

---

# The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges

Siegfried Wiessner\*

## Abstract

*The novel international legal regime of the rights and status of indigenous peoples has emerged in direct response to the concerted efforts and demands of indigenous communities regarding the survival and the flourishing of their distinct cultures. Its high point, as of yet, has been the 2007 UN Declaration on the Rights of Indigenous Peoples, now enjoying virtually universal support. This article locates the regime of the Declaration within post-World War II value-oriented international law; it highlights its novel, essentially communal rights to culture, self-determination, and land; and it assesses its content within existing sources of international law. It ends with an appraisal of the progress made, and an evaluation of the challenges ahead.*

Against all odds, the indignities of colonization, and the lures of modern society, indigenous peoples have survived as communities with a strongly felt, time-honoured identity. Their claims and aspirations are diverse, but their common ground is a quest for the preservation and flourishing of a culture inextricably, and often spiritually, tied to their ancestral land. This specific relationship to the land distinguishes them from other communities or groups dispossessed in terms of power or wealth. The world community has, through domestic and international laws, recognized their special claims, and it has tailored a legal regime for them. The global policy fosters cultural diversity, in particular, the protection of their threatened heritage, their language, their rituals, their land. The 2007 UN

\* Professor of Law and Director, Graduate Program in Intercultural Human Rights, St Thomas University School of Law, Miami, Florida; Chair, ILA Committee on the Rights of Indigenous Peoples. Email: swiessner@stu.edu.

Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>1</sup> is a major milestone, but much remains to be done.

To accommodate indigenous peoples' aspirations, the global community listened carefully to the claims advanced, and then formulated responses designed to accommodate them. To that end, traditional human rights concepts had to be adjusted and redefined. Property, a venerable individual right defined by exclusivity of use and enjoyment, the power of alienation, and destruction, had to be reconceived as an assemblage of pertinent tangible and intangible things defined as cultural heritage<sup>2</sup> and held in collective stewardship for future generations. Self-determination was essentially shorn of its connection to political power and redefined as the indispensable vehicle of preservation and flourishing of the culture of the group. This regime of cultural self-determination does not bar change or adaptation, even assimilation and integration – as long as such change is voluntary and the inherited traditions have a chance to survive in the hearts and minds of indigenous people. Such chances ought to be increased through imaginative measures of affirmative action. Ultimately, however, they depend on the will and determination of indigenous peoples themselves to survive and bloom as a distinct culture – as they have done in the face of existential threats in the past.

This article will provide a brief overview of how international law developed into the value-oriented regime it has come to be today under the battle cries of human rights and self-determination (section 1); how group rights and, in particular, the rights of indigenous peoples became part of this value-oriented project (section 2); how the protection of indigenous peoples' cultures became the *raison d'être* of pertinent claims and ensuing rights (section 3); and what the detailed response of the global legal community has been to the demands of indigenous peoples, i.e., the scope and the limits of their claims to maintain and develop their ways of life, their systems of authority and control, and their lands (section 4). The article will end with an appraisal of where we are and where we should go from here (section 5).

## 1 International Law in the 21st Century: A Value-Oriented Regime

The Vattelian idea of an international legal system based entirely on states in disregard of interests and influence of individuals and groups, weakened already through

<sup>1</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 Sept. 2007. For a draft expert commentary on this Declaration and indigenous peoples' rights in general see ILA Committee on the Rights of Indigenous Peoples, Interim Report to the 74th ILA Conference in The Hague, 15–20 Aug. 2010, available at: [www.ila-hq.org/en/committees/index.cfm/cid/1024](http://www.ila-hq.org/en/committees/index.cfm/cid/1024) (hereinafter 2010 ILA Interim Report). See also Anaya and Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment', *JURIST Forum*, 3 Oct. 2007, available at: <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>.

<sup>2</sup> Francioni, 'Culture, Heritage and Human Rights: An Introduction', in F. Francioni and M. Scheinin (eds), *Cultural Human Rights* (2008), at 1, 6–7.

