

INTRODUCTION

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Introducing the Inherent Rights of Indigenous Peoples

1. *The International Law Dimensions of the Rights of Indigenous Peoples*

In the age of exploration, and for some time afterwards, indigenous peoples were recognised as important players in international relations. They signed treaties and had autonomous forms of governance and independence. The colonization process dramatically altered this state of affairs, and international law almost forgot them. For centuries, indigenous peoples have not been considered to be actors of international law. Nonetheless, their contemporary efforts to protect their rights and regain control of their own destinies has highlighted ‘the transformative potential of international law’ as a tool of re-empowerment.¹ In the past decades, a new awareness of the importance of indigenous rights has emerged at both domestic and international levels. Such an awareness of the state duty to protect the social and cultural identity of indigenous peoples has developed particularly in the last fifty years. UN organs have systematically codified human rights law and adopted specific international law instruments that protect indigenous peoples’ rights. Indigenous transnational networks have not only enabled the transcontinental exchange of information and catalysed attention to the rights and needs of indigenous peoples, but they have also canvassed an important role for indigenous peoples in contemporary international relations. Although the estimated 370 million indigenous peoples live across 90 countries and are characterized by a variety of different geographical, political, and social situations, they have tried to convey common pressing needs.

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¹ M. Barelli, *Seeking Justice in International Law—The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples* (London: Routledge 2016) 4.

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has created further momentum for raising public awareness of indigenous peoples' rights.² It has led UN institutions to investigate how given international legal frameworks can better serve the needs of indigenous peoples,³ or to study how global challenges can particularly affect them.⁴ For instance, within international cultural law, the UNDRIP has shown the inadequacy of international cultural instruments to address the fundamental interests and values of indigenous peoples. In order to address this traditional imbalance, UNESCO has activated a number of mechanisms to change its course of action. For instance, the 2019 Operational Guidelines for the Implementation of the World Heritage Convention now encourage the parties to 'adopt a human-rights based approach, and ensure gender-balanced participation of a wide variety of stakeholders and rights-holders, including ... indigenous peoples ... in the identification, nomination, management, and protection processes of World Heritage properties.'⁵ One could argue that these changes are minimal; and that there is no specific legal instrument protecting indigenous cultural heritage at the international law level. While the adoption of a specific convention safeguarding indigenous cultural heritage would seem appropriate, nonetheless, UNESCO can endorse only the changes that its Member States are willing to support. In conclusion, the UNDRIP has certainly raised awareness of the rights of indigenous peoples and fostered change, even though it will probably take decades to realize its full potential.

However, concerns persist because of the continued widespread breaches of the rights of indigenous peoples. In many regions of the world, discrimination against indigenous peoples and violation of their human

² United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (13 September 2007). The Declaration was approved by 143 nations, but was opposed by the United States, Canada, New Zealand, and Australia. However, these four nations subsequently endorsed the Declaration. Drafted with the active participation of indigenous representatives, the Declaration constitutes the outcome of two decades of preparatory work. While this landmark instrument is currently not binding, this may change in the future to the extent that its provisions reflect customary international law.

³ See e.g. United Nations Educational, Scientific and Cultural Organization (UNESCO), *UNESCO Policy on Engaging with Indigenous Peoples* (Paris: UNESCO 2018).

⁴ See e.g. International Labour Organization (ILO), *Indigenous Peoples and Climate Change—Emerging Research on Traditional Knowledge and Livelihoods*, A. Ahearn, M. Oelz, and R. Kumar Dhir (eds) (Geneva: ILO 2019).

⁵ UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention, WHC.19/01, 10 July 2019, at <<https://whc.unesco.org/en/guidelines>>.

rights and fundamental freedoms continue today. Many indigenous peoples face the indifference, if not hostility, of local authorities – often disregarding their rights in order to favour the exploration and exploitation of indigenous territories through large-scale projects. Indigenous leaders denouncing the negative impact of those projects have been threatened, harassed or sometimes even killed, in order to prevent these peoples from exercising their rights.⁶ The dispossession of indigenous lands has forced a vast number of families to flee from their homelands with the effect of definitely disrupting their communal ties and traditions. These situations have provoked public widespread outcry and the rise of social protests by a vast number of non-governmental organisations active in the field of human rights.

Some advocates of indigenous rights are increasingly conceptualizing the violations of such rights as ‘cultural genocide.’⁷ However, although cultural genocide has been ‘a persistent international legal issue’, international law remains impervious to the same.⁸ International law does not formally recognize the concept of cultural genocide, even though international lawyers have coined the term and investigated it for decades. Defined as ‘the purposeful weakening and ultimate destruction of cultural values and practices of feared out-groups’,⁹ the idea of ‘cultural genocide’ was famously elaborated by the Polish lawyer, Raphael Lemkin (1900–1959), in the aftermath of WWII. Because ‘what makes up a group’s identity is its culture’, Lemkin believed that ‘the essence of genocide was cultural.’¹⁰ His unpublished works examined the linkage between colonialism and genocide.¹¹ Nonetheless, the concept of cultural genocide was not included in the Genocide Convention that limits its definition of genocide to violence committed ‘with intent to destroy, in whole or in part, a national,

⁶ See Special Rapporteur on the rights of indigenous peoples, Report to the Human Rights Council of 10 August 2018, Doc. UN A/HRC/39/17, Human Rights Council, 39th session, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/246/34/PDF/G1824634.pdf?OpenElement>>.

