mechanisms concerned are to be developed in conjunction with such communities.

Concerning the problem of the time-related aspect, it is essential that Article 11(2) is evaluated through taking into account that it is in principle necessary—as previously stressed—to adopt a restrictive approach in considering the possible applicability *ex tunc* of the UNDRIP provisions. Therefore, also in the case of the Article in point it is difficult to maintain that it may be of retrospective application. This seems to be confirmed by the language used in the provision, as the construction 'States *shall* provide redress ... with respect to ... property taken ...' seems to refer to action that is projected towards the future, in the sense that, once a property among those included within the scope of the provision will be taken without the 'free, prior and informed consent' of Indigenous peoples 'or in violation of their laws', then the duty of the State to provide redress will arise. This conclusion, however, is subject to change—depending on the specific situation—in light of the constantly growing tendency in the context of international law to ensure restitution of cultural property even in certain situations in which pieces of cultural heritage were taken in the far past.

The right of Indigenous peoples to 'redress through effective mechanisms, which may include restitution ... with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs' is also contemplated—as part of the right to cultural identity and integrity—by Article XIII(2) of the American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016.[69] The use of the word 'taken' (in the past form) would appear to support the possibility that the provision in point is applied retrospectively. In addition, the draft Principles and Guidelines for the Protection of the Heritage of Indigenous People (Principles and Guidelines) devote six paragraphs to the issue of recovery and restitution of heritage,[70] affirming, in particular, that:

> Moveable cultural property should be returned wherever possible to its traditional owners, particularly if shown to be of significant cultural, religious or historical value to them. Moveable cultural property should only be retained by universities, museums, private institutions or individuals in accordance with the terms of a recorded agreement with the traditional owners for the sharing of the custody and interpretation of the property.[71]

At the 2005 meeting of the Working Group on Indigenous Populations, the observer for Mexico referred to the Principles and Guidelines by saying that 'the concept of

[69] Available at <http://www.narf.org/wordpress/wp-content/uploads/2015/09/2016oas-declaration-indigenous-people.pdf> accessed 3 November 2017.

[70] See Final Report of the Special Rapporteur, Mrs. Erica-Irene Daes, in Conformity with Subcommission Res 1993/44 and Decision 1994/105 of the Commission on Human Rights, UN Doc E/CN.4/Sub.2/1995/26 (21 June 1995, revised in 2005) paras 19–24.

[71] See para 22.

compensation for continuing exploitation should be introduced in [their text], as should a reference to the establishment of a means by which Indigenous groups could have access to expert legal assistance in vindicating their rights.'[72]

With regard to relevant international treaties, the significance of the cultural heritage of Indigenous peoples is recognized by the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.[73] In particular, Article 5(3)(d) establishes that the court or other competent authority of the State to which a request for the return of an illegally exported cultural object has been submitted shall order such return if the requesting State establishes that the removal of the object from its territory significantly impairs 'the traditional or ritual use of the object by a tribal or indigenous community'. Although this obligation exists vis-à-vis the territorial State where the object was originally located—and not the Indigenous community spoiled of it—it is evident that it actually safeguards the right of Indigenous peoples to keep their cultural objects of traditional and ritual use. In addition, Article 7(2), in establishing the cases in which return of a cultural object is not due, affirms that, in any event, they do not cover the situation in which 'a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community'; in this situation the competent authority is therefore bound to order return of the object concerned, on the condition that the requesting State actually returns the property to the Indigenous community affected by its loss.

3.3 Article 20(2)

This provision aims at preserving the right of subsistence and development proclaimed by paragraph 1 of Article 20. The specific term chosen by the drafters of the Declaration for this provision is 'redress', which—as already noted—has a quite broad scope and may therefore be translated into any kind of concrete measure that is most suitable to ensure effective reparation in light of the specific features characterizing a given case. However, redress must be 'just and fair'. The contextual use of these two terms suggests that redress must be equitable from both the perspective of the State providing reparation and for the victims of the deprivation of the means of subsistence and development for which redress is given. In any event, the requirement that redress must be effective—which is *inherent* to the same purpose for which redress is provided—implies that in all situations when a reparatory measure is adopted it *must* fulfil the actual result of producing in the victim him- or herself the *genuine* perception that such a measure is adequate to restore his or her dignity and to effectively compensate the tort suffered.