global struggles against slavery and individual scourges such as human trafficking, finally founded on the ashes of the Holocaust: the idea that state sovereignty should be an impermeable shield against outside evaluation and intervention in cases of atrocities and wholesale abuses of individual human beings and groups thereof was no longer acceptable to a world community no longer content to tolerate state-sponsored offences that shocked the conscience of humankind. Colonization<sup>3</sup> was to be remedied by self-determination; and individual abuses were to be set right and contained by human rights instruments and associated mechanisms of monitoring and control. In the latter arena, the international legal system played catch-up with domestic law, which, after the influence of Reformation and Enlightenment, had moved to bills of rights and constitutional entitlements exemplified by the 1789 French *Déclaration des droits de l'homme et du citoyen* and the 1791 US Bill of Rights. This domestic development did not proceed equally over space and time. It experienced great leaps forward, but also suffered serious setbacks. Its content is still not uniform as documented, *inter alia*, by the continuing controversy over the legal content of social, economic, and cultural rights.<sup>4</sup> The human rights project, jolted into the seriousness of international prescription after 1945, formulated its guiding lights in the seminal 1948 Universal Declaration of Human Rights. It set a 'common standard of achievement' amongst all states regarding rights granted to individual human beings whose dignity was to be seen as untouchable, and, in the ringing prose of the document, gave rise, via domestic implementation, to the approximation of a legal regime guaranteeing opportunities of full self-realization of the individual. International law thus, content-wise, joined domestic law in its quest for substantive legitimacy through justice oriented at its usefulness to enhance human life on this planet.

Law, international and domestic, after all, is intended to serve human beings and their aspirations, not the other way around. The human rights regime, in particular, was one which was created to protect the weak, the powerless, the vulnerable, as shown by historical experience. It is there to protect, but also to allow those protected to flourish. Thus it may serve as a shield and a sword. Law is no longer seen, at least through the human rights lens of the early 21st century, as a protector of the *status quo*, if that situation is inconsistent with preferred value goals, or as a vehicle for social Darwinism (although it may often still work out to be). It is to empower the disempowered and dispossessed, to curb abuses, arguably also to provide access to the necessities of life. It intends to protect against discrimination and allow for self-determination of those who legitimately seek it.

<sup>3</sup> On the impact of colonization on indigenous peoples see R. Jaulin, *La Paix Blanche: Introduction à l'Ethnocide* (1972); F. Jennings, *The Invasion of America: Indians, Colonialism and the Cant of Conquest* (1975); T.R. Berger, *A Long and Terrible Shadow. White Values and Native Rights in the Americas 1492–1992* (1991).

<sup>4</sup> Cf. Eide, 'Economic, Social and Cultural Rights as Human Rights', in A. Eide *et al.* (eds), *Economic, Social and Cultural Rights: A Textbook* (1995), at 21ff.

## 2 Groups and Indigenous Peoples in Human Rights Discourse

While the UN Declaration on the Rights of Indigenous Peoples and other pertinent international instruments encompass both individual and collective rights, one of the major objections to the novel rights of indigenous peoples has been that they are largely rights of collectivities, not individuals. Thus, they appear to sit uneasily with the traditional human rights regime, which in the eyes of many is constructed around the interests and concerns of individual human beings.<sup>5</sup> Reducing positive human rights to solely individual freedoms and entitlements is, however, antithetical to human nature empirically assessed. It runs counter to the inherent goal of any human rights regime of fostering the full development of a human being's potential.

First, the psychosocial reality of a human community is manifest. Individuals feel parts of a community; their birth into certain ethnic, gender and societal categories, their upbringing in certain social settings, as well as their conscious choices make them members of certain groups. Membership of a group is of fundamental importance to individuals, to their pursuit of self-realization, a key human need.<sup>6</sup> In the constant interplay between the individual and society's constituent groups, not only is the individual self shaped and changed, but general patterns of group behaviour are reconstructed and modified as well.<sup>7</sup> Groups of meaning to individuals are thus essential extensions of self, necessary parts of a person's identity. Interaction with and reliance upon others is a *conditio sine qua non* for human existence.<sup>8</sup>

Furthermore, with respect to the philosophical moorings of human rights,<sup>9</sup> Immanuel Kant's ethical system revolving around the axiom of inviolate human dignity

<sup>5</sup> The natural rights theories of Locke and Rousseau as well as Kant's ethical axioms built around the concept of human dignity are generally seen as the philosophical backdrop to these conceptions. The first declarations of rights in positive law, i.e., the American Bill of Rights and the French *Déclaration des droits de l'homme et du citoyen* of 1789, shied away from enunciating any rights of entities between the individual and the state. That is also true for the first international such statement, i.e., the 1948 Universal Declaration of the Human Rights, and it permeates the original understanding of major universal and regional human rights treaties, with the notable exception of the African system. 'Despite existing diversity, all states have tried to promote the identification of its [sic] citizens with a single official language and culture, often through extremely coercive means': N.T. Casals, *Group Rights As Human Rights. A Liberal Approach to Multiculturalism* (2006), at 108.