⁷ For discussion, see L. Kingston, ‘The Destruction of Identity: Cultural Genocide and Indigenous Peoples’ (2015) 14 *Journal of Human Rights* 63–83.

⁸ E. Novic, *The Concept of Cultural Genocide—An International Law Perspective* (Oxford: OUP 2016) 9–10.

⁹ L. Davidson, *Cultural Genocide* (New Brunswick, NJ: Rutgers University Press 2012) 18–9.

¹⁰ L. Bilsky and R. Klagsbrun, ‘The Return of Cultural Genocide?’ (2018) 29 *European Journal of International Law* 373–396.

¹¹ J. Docker, ‘Are Settler-Colonies Inherently Genocidal?’ in D.A. Moses, *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (New York: Berghahn Books 2008) 81, 90–91, and 94.

ethnic, racial or religious group.¹² Reportedly, the inclusion of cultural genocide as part of the Genocide Convention was contested by States fearing prosecution for their treatment of minorities and indigenous peoples.¹³ Although indigenous peoples can be comprehended under the definition of ‘national, ethnical, racial or religious groups’ that must be protected against genocide, the 1948 Convention on the Prevention and Repression of Genocide is inapplicable whenever the intention to physically destroy the group is lacking.¹⁴ Analogously, a draft provision on cultural genocide was debated during the *travaux préparatoires* of the UNDRIP, but ultimately not included in its text.¹⁵ Nonetheless, the UNDRIP expressly provides that indigenous peoples shall not be subject to any act of genocide and that they have the right not to be subjected to forced assimilation or the destruction of their culture.¹⁶ Their ‘integrity as distinct peoples’, cultural values, and cultural rights plays a central role in the UNDRIP.¹⁷

This introduction unfolds as follows. After having introduced some key challenges in the protection of indigenous peoples’ rights under international law in this first section, section 2 defines the notion of indigenous peoples, canvasses the distinction between indigenous peoples and minorities, and the cogency and urgency of their protection. Section 3 briefly explores the protection of indigenous rights in human rights law. Section 4 introduces the concept of ‘inherent rights.’ Finally, section 5 concludes briefly summarising the contributions of this book.

2. *Indigenous Peoples and Minorities in International Law*

There is no single definition of indigenous peoples in international law. While the UNDRIP does not define indigeneity, two notions of indigeneity are found in the International Labour Organization (ILO) Convention

¹² Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, in force 12 January 1951, 78 *UNTS* 277, Article 2.

¹³ S. Mako, ‘Cultural Genocide and Key International Instruments: Framing the Indigenous Experience’ (2012) 19 *International Journal on Minority and Group Rights* 175–194, 180.

¹⁴ See the Report of the independent international fact-finding mission on Myanmar of 12 September 2018 (Doc. A/HCR/39/64, following to Res. 34/22 of the UN Human Rights Council).

¹⁵ Novic, *The Concept of Cultural Genocide*, 9–10.

¹⁶ UNDRIP Articles 7 and 8.

¹⁷ See e.g. UNDRIP Articles 14, 15, and 16.

169 and in the Martinez-Cobo Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities, respectively. The ILO Convention 169 applies to peoples regarded as indigenous on account of their descent from the populations that inhabited a country at the time of conquest or colonization, who retain some or all of their social, economic, cultural, and political institutions.¹⁸ Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, gave one of the most cited definitions of the concept of indigenous peoples in his renowned Study on the Problem of Discrimination against Indigenous Populations. The study defined 'Indigenous communities, peoples and nations' as

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.¹⁹

This working definition stressed various features of indigenous peoples, including historical continuity, cultural diversity, and the linkage with their ancestral lands.

Indigenous peoples differ from minorities. Here again, there is no single definition of minorities in international law. Francesco Capotorti, a Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, defined 'minority' as

a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.²⁰

¹⁸ International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 27 June 1989, 28 *ILM* 1382, Article 1.2.

¹⁹ Special Rapporteur on the Rights of Indigenous People, *Study of the Problem of Discrimination Against Indigenous Populations*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Economic and Social Council, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1987) (by José R. Martinez-Cobo).

²⁰ F. Capotorti, 'Study on the Rights of Persons belonging to Ethnic, Religious and

At first glance, the ‘voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions’ is a feature that characterizes both indigenous peoples and minorities in the practice of the United Nations.²¹ Both kinds of communities can be encompassed within the definition of ‘national, ethnical, racial or religious groups’ under the already mentioned 1948 Convention on the Prevention and Repression of Genocide that proscribes crimes against the life or survival of those groups ‘committed with intent to destroy, in whole or in part’, such groups.²² In addition, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) requires States to eradicate discrimination related to ethnical or native elements, which are distinctive both for minorities and indigenous groups.²³ Indigenous peoples are often numerically inferior to the population of the countries in which they live—even though an indigenous group does not need any numerical evidence to be characterized as such—and often share a non-dominant status with minorities. Debates leading to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples started in the 1980s within the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, a subsidiary organ of the then Human Rights Commission.