With regard to the provision in point, the necessary caution to be used in evaluating the possible retrospective application seems to be overcome by textual evidence. This conclusion appears to be the most reasonable in light of the use in the text of the norm of the past tense in the passive form, without any element that may militate in favour of the opposite solution. This finds indirect confirmation in Article XXIX(5) of the American Declaration, which is even clearer in affirming that 'Indigenous peoples who *have been* deprived of their own means of subsistence and development have the right to restitution

[72] See Report of the Working Group on Indigenous Populations on Its Twenty-Third Session, UN Doc E/CN.4/Sub.2/2005/26 (12 August 2005) para 47.

[73] The full text of the Convention is available at <http://www.unidroit.org/instruments/cultural-property/1995-convention> accessed 3 November 2017.

and, where this is not possible, to fair and equitable compensation.'[74] Such provision continues by stating that '[t]his includes the right to compensation for any damage caused to them by the implementation of state, international financial institutions or private business plans, programs, or projects.'

3.4 Article 28

During the *travaux préparatoires*, Article 28 was the object of a particularly fervent debate.[75] Certain States were in particular concerned by its possible applicability *ex tunc*, while the same governments had far fewer problems in accepting its application for the future. This notwithstanding, it appears quite indisputable that Article 28 can be the object of retrospective application. This clearly emerges from the formulation of the text ('*have* the right to redress ... for the lands, territories and resources ... which *have been* confiscated, taken, occupied, used or damaged ...'), and States are well aware of this, as demonstrated by the explanation of the vote made by the representative of New Zealand the same day that the UNDRIP was adopted by the GA. In fact, in stating that 'the entire country would appear to fall within the scope of the article',[76] it is evident that this government referred to any instance in which, in the history of New Zealand, confiscation, taking, occupation, use, or damage of lands traditionally belonging to Indigenous peoples occurred, including those that happened in the far past.

In any event, the reality that Article 28—ie the right contemplated therein—also applies to situations of deprivation of lands of Indigenous peoples which occurred in the past is transparent especially in consideration of the fact that in most cases the *effects* of these situations continue at present. As a consequence, it is not even appropriate to speak about 'retrospective application' as such. In fact, in consideration of the special relationship Indigenous peoples have with their traditional lands, they usually continue to be negatively affected by the loss of these lands even after many generations. Therefore, as the communities concerned continue to suffer *today* the grief resulting from the fact of having been dispossessed of their land in the past, they are actually entitled to redress due to a wrong that they are actually experiencing *at present*. This is an argument commonly used with regard to reparation for past wrongs in general[77] and—with regard specifically to Indigenous peoples—has been, for example, confirmed by an ILO Committee in relation to a claim brought by an Indigenous community located in Denmark under ILO Convention 169.[78] Hence, since most cases of deprivation of traditional lands of Indigenous peoples which occurred in the past produce

[74] Emphasis added. [75] See previous section. [76] ibid.

[77] See D Shelton, 'Reparations for Indigenous Peoples: The Present Value of Past Wrongs' in Lenzerini (n 7) 47, 48.

[78] See Representation (Article 24), 2000, Denmark, C169, Report of the Committee Set up to Examine the Representation Alleging Non-Observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No 169), Made under Article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsiuteqartut Kattuffiat-SIK) (SIK), <https://www.elaw.org/content/denmark-report-committee-set-examine-representation-alleging-non-observance-denmark-ilo-169-> accessed 31 January 2018; the Committee observed that 'the relocation of the population of the Uummannaq settlement, which forms the basis of this representation, took place in 1953. It also takes note of the fact that the Convention only came into force for Denmark on 22 February 1997. The Committee considers that *the provisions of the Convention cannot be applied retroactively*, particularly with regard to procedural matters, such as whether the appropriate consultations were held in 1953 with the peoples concerned. However, the Committee notes that *the effects of the 1953 relocation continue today*, in that the relocated persons cannot return to the Uummannaq settlement and that legal claims to those lands remain outstanding. Accordingly,

ongoing effects, restitution of the lands concerned and subsequent official recognition of the formal title of ownership over said land in favour of the relevant Indigenous community simply represent the usual forms of reparation that are due in the event of violations of an ongoing nature, consisting in stopping the violation and guaranteeing its non-repetition (with no need to debate on the applicability *ex tunc* of Article 28). Of course, as established by the provision in point, when restitution of the lands concerned is materially impossible, the form of reparation due is compensation.