<sup>6</sup> Cf. Margalit and Raz, 'National Self-Determination', 87 *J Philosophy* (1990) 439. This is true especially in a world of distinct and increasing ethnocultural diversity within and across states: Makkonen, 'Minorities' Right to Maintain and Develop Their Cultures: Legal Implications of Social Science Research', in Francioni and Scheinin (eds), *supra* note 2, at 193ff.

<sup>7</sup> See, e.g., G.H. Mead, *Mind, Self and Society: From the Standpoint of a Social Behaviorist* (ed. C. Morris, 1934); G.H. Mead, *On Social Psychology: Selected Papers* (rev'd edn by A. Strauss, 1964).

<sup>8</sup> As John Donne famously stated, 'No man is an island, intire of itselfe; every man is a peece of the Continent, a part of the maine': J. Donne, *Meditations* (1624), at 17. Individual liberalism has thus been criticized for cutting the citizen off from the person and constructing a 'cripple of a man, lacking moral or political nature, without roots': Bay, 'From Contract to Community: Thoughts on Liberalism and Postindustrial Society', in F.R. Dallmayr (ed.), *From Contract to Community* (1978), at 30.

<sup>9</sup> For an introduction to this problématique see Åhren, 'Protecting Peoples' Cultural Rights: A Question of Properly Understanding the Notion of States and Nations?', in Francioni and Scheinin (eds), *supra* note 2, at 91ff. See also Underkuffler, 'Human Genetics Studies: The Case for Group Rights', 35 *JL Medicine and Ethics* (2007) 383, at 384–385.

is not necessarily individualist in an exclusivist sense. As Neil MacCormick has found, '[t]he Kantian ideal of respect for persons implies . . . an obligation in each of us to respect that which in others constitutes any part of their sense of their own identity'.<sup>10</sup> That identity is shaped by participation in what he calls 'cultural communities', which need appropriate institutional protection.<sup>11</sup> Similarly, Will Kymlicka has pointed out that groups not only provide the cultural structures which constitute the context of choice for individual action,<sup>12</sup> they need to have rights in order to foster individuals' well-being.<sup>13</sup> Others have argued that groups have distinctly collective interests the moral value of which is on a par with the interests of individuals.<sup>14</sup>

In order to respond holistically to human needs and aspirations, law thus needs to strive to protect both the individuals and the groups they form or are born into – communities of destiny or communities of choice. The vulnerability of individuals created the need for individual human rights; the vulnerability of groups, particularly cultures, creates the need for *their* protection. The critical questions of relevance to the human rights project are in this context: what deprivations of values targeting individuals as members of groups have taken place in recent history? In order to achieve a world public order of human dignity, how may these deprivations be remedied?

To answer this question, I suggest making a further distinction, i.e., the one between an 'organic' and a 'non-organic group'.<sup>15</sup> The first category encompasses collectivities of human beings, commonly designated as a 'nation' or a 'people', who have made and maintain a conscious decision – in Ernest Renan's words, the *plébiscite de tous les jours* – which manifests their will to live together as a community. 'Non-organic groups', such as women, children, even many religious communities, do not have the same interest in sharing all aspects of life. They are primarily concerned about not being discriminated against by the ruling elites. In contrast, 'the ultimate expression of solidarity within an organic group, the quest for cultural, political and other forms of autonomy, constitutes a demand to be treated differentially *ab initio*'.<sup>16</sup> The vulnerability of an organic group can be measured by the 'intensity of threat to the group's identity, defined by its distinctive cultural, linguistic, ethnic, religious or other bonds'.<sup>17</sup> Denials of their claims to be separate, to determine their own fate, to

<sup>10</sup> N. MacCormick, *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy* (1982), at 261.

<sup>11</sup> *Ibid.*

<sup>12</sup> W. Kymlicka, *Liberalism, Community, and Culture* (1989), at 167.

<sup>13</sup> W. Kymlicka, *supra* note 6, at 13.

<sup>14</sup> McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism', 4 *Canadian J L and Jurisprudence* (1991) 217, at 237 ('[i]ndividuals are regarded as valuable because they are choosers and have interests. But so also do communities make choices and have values. Why not then treat communities as fundamental units of value?'). See also Réaume, 'Individuals, Groups, and Rights to Public Goods', 38 *U Toronto LJ* (1988) 1, at 13–17, 24; Garet, 'Communitarianism and Existence: The Rights of Groups', 56 *Southern California L Rev* (1983) 1001; Addis, 'Individualism, Communitarianism, and the Rights of Ethnic Minorities', 67 *Notre Dame L Rev* (1992) 615.