However, the regime safeguarding the rights of minorities and that safeguarding the rights of indigenous peoples have different histories, goals, and objectives. Therefore, indigenous peoples see any analogy between their case and that of minorities as ‘highly problematic.’²⁴ This section now

Linguistic Minorities’, UN Publications, Sales no. E.91.XIV, Geneva 1991, para. 568.

²¹ A situation of a special kind relates to the Inuit of Greenland, representing more than 80% of the population of that territory. On the basis of the *Home Rule Act* No. 577 of 29 November 1978, Greenland obtained self-government in some fields as education, health, fisheries, and environmental protection. The Act is available at <http://www.stm.dk/_p_12712.html>.

²² Article 2 of the Convention on the Prevention and Repression of Genocide seems to provide an instrument of claim for genocide whenever the destruction or forced removal of indigenous peoples from their traditional land is made with the intent of destroying the group, which is easily foreseeable because of their physical and spiritual attachment to their land.

²³ International Convention on the Elimination of All Forms of Racial Discrimination, adopted General Assembly Res. 2106 (XX) of 21 December 1965, in force on 4 January 1969, 660 *UNTS* 195.

²⁴ J. Castellino and C. Doyle, ‘Who Are Indigenous Peoples?’ in J. Hohmann and M. Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples* (Oxford: OUP 2018) 7–37, 14.

highlights these differences by briefly juxtaposing the different histories, goals, and objectives of the two international law regimes. From a historical perspective, treaties safeguarding minorities date back to the seventeenth century. Treaty provisions protecting religious minorities were part of the Peace of Westphalia, which recognized state sovereignty to the extent that states did not violate the rights of religious minorities.²⁵ If states violated such rights and behaved tyrannically towards their peoples, the international community had the right to intervene.²⁶ Minorities Treaties accompanied the post-World War I Peace Settlement.²⁷ Such treaties commonly included the rights to equality and non-discrimination; the right to citizenship; the right to use one's own language in public and private; the right of minorities to establish their own religious and cultural institutions; an obligation on the state to provide financial support to minority schools.²⁸ The League of Nations nonetheless failed to adequately protect the rights of minorities. During World War II, the displacement, massive persecution, and genocide of minorities took place. In the aftermath of WWII, the question of minority protection acquired more salience and urgency due to the outrage caused by such crimes. This led to the adoption of a number of UN Resolutions and international conventions both at the universal and regional level.²⁹ Whereas the League of Nations' system built on earlier

²⁵ See the Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies (Treaty of Münster, *Instrumentum Pacis Monasteriensis*), signed 24 October 1648, <https://avalon.law.yale.edu/17th_century/westphal.asp>, Article XXVIII; and the Peace Treaty between the Holy Roman Emperor and Sweden (Treaty of Osnabrück, *Instrumentum Pacis Osnabrugensis*), signed 24 October 1648, <<http://www.pax-westphalica.de/ipmipo/indexen.html>> Article IV para 55; Article V, para 3; Article V paras 7, 8 and 29.

²⁶ See generally B. Simms and D.J.B. Trim (eds), *Humanitarian Intervention: A History* (Cambridge: Cambridge University Press 2011).

²⁷ See e.g. the Treaty of Peace between the Allied and Associated Powers and Austria (Treaty of Saint-Germain-en-Laye) signed on 10 September 1919, in force 16 July 1920, <<http://www.austlii.edu.au/au/other/dfat/treaties/1920/3.html>> (visited 22 November 2019) Articles 51, 57, 60, 63, 66, 67.

²⁸ See e.g. *Minority Schools in Albania*, 1935 PCIJ (ser. A/B) No. 64, Advisory Opinion 6 April 1935; *Minorities in Upper Silesia (Minority Schools, Germany v. Poland)*, 1928 PCIJ (ser. A) No. 15, Judgment 26 April 1928; *Questions Relating to Settlers of German Origin in Poland*, 1923 PCIJ (ser. B) No 6, Advisory Opinion 10 September 1923; *The Greco-Bulgarian "Communities"*, 1930 PCIJ (ser. B) No. 17, Advisory Opinion 31 July 1930; *Access to German Minority Schools in Upper Silesia*, 1931 PCIJ (ser. A/B) No. 40, Advisory Opinion 15 May 1931.

²⁹ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious Minorities adopted by General Assembly Res. 47/135 of 18 December 1992 (UN Doc. A/RES/47/135); Framework Convention for the Protection of National Minorities 1

treaties protecting religious minorities, the post-World War II architecture expanded the range of protected rights, recognising universal human rights. Contemporary debates over humanitarian intervention in armed conflicts that can affect the very existence of ethno-cultural communities ‘echo the international system’s deeper oscillations between commitment and disengagement, advances and retreats in relation to the international legal protection of those communities.’³⁰

The history of indigenous peoples’ rights dates back centuries and necessarily predates the Age of Encounter.³¹ Indigenous peoples are historically and culturally rooted in the land on which they exercised an undisputed sovereignty in the past. Their rights to land do not stem from a title awarded by the state; rather they derive from their linkage to a territory where they have lived since time immemorial. In other words, had indigenous peoples continuously been treated as subjects of international law rather than objects of colonization by given states, they would be sovereign nations. Not only do they have special ties to their territory, but in many indigenous worldviews land has a spiritual value, as well as a cultural, social, and economic function within the community.