With regard to remedial aspects properly, the terminology used in paragraph 1 is 'redress'. As previously noted with regard to other provisions, the broad scope of this expression implies in principle that the kind of reparation to be afforded is to be decided on a case-by-case basis, according to the specific objective situation, as well as the needs and aspirations of the peoples concerned. However, the provision itself determines the kind of reparation that is in general to be preferred (ie restitution of the lands, territories, and resources concerned). This is due to the fact that in most cases no form of compensation is adequate to effectively recompense the deep spiritual significance that the Motherland has for the very cultural identity and—in many cases—even the physical existence of Indigenous communities. For this reason, restitution is the form of redress to be preferred any time that it is actually practicable. This conclusion is confirmed by the textual construction of the provision in point: in fact, although the use of the expression 'that *can* include restitution' would *prima facie* indicate that restitution is only one of the possible practicable options, the subsequent phrase 'when this is not possible'—which refers to restitution—reveals that the latter is to be ensured in all possible situations. When it is not practicable, then it must be replaced by compensation, which must be 'just, fair and equitable'; similarly to Article 20(2), the combination of all these terms denotes that compensation must take a form that is perceived as just, fair, and equitable by the Indigenous communities concerned.

Paragraph 2 clarifies that the meaning of 'compensation' is not necessarily limited to monetary redress. On the contrary, it has a broad scope, as it may 'take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress'. Apart from this, the provision in point barely offers useful indications concerning the form of redress—among those into which compensation may be concretely translated—that is to be preferred over the others. In fact, even though including the sentence just quoted, the last expression of Article 28(2) adds that it may alternatively take the form of 'other appropriate redress', as the presence of the conjunction 'or' unequivocally shows. Therefore, the only function that may be assigned to the specific reference by the provision in point to the means of redress listed in its text is that of a simple advice to States, in the sense that—when possible—compensation in the form of lands, territories, and resources equal in quality, size, and legal status may be privileged over the other compensatory measures available in the specific case.

The right to reparation for Indigenous peoples deprived of their ancestral lands or natural resources is regularly contemplated by all pertinent international legal instruments.

the Committee considers that the consequences of the relocation that persist following the entry into force of Convention No. 169 still need to be considered with regard to Articles 14(2) and (3), 16(3) and (4) and 17 of the Convention ... despite the fact that the relocation was carried out prior to the entry into force of the Convention. These provisions of the Convention are almost invariably invoked concerning displacements of indigenous and tribal peoples which predated the ratification of the Convention by a member State' (para 29, emphasis added).

In particular, Article 16 of ILO Convention 169 affirms the right of Indigenous peoples removed from their traditional lands to return to such lands when 'the grounds for relocation cease to exist' or, when this is not possible, to be 'provided ... with lands of quality and legal status at least equal to that of the lands previously occupied by them' or with compensation in money or in kind. In addition, Article 15(2) entitles Indigenous peoples prejudiced by activities of exploration or exploitation of mineral or sub-surface resources or other resources pertaining to their lands with the right to receive 'fair compensation for any damages which they may sustain as a result of such activities'.