<sup>15</sup> For details see Wiessner, 'Faces of Vulnerability: Protecting Individuals in Organic and Non-organic Groups', in G. Alfredsson and P. Macalister-Smith (eds), *The Living Law of Nations* (1996) 217, at 218.

<sup>16</sup> *Ibid.*, at 222.

<sup>17</sup> *Ibid.*, at 221.

govern themselves, constitute deprivations of essential values of the members of the organic group as well as of the group itself.

Indigenous peoples are, by definition, organic groups, i.e., collectivities which are characterized by the desire and practice of sharing virtually all aspects of life together.<sup>18</sup> Such classification as an organic group facilitates inclusion in the legal regime of autonomy of not only indigenous communities with distinct territories, but also those indigenous peoples who have lost most of their land base, thus constituting largely personal associations. In a larger sense, ‘communities’ are the proper frames of reference for legal systems below, beside, and above the state that have been brought to light by policy-oriented jurisprudence and its understanding of law as a process of authoritative and controlling decision within a community<sup>19</sup> as well as the movement *du jour* of legal pluralism.<sup>20</sup> The recognition of these communities’ own spheres of law-making within the system of the still pre-eminent global actor, the state, is achieved by a key group right, the right to autonomy.

Collective entitlements in the field of human rights are thus here to stay. They are essential for the protection of cultural diversity, and indispensable for the protection of indigenous peoples and their ways of life.<sup>21</sup> They complete the needed holistic response of the law to the human condition and its vulnerabilities.

### 3 Cultures under Threat: The Predicate of Indigenous Peoples’ Rights

As discussed above, indigenous peoples constitute the prototype of an organic group: ideally, they aspire to spend their lives together – in virtually all aspects, not just a few. Their essential characteristics are not only those of a heteronomously defined collectivity of human beings, discriminated against over time, but also of an autonomous, self-defined community with specific ways of life and a view of the world characterized

<sup>18</sup> *Ibid.*

<sup>19</sup> McDougal, Lasswell, and Reisman, ‘The World Constitutive Process of Authoritative Decision’, 19 *J of Legal Ed* (1967) 253; Reisman, ‘International Law-Making: A Process of Communication’, 75 *Proceedings of The American Society of International Law* (1981) 101; Wiessner, ‘International Law in the 21st Century: Decision making in Institutionalized and Non-Institutionalized Settings’, in *International Justice*, 26 *Thesaurus Acroasium* (1997) 129.

<sup>20</sup> See, e.g., Berman, ‘A Pluralist Approach to International Law’, 32 *Yale J Int’l L* (2007) 307; Tamanaha, ‘Understanding Global Legal Pluralism: Past to Present, Local to Global’, 30 *Sydney L Rev* (2007) 375. For its application to indigenous peoples see Roughan, ‘The Association of State and Indigenous Law: A Case Study in “Legal Association”’, 59 *U Toronto LJ* (2009) 135. See also Lenzerini, ‘Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples’, 42 *Texas Int’l LJ* (2006) 155, at 189.

<sup>21</sup> Torres, ‘Indigenous Education and “Living Well”: An Alternative in the Midst of Crisis’, in L.Meyer and B.M. Alvarado (eds), *New World of Indigenous Resistance* (2010), at 213, 217 (‘[t]he notion of individual culture is unacceptable for indigenous peoples who claim the collective production, throughout history, of all systemic expressions of their particular cultures’). See also Estevez, ‘Beyond Education’, in *ibid.*, at 115, 121 (‘[a]mong all indigenous peoples, the condition of the strong “we” is expressed existentially and in the language itself, for this is the subject of *comunalidad*, the first layer of existence, formed by the interlocking of the networks of real relationships that make up each person’).

by their strong, often spiritual relationship with the land the outside world regards them as the original inhabitants of.<sup>22</sup> This view has been seen as overly romantic, essentialized, thus reductionist, strategically so, and consequently somewhat less than truthful or genuine. Such an opinion, however, would miss the point in various ways. It is in itself reductionist of the empirical reality of human beings, caricaturing individuals as purely economic actors interested exclusively in power and wealth. Human life and human flourishing extend far beyond the econometric view of cost/benefit analysis and wealth maximization. Man does not live by bread alone. A comprehensive view of human nature would comprehend that beyond power and wealth, human beings are motivated by a range of other goals: respect, well-being, affection, skills, enlightenment, and rectitude.<sup>23</sup> Individual human beings differ in their setting of priorities of aspiration, and the empirical description of such aspirations does not portend any hierarchy between them. There may be, indeed, there often are, mixed motives or aspirations. The law should allow access by all to the processes of shaping and sharing all of these aspirations, i.e., things humans value. This is what an order of human dignity<sup>24</sup> demands.