The international legal instruments governing indigenous peoples’ rights and those protecting minorities also differ because they have different aims and objectives. While minorities often aim to be granted the same opportunities of the majority and non-discrimination in the countries where they live, while preserving their cultural uniqueness, indigenous peoples are often determined to keep a distinct and separate way of living and to exercise the right to a form of self-government in keeping with their tradition and culture.³² The right to self-determination, which is so fundamental to indigenous peoples—even if exercised within the contemporary boundaries of the state—and is specifically recognized by the UNDRIP, is not mentioned in the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic

February 1995, in force 1 February 1998, *ETS* 157.

³⁰ G. Pentassuglia, ‘Evolving Protection of Minority Groups: Global Challenges and the Role of International Jurisprudence’ (2009) 11 *International Community Law Review* 185.

³¹ See Report of the African Commission’s Working Group of Experts on Indigenous populations/Communities, adopted by the African Commission on Human and Peoples’ Rights by Res. 65 (XXXIV) 03, 20 November 2003, 92.

³² See A. Eide, ‘Working Paper on the Relationship and Distinction between the Rights of persons belonging to Minorities and Those of Indigenous Peoples’, UN Doc. E/CN.4/Sub.2/2000/10, 19 July 2000; PCIJ, *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, quoted above.

Minorities.³³ Rather, international law instruments on the protection of minorities prevalently focus the rights of the members of minorities—individually as well as in common with other members of their group—to equality and social cohesion under conditions of equal dignity and non-discrimination.³⁴ The declaration on minorities does not protect land rights that are a central element in the protection of indigenous peoples' rights. While both sets of instruments recognize the cultural rights of indigenous peoples and minorities respectively, the UNDRIP is more detailed about such rights than other instruments.³⁵ While the subfields of international law are not self-contained and can influence each other, the international law protection of indigenous peoples seems more dynamic and better crafted than that traditionally reserved to minorities. However, much remains to be done in both fields at the implementation level.

3. *Indigenous Rights as Human Rights*

The rights of indigenous peoples are recognized by a range of international law instruments, including human rights law. Traditionally, however, human rights instruments have mainly centred on individuals rather than communities. The protection of indigenous peoples' rights can benefit from the traditional protection of human rights enabling individual members of indigenous tribes to use natural resources of their traditional land and practice their culture and religion together with the other members of the group. Nonetheless, human rights bodies have clarified that individuals could not enjoy those rights if they were deprived of the capacity to live and participate in the life of the native group. Therefore, the protection of indigenous rights cannot be fully effective without recognizing their collective dimension.³⁶

³³ *Supra*, note 29.

³⁴ For a critical assessment, see Alexandra Xanthaki, 'Against Integration, for Human Rights' (2016) 20 *International Journal of Human Rights* 815–38.

³⁵ Article 27 of the International Covenant of Civil and Political Rights simply states: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

³⁶ For instance, a complaint by indigenous persons aimed at stopping a project to build a road on public soil because of the impact on the indigenous religious ceremonies has been rejected on the basis that the Government could not grant more extended rights

Thus, if the protection of the individual rights of indigenous peoples is of fundamental importance in addressing indigenous issues, the category of human rights has also been adapted to better suit the specific collective needs and demands of indigenous peoples.³⁷ In fact, indigenous peoples' rights cannot be placed *sic-et-simpliciter* within the category of individual human rights. The right to land of indigenous peoples is not equivalent to the individual title of ownership of a parcel of land. Rather, the former has a collective dimension, being indigenous land strictly connected to the cultural identity, life, and survival of indigenous peoples as a group. Therefore, it should be enjoyed in the form of a collective right. Analogously, the right to take part in spiritual, religious, and cultural traditions cannot be satisfied if it is not granted to the whole group.

With regard to the remedies available to indigenous peoples to obtain redress for the infringements of their rights, indigenous peoples seem affected by the traditional emphasis of human rights law on individual entitlements. Communications before the UN Human Rights Committee set up by the Covenant on the International Civil and Political Rights³⁸ and the Covenant on the International Social, Economic and Cultural Rights³⁹ are in fact restricted to individuals. There is a vast number of cases where lack of *locus standi* has barred indigenous peoples from filing a suit before an international court.⁴⁰

than those awarded to non-indigenous persons, unless incurring in the violation of the non-discrimination principle. The complaint was promoted by a group of indigenous persons and concerned the sacred area of Chimney Rock. See *Lyng v. Northwest Indian Cemetery Protective Association*, US Supreme Court, 19 April 1988, US 439 (1988) no. 86 1013, <<https://supreme.justia.com/cases/federal/us/485/439/#tab-opinion-1957423>>.

³⁷ See B. Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International And Comparative Law' (2001–2) 34 *New York University Journal of International Law & Policy* 15, arguing that 'The adaptation of the category of "human rights" is of fundamental importance in addressing indigenous issues...but practice and experience suggest that additional concepts are needed and often are deployed.'

³⁸ International Covenant on Civil and Political Rights (ICCPR) and annexed Protocol, General Assembly Res. 2200A (XXI), 16 December 1966, in force 23 March 1976, 999 *UNTS* 171.