During the UNDRIP *travaux préparatoires*, many statements were released by State representatives supporting the right of Indigenous peoples to be repaired in all cases in which they are (or were) deprived of their traditional lands. At the 1996 Session of the Working Group on the Draft Declaration, for example, some delegations stated that, although 'land alienation for the common good or legitimate sale' should be possible, 'in such cases compensation or other forms of reasonable redress should be provided to indigenous people'.[79] Also in 1996, both Australia and Canada (two of the four States originally voting against the adoption of the UNDRIP) expressed a positive position with regard to the right in point; in particular, while Australia declared that 'the Native Title Act ensured that just terms of compensation would be provided' in the event of compulsory acquisition of land,[80] the representative of Canada stated 'that his Government felt strongly that adequate processes for dealing with land claims and related resource issues should be available for indigenous groups'.[81] Some years later, with much stronger words, the representative of Guatemala 'reaffirmed his support for the rights of indigenous peoples to their lands and territories and underlined their inalienable and absolute right to restitution and compensation in that context'.[82]

In more general terms, the right proclaimed by Article 28 is the one—among those included in the UNDRIP concerning reparatory aspects—that is characterized by the highest rate of consistent international and State practice. In this respect, one can first refer to the position of the HRComm, according to which in concrete terms proper protection of the individual right defended by Article 27 of the ICCPR[83] necessarily translates into the safeguarding of certain collective rights in favour of the communities to which the individuals concerned belong. To use the words of the Committee, 'protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities [including indigenous communities] concerned.'[84] In order for this right to be effective, States must ensure reparation in the event of infringement.[85] The HRComm has also taken a position with regard to the *kind* of reparation that is to be ensured in favour of Indigenous peoples—following deprivation of traditional lands—in order to ensure effective implementation of Article 27 of the ICCPR. In particular, in 1999, it advised Chile that '[r]elocation and

[79] See UN Doc E/CN.4/1996/84 (n 20) para 85.

[80] See UN Doc E/CN.4/1997/102 (n 21) para 185.

[81] ibid para 279.

[82] See UN Doc E/CN.4/2004/81 (n 29) para 16.

[83] ICCPR Art 27 states that '[i]n 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 practise their own religion, or to use their own language.'

[84] See HRComm, General Comment 23: Rights of Minorities (Art. 27), UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).

[85] See, eg, Concluding Observations of the Human Rights Committee, Brazil, UN Doc CCPR/C/BRA/CO/2 (1 December 2005) para 6.

compensation may *not* be appropriate in order to comply with article 27',[86] while in 2001, it regretted with Guatemala that it had not been possible 'to adopt legislation designed to guarantee the full enjoyment of all [indigenous peoples'] rights under the Covenant, including the *restitution* of communal lands'.[87] In a number of other cases, concerning, for example, Australia, Canada, Democratic Republic of the Congo, Honduras, Norway, Paraguay, and the United States, the HRComm stressed the obligation of State Parties to the ICCPR to, inter alia, 'provide an effective restitution of ancestral lands' to Indigenous peoples.[88]

Even more explicit is the position taken by the Committee on the Elimination of Racial Discrimination (CERD), according to which, in order to avoid racial discrimination against Indigenous peoples, State Parties to the 1966 Convention on the Elimination of All Forms of Racial Discrimination[89] are bound, inter alia, to *return* to Indigenous peoples the lands and territories traditionally owned or otherwise inhabited of which they have been deprived without their free and informed consent.[90] Even the Committee on Economic, Social and Cultural Rights has linked the safeguarding of economic, social, and cultural rights of Indigenous peoples—particularly the right to take part in cultural life—with the obligation by States to 'take steps to return' their communal lands, territories, and resources 'where they have been ... inhabited or used without their free and informed consent'.[91] Last but not least, a similar position has been taken by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR).[92]

At the regional level, the practice of the IACtHR emerges. Since the leading *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*,[93] the Court—basing on the assumption that 'it is a principle of international law that any violation of an international obligation which has caused damage carries with it the obligation to provide adequate reparation for it'[94]—has developed firm case law recognizing the right of Indigenous

[86] See Concluding Observations of the Human Rights Committee: Chile, UN Doc CCPR/C/79/Add.104 (30 March 1999) para 22 (emphasis added).

[87] See Concluding Observations of the Human Rights Committee: Guatemala, UN Doc CCPR/CO/72/GTM (27 August 2001) para 29 (emphasis added). For a more comprehensive assessment of the relevant practice of the HRComm, see C Charters, 'Reparations for Indigenous Peoples: Global International Instruments and Institutions' in Lenzerini (n 7) 163, 177ff.

[88] See Report of the United Nations High Commissioner for Human Rights on Indigenous Issues, UN Doc A/HRC/4/77 (6 March 2007) para 8.

[89] 660 UNTS 195.

[90] See, in particular, General Recommendation 23: Rights of Indigenous Peoples, UN Doc A/52/18 (18 August 1997) para 5 (emphasis added); see also the practice described in Charters (n 87) 182 ff.

[91] See CESCR, General Comment 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1(a), of the ICESCR), UN Doc E/C.12/GC/21 (21 December 2009) para 36.

[92] See CEACR, Individual Direct Request concerning Convention No 169, Indigenous and Tribal Peoples, 1989 Paraguay (ratification: 1993; submitted: 2004); Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No 169) Bolivia (ratification: 1991; published: 2006); see Charters (n 87) 174f.

[93] Series C No 79, Judgment (31 August 2001), <http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf> accessed 23 October 2017. For other subsequent judgments taking the same position, see *Case of the Moiwana Community v Suriname*, Judgment (15 June 2005), Series C No 124; *Case of the Yakye Axa Indigenous Community v Paraguay*, Judgment (17 June 2005), Series C No 125; *Case of the Sawhoyamaxa Indigenous Community v Paraguay*, Judgment (29 March 2006), Series C No 146; *Case of the Saramaka People v Suriname*, Judgment (28 November 2007), Series C No 172; *Case of the Xákmok Kásek Indigenous Community v Paraguay*, Judgment (24 August 2010), Series C No 214; *Case of Kichwa Indigenous People of Sarayaku v Ecuador*, Judgment (27 June 2012), Series C No 245 (all available at <http://www.corteidh.or.cr/casos.cfm?&CFID=1909265&CFTOKEN=39001500> accessed 23 October 2017).

[94] See *Awas Tingni* (n 93) para 163.

peoples to be given appropriate reparation in all cases in which their traditional lands are taken or damaged by a State Party to the American Convention on Human Rights (ACHR). In taking this position, the Court—in consideration of the fact that reparations 'consist in those measures necessary to make the effects of the committed violations disappear'[95]—pays particular attention to accord the most appropriate kinds of redress in each case in light of the special needs of the communities concerned, so that the form of reparation applied is actually perceived by themselves as adequate to restore the wrong suffered.[96]

An equivalent position has been taken by the ACommHPR. In particular, in a recent case concerning the displacement from their traditional land of an Indigenous community living in Kenya (the Endorois),[97] the Commission—adopting an approach tailored on the basis of the cultural specificity of such a community—found that the Endorois' forced eviction from their ancestral lands by the government of Kenya produced a breach of their rights to religious freedom[98] and to property of their traditional land,[99] of their cultural rights[100] and their right to freely dispose of their wealth and natural resources,[101] as well as of their right to development.[102] What is of special importance for the purposes of this paragraph, however, is the fact that one of the grounds on which the Commission based its finding concerning the violation of the right to property is the inadequacy of the redress offered by the government of Kenya to the Endorois following their eviction from their ancestral land. In developing this argument, the Commission relied exactly on Article 28 of the UNDRIP (although referring to the 1994 Draft of the Declaration),[103] concluding that:

> when a State is unable, *on objective and reasonable grounds*, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.[104]

In addition to international practice, the commitment to providing reparation for expropriation or damage of Indigenous traditional lands is today reflected in the practice developed at the level of individual States. The existence of such an obligation has been affirmed, inter alia, by the courts of Argentina, Australia, Belize, Botswana, Brazil, Cambodia, Colombia, India, Japan, Malaysia, New Zealand, South Africa, and the United States. Also, specific programmes of reparation have been recently developed by

[95] See *Moiwana Community* (n 93) para 171.

[96] For a more comprehensive assessment of this issue, see G Citroni and KI Quintana Osuna, 'Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights' in Lenzerini (n 7) 317ff.

[97] See Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (4 February 2010), <http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf> accessed 3 November 2017.

[98] ibid para 173.