³⁹ International Covenant on Economic Social and Cultural Rights (ICESCR), General Assembly Res. 2200A (XXI), 16 December 1966, 993 *UNTS* 3. The Optional Protocol to the ICESCR was adopted by General Assembly Res. 63/117, 10 December 2008.

⁴⁰ For instance, an action by the Inuit for the annulment of an EU regulation that prohibited the importation of seals before the European Union Court was declared inadmissible: see V. Vadi, 'Cultural Heritage in International Economic Law', in V. Vadi and B. de Witte (eds), *Culture and Economic Law* (London: Routledge 2015) 60–1. In the case *Tsumib v. Government of the Republic of Namibia*, High Court of Namibia [2019] NAHCMD, No. A 206/2015, 28 August 2019, 312, members of the Hai|lom

However, the recent practice of the UN Human Rights Committee in cases related to the infringements of indigenous rights seems to have mitigated the consequences of such a drawback. From the 1990s onward, the Committee has started giving relevance to the collective rights of indigenous people as an element to be considered in the outcome of an individual claim.⁴¹ While arguing that a violation of Article 1 of the Covenant proclaiming the self-determination of peoples cannot as such be the object of a claim by individuals, it considered that violations against the group may affect the effectiveness of the Covenant.⁴² This practice has cleared the path towards an assessment of the situation of indigenous peoples by the Committee.⁴³

In addition to the UN instruments enabling direct complaints before a universal forum, a number of different regional instruments empower indigenous peoples to monitor the state implementation of their obligations toward indigenous peoples, granting them remedies in case of non-compliance. Regional human rights bodies (in Africa, the Americas and Europe) have interpreted and applied human rights standards to the special circumstances and experiences of indigenous peoples. Indigenous peoples have also voiced their concerns through mass media, effectively shaping international public opinion.

The specific needs and aspirations of indigenous peoples originate from the past wrongs connected with the settlement of colonizers or forced occupation of the lands where they lived as sovereigns. Their rights are based on the need to safeguard their distinctive culture intrinsically tied to

community sought the court's permission to represent their community in filing a claim on their land rights over Etosha National Park. The Court held that the representatives did not have the necessary *locus standi* to represent the Hai||om people.

⁴¹ *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990), UN Doc. A/45/40, para. 2, alleging 'violations by the Government of Canada of the Lubicon Lake Band's right of self-determination and, by virtue of that right, to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence.' The Committee found that '[h]istorical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue.'

⁴² In this sense, see *Apirana Mahuika et al. v. New Zealand*, 27 October 2000 (Communication no. 547/1993), Report of the Human Rights Committee, UN Doc. A/56/40, II, paras. 9.4–9.9.

⁴³ See M. Scheinin, 'Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights', in J. Castellino and N. Walsh (eds), *International Law and Indigenous Peoples* (Leiden: Brill 2004) 9–15.

the traditional use of their territories. The use of the land according to ways and methods passed from one generation to the next enables their survival as a people: the latter would be seriously jeopardized if they were forcibly assimilated to the dominant culture of the rest of the society living in the State.⁴⁴ Thus, the autonomy of indigenous peoples in the administration of their territories and in the exercise of their activities is instrumental to their survival as a group. Expressions of their autonomy (in the sense of self-governance and self-identification) constitute a form of self-determination.

Like other peoples, indigenous peoples have the right to self-determination.⁴⁵ Respect for the equality and 'self-determination of peoples' is one of the purposes of the United Nations.⁴⁶ Self-determination has played a central role within the decolonization process launched by the UN when proclaiming the right of former colonies to become independent states.⁴⁷ Beyond decolonization, cases where the UN supports independence are exceptional. Any extension of the meaning of self-determination beyond the framework established by the UN would entail a high risk of instability and conflicts. This is the reason why it has been generally meant to be a right to internal self-determination, to be exercised within a given state.

The right to self-determination includes the right for indigenous peoples to determine their own economic, social, and cultural development according to their own aspirations. Of particular relevance are indigenous peoples' rights to express a choice, to be informed and to take part in decisions relating to the use of natural resources, in order to avoid inappropriate forms of exploitation. The legal systems and worldviews of indigenous peoples could – in the long-run – provide an alternative model

⁴⁴ *Kayano et al. v. Hokkaido Expropriation Committee* (Nibutani Dam Decision) Sapporo District Court, Civil Division No. 3, Judgment 27 March 1997, (1999) 38 *International Legal Materials* p. 394 (noting that the Ainu's 'distinct ethnic culture is an essential commodity to sustain [their] ethnicity without being assimilated into the majority. And thus, it must be said that for the individuals who belong to an ethnic group, the right to enjoy their distinct ethnic culture is a right that is needed for their self-survival as a person.')

⁴⁵ UNDRIP Article 3.

⁴⁶ United Nations, Charter of the United Nations, 24 October 1945, 1 *UNTS* XVI, Article 1, paragraph 2.