[99] ibid para 238. See also para 209, in which the Commission affirms that: 'the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, *are entitled to restitution thereof or to obtain other lands of equal extension and quality*. Consequently, *possession is not a requisite condition for the existence of indigenous land restitution rights*' (emphasis added).

[100] ibid para 251. [101] ibid para 268. [102] ibid para 298. [103] ibid para 232.

[104] ibid para 234 (emphasis in the original). For an earlier case in which the Commission found the respondent State bound to ensure reparation for environmental degradation and contamination of the ancestral lands of an Indigenous community, see Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, 2001 AHRLR 60.

a number of governments, ensuring redress for Indigenous communities deprived in the past of their traditional lands, including Australia, Canada, and the United States.[105]

4. The Provisions of the UNDRIP on Reparations, Restitution, and Redress as Reflective of Customary International Law

The International Law Association's Resolution 5/2012 on the Rights of Indigenous Peoples—adopted in Sofia on 28 August 2012 with an overwhelming majority and no opposition—affirms that:

> States must comply with their obligations—*under customary* and applicable conventional *international law*—to recognise and fulfil the rights of indigenous peoples to reparation and redress for wrongs they have suffered, including rights relating to lands taken or damaged without their free, prior and informed consent. Effective mechanisms for redress—established in conjunction with the peoples concerned—must be available and accessible in favour of indigenous peoples. Reparation must be adequate and effective, and, according to the perspective of the indigenous communities concerned, actually capable of repairing the wrongs they have suffered.[106]

Although a Declaration—like the UNDRIP—is not in itself a binding instrument, as several delegations have carefully reiterated during the final discussion accompanying its adoption,[107] it may either represent the translation into paper of pre-existing rules of customary international law or the expression of commitments that—if accompanied by correspondent State practice and *opinio juris*—can subsequently evolve into principles of customary law. It is in principle indubitable that a Declaration, representing an authoritative explanation of some general principles proclaimed by the constitutive statute of the organization by which it is adopted, inherently implies a duty of all members of such an organization to comply with its rules. In fact, when a Declaration includes rules having the purpose of giving concrete realization to the basic principles representing the *raison d'être* of an international organization, a behaviour held by a State which is incompatible with such rules would be inconsistent with the status of being a member of the organization itself. The UNDRIP does not escape this rule, as demonstrated by the very first sentence of its Preamble, affirming that, in adopting the Declaration, the GA is guided 'by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter'. This argumentation is reinforced by the nearly universal acceptance of the UNDRIP, in consideration of the fact that all countries which had originally voted against its adoption (Australia, Canada, New Zealand, and the United States) and two of those which abstained (Colombia and Samoa) have subsequently formally endorsed the Declaration. Furthermore, after its adoption, the UNDRIP has been authoritatively

[105] See, for details, F Lenzerini, 'Reparations, Redress and Remedies', International Law Association, Committee on the Rights of Indigenous Peoples, Hague Conference Report (2010), 39, 42, <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> accessed 23 October 2017. The practice in point is today progressively increasing; for a recent example (concerning the United States), see 'Government Pays $1Billion Compensation to Indian Tribes over Century-Old Claims to Money and Land', *Daily Mail online* (12 April 2012), <http://www.dailymail.co.uk/news/article-2129056/Government-pays-1billion-compensation-Indian-tribes-century-old-claims-money-land.html> accessed 23 October 2017.

[106] See para 10 (emphasis added). The text of the Resolution is available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> accessed 23 October 2017.

[107] See UN Doc A/61/PV.107 (n 49) *passim*.

regarded by a number of international institutions as the instrument of reference to define the content of international *obligations* held by States vis-à-vis Indigenous peoples. For instance, in a long-awaited judgment released by the African Court on Human and Peoples' Rights in May 2017, the judges have affirmed that the relevant provisions of the African Charter on Human and Peoples' Rights (ACHPR)[108] 'must be interpreted in light of the applicable principles especially by the United Nations', considering these principles as enshrined by the UNDRIP.[109]