⁴⁷ UN General Assembly Res. 1514 (XV) 14 December 1960, 'Declaration on the Granting of Independence to Colonial Countries and Peoples'. See recently ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion 25 February 2019 No. 169, <<https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>> (highlighting that 'the right to self-determination, as a fundamental human right, has a broad scope of application' but confining itself, in this Advisory Opinion, to 'analysing the right to self-determination in the context of decolonization.')

to the currently prevailing methods and strategies of the global economy.⁴⁸ Since the survival of indigenous peoples is intimately connected to the use of resources of the land where they are settled, their model of cultural, economic, and social development is shaped by their inner beliefs and worldviews. Instead of prioritizing profits, the economic, social and cultural model developed by indigenous peoples may emphasize non-economic values, namely the primary needs of indigenous peoples. Therefore, it differs from predominant liberal economic models.⁴⁹ International environmental law instruments have further supported sustainable models and alternative pathways to development. Whether these models are too idealistic to be applied more generally or are merely applicable with regard to indigenous peoples remains to be seen.

4. Introducing the Inherent Rights of Indigenous Peoples

This book aims to discuss crucial aspects of the international legal theory and practice relating to the inherent rights of indigenous peoples. The concept of ‘the inherent rights of indigenous peoples’ appears only once in the UNDRIP, namely in its preamble, where the UN General Assembly recognized ‘the urgent need to respect and promote the inherent rights of indigenous peoples.’⁵⁰ The preamble clarifies that the inherent rights of indigenous peoples ‘derive from their political, economic, and

⁴⁸ Arguably, the economic model shaped and fought for by indigenous peoples could become a useful paradigm to re-empower the disempowered sectors of society including the non-indigenous rural communities that obtain the resources for their economic survival from the land and are interested in safeguarding the quality of such resources. Discourse on the rights of indigenous peoples can facilitate the rethinking of the rights of peoples more generally.

⁴⁹ See e.g. Permanent Forum on Indigenous Issues, *Study to Examine Conservation and Indigenous Peoples’ Human Rights*, by B. Keane and E. Laltaika, UN doc. E/C.19/2018/9, 8 March 2018, para. 5 (‘recognizing the rights of indigenous peoples to their territories and resources is the most effective way to safeguard biological diversity, to ensure the sustainable use of natural resources and to protect the ecological integrity of critical ecosystems. The role of indigenous peoples in realizing the goals of conservation cannot be overstated: the lands and waters that they continue to manage contain over 80 per cent of Earth’s biodiversity; the forests in demarcated indigenous territories are subject to less deforestation than those in protected areas; and the traditional knowledge systems and resource management strategies of indigenous peoples can play a key role in developing truly sustainable conservation strategies and policies.’)

⁵⁰ UNDRIP, preamble.

social structures and from their cultures, spiritual traditions, histories, and philosophies, especially their rights to their lands, territories and resources.’⁵¹ Adopting an inter-civilizational approach to the rights of indigenous peoples means not only that ‘indigenous peoples are equal to other peoples’, but also that ‘they have the right of all peoples to be different, to consider themselves different, and to be respected as such.’⁵² Such an approach recognises that ‘all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.’⁵³ The inherent rights of indigenous peoples are not granted by states; rather, they pertain to indigenous peoples. They are historically and currently inherent rather than acquired rights. They are based on the deep connection of indigenous peoples to their lands, cultures, and legal systems. This is the first monograph focusing on the inherent rights of indigenous peoples in international law. While at least in some countries the term ‘inherent rights’ has been used extensively at the domestic level by indigenous peoples, there has been only limited mentioning of this concept in international legal scholarship. Nonetheless, the concept of inherence is at the heart of human rights law and current international law itself. Human rights are inherent rights, rights that pertain to human beings because of their intrinsic human dignity. The 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.’⁵⁴ Therefore, the recognition of the inherent rights of indigenous peoples is an expression of ‘the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.’⁵⁵ It expresses ‘the idea that human rights are inherent in the human person and not simply the result of social, legal or political processes.’⁵⁶ Such an approach can contribute to the protection, promotion, and fulfilment of human rights and ‘the foundation of freedom, justice, and peace in the world.’⁵⁷

The volume focuses on three sets of inherent rights of indigenous peoples that are central to the process of their re-empowerment, namely: their right to

⁵¹ UNDRIP, preamble para. 7. Compare with UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), preamble.

⁵² Id. para. 2.

⁵³ Id. para. 3.

⁵⁴ United Nations Declaration of Human Rights preamble.

⁵⁵ Id.

⁵⁶ J. Morsink, *Inherent Human Rights—Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press 2009).

⁵⁷ Universal Declaration of Human Rights, preamble.

self-determination, land rights, and cultural rights.⁵⁸ Self-determination entails indigenous peoples being entitled to be ‘in control of their own destinies.’⁵⁹ While some countries were reluctant to recognize the right of indigenous peoples to self-determination because they feared that such recognition could affect state sovereignty, indigenous peoples perceived self-determination as essential for the enjoyment of all their rights. In the end, the UNDRIP has recognized that indigenous peoples have the right to self-determination.⁶⁰ This provision is generally interpreted as recognizing internal self-determination, that is, the right of indigenous peoples to make meaningful choices in matters of concern to them, and to enjoy some autonomy within the existing state. Self-determination ‘can be exercised in ways that do not fundamentally challenge the sovereignty and integrity of states.’⁶¹

Such ‘self-determination within the sovereignty of a state’ or ‘internal self-determination’ can also be conceptualized as a form of ‘parallel sovereignty of indigenous peoples’ coexisting with that of, and within, the state. In other words, indigenous sovereignty would run parallel to state sovereignty. This interpretation seems supported by indigenous peoples’ aspirations, international legal instruments, and state practice. The vast majority of indigenous peoples’ ‘self-determination claims are not aimed at dissolving states.’⁶² Rather, they are generally in line with the principle of territorial integrity of states. Article 46 of the UNDRIP provides that ‘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 authorising or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.’ Moreover, several states explicitly recognize the right of self-determination for constituent groups in their constitutions or specific legislation.⁶³ The possibility of external self-determination or remedial independence might be exercised only if a state committed systematic and

⁵⁸ For an excellent study, completed before the adoption of the UNDRIP, see A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-determination, Culture and Land* (Cambridge: CUP 2009).