The adoption of the UNDRIP in 2007 by the GA undoubtedly represented a groundbreaking event in the struggle of Indigenous peoples to obtain recognition of their collective dignity, as well as their right to be different from the stereotyped cultural models of the dominant society and to transmit this diversity to future generations. In this context, reparation for the wrongs suffered—both past and present—is an essential element to make this goal a reality, especially with regard to land rights. On account of the special relationship existing between Indigenous peoples and their traditional territories, when an Indigenous community is deprived of its land, the intergenerational spiritual chain on which the cultural existence of the said community is based breaks, and the only way to re-establish the order of Indigenous life is to ensure restitution of the lands concerned, even after many generations have passed. In this respect, the centrality of redress is shown by the high number of provisions dealing with reparatory aspects included in the UNDRIP. As seen in Section 2, during the *travaux préparatoires* of the Declaration some of these provisions have been the object of a fervent debate with regard to their specific formulation and contents. Nevertheless, to this writer's knowledge, no State has ever advanced the idea that the relevant Articles had to be removed *tout court* from the text of the Declaration; on the contrary, virtually all States agreed with the relevant provisions 'in principle'. Besides this, the fact that Indigenous peoples are entitled to some form of reparation is confirmed by—apart from the UNDRIP—consistent practice. In the previous section,[110] it was possible to ascertain that, especially with regard to reparation for the deprivation of Indigenous peoples' ancestral lands, even limiting to the practice arising from pertinent treaty law, virtually all States in the world have an obligation to ensure reparation in favour of Indigenous peoples. This is crystal clear if one considers that such an obligation applies, *at least*, to all State Parties to the ICCPR; *plus* all State Parties to the CERD; *plus* all countries that have ratified the 1966 International Covenant on Economic, Social and Cultural Rights;[111] *plus* all States that are parties to ILO Convention 169; *plus* all States that have ratified the ACHR; plus all countries that are parties to the ACHPR. The American Declaration adopted in 2016, at Article XXXIII, also confirms that 'Indigenous peoples and persons have the right to effective and appropriate remedies, including prompt judicial remedies, for the reparation of all violations of their collective and individual rights. The states, with full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right.' If one adds the massive consistent domestic practice recently developed in the field and the many official

[108] African Charter on Human and Peoples' Rights 21 ILM 58 (1982).

[109] See Application No 006/2012, *African Commission on Human and Peoples' Rights v Republic of Kenya*, Judgment (26 May 2017) paras 125–26, <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf> accessed 3 November 2017.

[110] See Section 3.4. [111] 993 UNTS 3.

statements of governments affirming their commitment to ensure adequate and effective reparation for the wrongs suffered by Indigenous peoples,[112] there is little or no doubt that today a general *opinio juris* exists within the international community confirming that States are *required* to provide some form of reparation for the wrongs suffered by Indigenous peoples, especially in the event of deprivation of, or damage to, their traditional lands.

The conclusion just reached is confirmed by a simple reasoning of legal logic. Once we have established that redress is an essential element for the effectiveness of human rights,[113] it is consequential that any human rights-related obligation brings in itself the *inherent* requirement that any breach of the relevant right is effectively and adequately repaired. This implies, *a fortiori*, that, with regard to any human right protected by customary international law, a corresponding obligation must exist—*also pursuant to customary international law*—according to which whatever violation of the right concerned presupposes that the victim(s) of such a violation must be ensured access to effective and adequate reparation. Therefore, this logical legal reasoning eventually leads to the conclusion that, to the extent that certain rights of Indigenous peoples are protected by customary international law—as is actually the case (including as regards land rights)[114]—parallel obligations exist under general international law binding States to ensure effective and adequate reparation in favour of Indigenous peoples for any breach of the said rights occurring in the real world. This implies that, although it is unlikely that the provisions of the UNDRIP concerning reparation and redress correspond to general international law *in their exact text*, at the same time it is reasonably unquestionable that a principle of customary international law actually exists commending States to ensure Indigenous peoples some form of reparation for the wrongs suffered, to the extent that these wrongs negatively affect the rights of Indigenous peoples, the respect of which is essential in order to allow them to preserve and transmit to future generations their own cultural identity. The minimum requirement characterizing such a customary principle is that reparation must be *adequate* and *effective*, ie capable of removing—to the maximum extent possible—the effects of the wrong *as they are perceived by the communities concerned*.