⁵⁹ J. Anaya, ‘The Right of Indigenous Peoples to Self-Determination in the Post-declaration Era’ in C. Charles and R. Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs 2009) 184–199, 187.

⁶⁰ UNDRIP, Article 3.

⁶¹ J. Summers, *Peoples and International Law* (Leiden: Brill/Nijhoff 2013) 497.

⁶² Barelli, *Seeking Justice in International Law*, 25.

⁶³ Summers, *Peoples and International Law*, 493.

severe forms of oppression and subjugation.⁶⁴ The existence and extent of a right of remedial secession remains contested, and state practice remains too limited to ascertain whether the concept reflects an international law standard.⁶⁵ Nonetheless the UNDRIP is not meant to restrict the rights of indigenous peoples, and therefore it can reflect further developments in international law.

Indigenous peoples have a special relationship with land. As the Inter-American Court of Human Rights explained, not only does land constitute their own principal means of subsistence, but it also shapes their cultural identity:⁶⁶ the close ties of indigenous peoples to the land 'must be recognised and understood as the fundamental basis for their cultures, their spiritual life, their integrity, and their economic survival.'⁶⁷

Finally, cultural rights have always figured prominently in indigenous advocacy and now permeate the entire UNDRIP. The cultural rights of indigenous peoples are multi-faceted but all express the fundamental need to maintain their own culture. Access to land and natural resources is fundamental for the meaningful exercise of the cultural rights of indigenous peoples. There is mutual supportiveness between the protection of indigenous peoples' cultural and land rights. The customary rule of free, prior, and informed consent is now codified in the UNDRIP and in other international law instruments.⁶⁸

The book adopts an international law perspective, thus mainly focusing on international legal instruments, the jurisprudence of UN mechanisms, regional human rights courts and tribunals, as well as investor-state arbitrations. It complements studies focusing on domestic practice, and refers to domestic cases where needed to discuss state practice. This practice shows an increasing awareness of the inherent rights of indigenous peoples. States have gradually but firmly recognized the inherent rights of indigenous peoples and acknowledged the need to give full implementation to their rights to overcome their historical marginalization and discrimination by the dominant sectors of society.⁶⁹ In this regard, there is a growing

⁶⁴ J. Crawford, 'The Right of Self-determination in International Law: Its Development and Future', in P. Alston (ed) *Peoples' Rights* (Oxford: OUP 2000) 7–68, 56 and 57.

⁶⁵ Summers, *Peoples and International Law*, 521.

⁶⁶ IACtHR (ser. C) No. 125, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment 17 June 2005, para. 135.

⁶⁷ IACtHR (ser. C.) No. 79, *Case of the Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, 21 August 2001, para. 149.

⁶⁸ UNDRIP Articles 10 and 32(2); Convention on Biological Diversity, 5 June 1992, 31 *ILM* 818, Article 8(j).

⁶⁹ *Kayano et al. v. Hokkaido Expropriation Committee* (Nibutani Dam Decision), *supra*

awareness that indigenous peoples should decide about their future and the use of their natural resources on the basis of their own cultural values and self-determination. Therefore, the notion of development should be defined according to different cultural contexts, including the worldviews of indigenous peoples. The indigenous notion of development may at times converge with the Western notion; however, at times it differs considerably, the latter being based primarily on economic considerations.⁷⁰

5. *Structure of the Book*

This book stems from a number of seminars, workshops, and conferences organised at the Law Department of the University of Roma 'Roma Tre' since the adoption of the UNDRIP. The authors, all distinguished scholars and practitioners have participated in the seminars.⁷¹ Other specialists, active within international organisations, have provided their oral contribution: Mrs. Antonella Cordone, Senior Technical Specialist Indigenous Peoples and Tribal Issues at the International Fund for Agricultural Development (IFAD), who presented on 'Indigenous peoples' development, culture and identity' and Dr. Elifuraha Laltaika, Member of the UN Permanent Forum on Indigenous Issues and Senior Law Lecturer at Tumaini University Makumira in Tanzania.

The book is divided into three parts. Part I introduces the main themes

n. 42, 31 (acknowledging that 'Even while enduring tremendous political and economic influence from the Shogunate feudal system, Ainu people lived throughout Hokkaido preserving the enjoyment of their unique culture.' and stressing the need to maintain and preserve 'the real life practices' of the Ainu).

⁷⁰ R. Stavenhagen, 'Ethnodevelopment: A Neglected Dimension in Development Thinking' in R. Stavenhagen (ed), *Pioneer on Indigenous Rights* (Berlin: Springer 2013) 65–86.

⁷¹ The views in this edited volume are those of the individual authors and do not necessarily correspond to those of the editors. The editing was relatively non-intrusive, in order to allow authors to maintain their own voices and perspectives. The use of particular designations of countries or territories does not imply any judgment of the publisher or the editors as to the legal status of such countries or territories, their authorities or institutions or the delimitation of their boundaries. The mentioning of names of specific companies or products does not imply any intention of infringing upon proprietary rights, nor should it be construed as an endorsement or recommendation by the editors. The authors are responsible for having obtained the necessary permission to reproduce, translate or use material from sources already protected by copyright. This book constitutes a doctrinal work of legal history and theory, with focus on the relevant jurisprudence. It does not constitute legal advice.

and challenges to be addressed, considering the debate on identification of indigenous peoples, the theoretical origins of 'indigenous sovereignty', and the inherent rights of indigenous peoples. Di Blase's chapter explores the right of self-determination of indigenous peoples, explicitly recognized in the UNDRIP. That principle is considered with reference to the fields where it is especially relevant: defining indigeneity, possession and use of the land, identification of members by indigenous communities. National jurisprudence and international practice show a growing awareness about the distinctive features of self-determination as referred to indigenous peoples. Such right cannot be read as legitimizing actions against the integrity of the state, nor can be encompassed within the concept of 'internal' self-determination. The chapter highlights some meaningful elements that suggest a different appraisal. The practice shows increased awareness about the need to identify and safeguard the rights of indigenous peoples to their lands and traditional culture. In addition, the jurisprudence shows that indigenous rights to land have been considered as relevant not only within the internal legal order of the local state, but also in the framework of the relations between the local state and third states.

Vadi's chapter investigates the spatio-temporal dimensions of indigenous sovereignty in international law. The topic holds both theoretical relevance and contemporary practical significance, as it can inform and transform ongoing debates on the rights of indigenous people. The chapter highlights the importance of history in any discussion of indigenous rights and the need to consider competing stories, histories, and temporalities of sovereignty. This method of analysing sovereignty in international law infuses the concept of sovereignty with inter-civilizational connotations, which are often neglected in current debates. Going beyond the traditional conception of state sovereignty, the paper supports the emergence of novel concepts, such as parallel sovereignty, to complement the internal self-determination of indigenous peoples within existing states.

Parts II and III explore the interplay between indigenous peoples and human rights, and international economic law respectively. In particular, Part II focuses on the main developments of the international practice of the UN and relevant jurisprudence relating to indigenous peoples' rights, with a special reference to the positive role of the American and the African international systems for the promotion and protection of human rights. It explores the jurisprudence of regional human rights and demonstrates that such courts are in accord with the approach followed by the UN organs. Citroni's chapter illuminates the jurisprudence of the Inter-American

Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) on indigenous peoples' rights. The chapter focuses on the special connection existing between indigenous communities and their ancestral lands and natural resources contained therein as the source of their distinct cultural identity. Citroni argues that there is a need for reinterpreting the notion of development, going beyond a purely economic meaning and rather encompassing the human dimension. Focarelli's chapter first scrutinises the status of indigenous peoples under international law, both diachronically and synchronically. Focarelli then discusses a recent judgment of the African Court on Human and Peoples' Rights (ACtHPR).

Part III focuses on the protection of indigenous rights in international economic law. Although the protection of indigenous rights has gained some momentum at the international law level since the adoption of the UNDRIP, many of the estimated 370 million indigenous peoples around the world have lost, or are under imminent threat of losing, their ancestral lands because of the exploitation of natural resources. In fact, a large portion of the world's remaining natural resources 'are located on indigenous-occupied lands ... [and] global demand for natural resources has skyrocketed in recent years.'⁷²

Vadi and Acconci's respective chapters explore the clash between economic development and indigenous peoples' rights from the perspective of international investment law. The protection of the rights of indigenous peoples has increasingly intersected with the promotion of foreign investments in international investment law. In fact, a tension exists when a state adopts policies to protect the rights of indigenous peoples, which interfere with foreign investments, as such policies may be deemed to amount to indirect expropriation or a violation of other investment treaty provisions. While the incidence of cases in which arbitrators have taken non-economic values into account is increasing,⁷³ investment treaty arbitrations do not offer effective remedies against the unfair use of resources by national or foreign companies. Vadi's chapter highlights that, for the time being, investment treaty arbitrations may not provide adequate safeguards to the inherent rights of indigenous peoples. The chapter outlines three principal legal mechanisms that would achieve a better balance between economic interests and the human rights of indigenous peoples in investment treaty

⁷² [Anonymus] 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) 129 *Harvard Law Review* 1755–1778, 1756.

⁷³ V. Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge: CUP 2014).

law and arbitration: treaty drafting, treaty interpretation, and counterclaims. These techniques can prevent conflicts between different treaty regimes and contribute to the humanization of international investment law, as well as the development of international law. Acconci's chapter also discusses whether, and if so how, international investment law is responding to the concerns of indigenous peoples, also focusing on the legal framework established by the European Union. Finally, Vezzani's chapter deals with the international protection and promotion of indigenous traditional knowledge (TK) associated with agriculture. Interest in this knowledge and in sustainable models of agriculture has intensified over the past two decades. The chapter investigates the international legal framework protecting TK, and discusses ongoing international efforts to develop a *sui generis* protection system for such knowledge.

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