[112] One of these statements was released by Guyana after voting in favour of the adoption of the UNDRIP on 13 September 2007: 'in recognition of the specific circumstances and needs of Amerindians in Guyana, the Government has taken special measures, including the creation of a dedicated Ministry of Amerindian Affairs, the extension of land reforms, the enactment of an updated Amerindian Act 2006 to take account of current realities, and the establishment of a constitutionally mandated indigenous peoples' provision *to provide opportunity for redress in matters pertaining to the rights of Amerindians in Guyana*. Those measures have been undertaken through a process that allows for full and active participation by Amerindian communities and representatives'; see UN Doc A/61/PV.107 (n 49) 27 (emphasis added).

[113] See above, Section 1.

[114] See F Lenzerini, 'Rights of Indigenous Peoples under Customary International Law', International Law Association, Committee on the Rights of Indigenous Peoples, Hague Conference Report (n 105) 43ff. The authority of this Report was explicitly recognized by the Arbitral Tribunal instituted under UNCITRAL Arbitration Rules in *Grand River Enterprises Six Nations, Ltd and Others v United States of America*, Award (12 January 2011) para 210, <http://www.state.gov/documents/organization/156820.pdf> accessed 3 November 2017. See also F Lenzerini, 'Rights of Indigenous Peoples under Customary International Law', International Law Association, Committee on the Rights of Indigenous Peoples, Sofia Conference Report (2012) 28f, <http://www.ila-hq.org/index.php/committees> accessed 3 November 2017; ILA, Res 5/2012, paras 3, 4, 5, 7, 10.

5. Conclusion

According to the *Oxford English Dictionary*, the verb 'repair' means 'make good' a damage or 'put right' an unwelcome situation.[115] It follows that, in order to establish what the proper measures of reparation are in a given concrete case, it is necessary to properly understand the meaning of the terms 'good' and 'right'. This is a very complicated task, which requires that moral, philosophical, ideological, and—ultimately—cultural judgments are carefully assessed. While we could discuss endlessly (and, probably, with little success) whether certain moral judgments are *universally* valid—that is to say valid for *everybody, everywhere* in the world—it is a fact that for the most part of human ideas, values and needs, what is 'good' or 'right' for somebody may not be perceived as being equally 'good' or 'right' by others.[116] If the purpose of human rights law is to allow people to achieve actual realization of their life expectations, in order for this purpose to be effectively accomplished it is necessary that the concrete implementation, adjudication, and enforcement of human rights properly takes into account the differences existing among human communities and individuals in terms of their respective life expectations. Since, as previously emphasized,[117] reparation actually represents a crucial phase in the process of ensuring effectiveness of human rights, it is consequently necessary that the said differences are adequately considered, especially, when the specific measures of redress to be applied in each specific case of human rights breach are selected and implemented. This holds true in particular for Indigenous peoples, in light of their cultural specificity leading their (holistic) vision of the world to be grounded on life values which are for a large part different from those pursued by Western people.

The need of taking into proper account the cultural specificity of Indigenous peoples, in establishing the forms of reparation to be used with the purpose of redressing violations of their recognized collective and/or individual human rights, seems to be adequately considered by the relevant provisions included in the UNDRIP. In fact, as noted in the previous sections, those provisions are inspired by a clear culturally driven rationale, providing a good basis for the setting-up of reparatory measures which are adequate to actually restore the wrongs suffered by Indigenous peoples *in light of their specific expectations and needs*. Then, of course, the said provisions are only written on paper, and their actual translation into concrete effective measures of reparation ultimately depends on the sensibility of the legal operators who are entrusted with their actual application and implementation in the real world. However, the most recent pertinent practice, as described in the previous sections, offers encouraging symptoms that the international community is maturing/has matured the proper approach in managing the complex and challenging issue of reparations for Indigenous peoples.

[115] See <http://www.oxforddictionaries.com/> accessed 23 October 2017.

[116] See, on this point, the discussion developed by this author in *The Culturalization of Human Rights Law* (Oxford University Press 2014) 4–5.

[117] See Section 1 above.

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