Indigenous peoples may be, and often are, at the bottom of the social and economic ladder in virtually all societies they live in.<sup>25</sup> That is why one of their claims is the quest for social and economic rights such as food, health care, and shelter.<sup>26</sup> This is, however, not their only, or most characteristic, claim. Their other claims have historically asked for preservation of their endangered culture, their language, their lands.<sup>27</sup> This enters a realm not easily assessed or included by materialist *matrices*.

<sup>22</sup> See the understanding of the term as advanced in the UN Permanent Forum on Indigenous Issues, Fact Sheet, 21 Oct. 2007, and the discussion on the issue of definition in the 2010 ILA Interim Report, *supra* note 1, at 6–9. This understanding also reflects the criteria advanced in the literature by Wiessner, 'Rights and Status of Indigenous Peoples', 12 *Harvard Human Rts J* (1999) 57, at 115, and Scheinin, 'The Rights of an Individual and a People: Towards a Nordic Sámi Convention', in M. Åhrén, M. Scheinin, and J. B. Henriksen (eds), *The Nordic Sami Convention: International Human Rights, Self-Determination and other Central Provisions*, 3 *J Indigenous Peoples' Rights* (2007) 40, at 43ff, as well as Scheinin, 'The Right of a People to Enjoy Its Culture: Towards a Nordic Sami Convention', in Francioni and Scheinin (eds), *supra* note 2, at 151, 154–158.

<sup>23</sup> Cf. H.D. Lasswell and A. Kaplan, *Power and Society* (1950); H.D. Lasswell and M.S. McDougal, *Jurisprudence for a Free Society. Studies in Law, Science and Policy* (1992), at 336ff.

<sup>24</sup> Professor Francioni has spoken of human dignity as the 'central notion' of the Universal Declaration of Human Rights: Francioni, *supra* note 2, at 8. See also D. Kretzmer and E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (2002).

<sup>25</sup> E.g., '[a]boriginal people [in Canada] are on the bottom of every list where it's a bad place to be, such as regarding life span, income and so forth, and on the top of the list, where that is the worst place to be, such as concerning unemployment, suicide, diabetes and the like': Morse, 'A View from the North: Aboriginal and Treaty Issues in Canada', 7 *St Thomas L Rev* (1995) 671, at 674. For other country situations see Wiessner, *supra* note 22, at 60–93.

<sup>26</sup> Due to their frequent relegation to a status of extreme poverty, disease, and despair, they often claim 'access to welfare, health, educational and social services': Wiessner, *supra* note 22, at 98–99.

<sup>27</sup> Due to the conquerors' taking of their ancestral lands, the drastic curtailment of their ways of life and autonomy, the indigenous peoples mainly claim that 'traditional lands should be respected or restored, as a means to their physical, cultural, and spiritual survival: . . . indigenous peoples should have the right to practice their traditions and celebrate their culture and spirituality with all its implications: . . . conquering nations should respect and honor their treaty promises; and . . . indigenous nations should have the right to self-determination'. *Ibid.*

It is the realm of spirituality. It is the reality of inner worlds, cosmovisions.<sup>28</sup> It is a world often foreclosed to the modern mind and its overweening idea of progress.<sup>29</sup> It may be characterized as made-up, unprovable, unreal. Still, it is a powerful force which motivates people across the globe in many places at least as powerfully as greed or the desire to remove vast material inequality. As the leader of the Indian Nations Union in the Amazon, Ailton Krenak has formulated:

When the government took our land . . . they wanted to give us another place . . . But the State, the government, will never understand that we do not have another place to go. The only possible place for [indigenous] people to live and to re-establish our existence, to speak to our Gods, to speak to our nature, to weave our lives, is where our God created us. . . . We are not idiots to believe that there is possibility of life for us outside of where the origin of our life is. Respect our place of living, do not degrade our living conditions, respect this life. . . . [T]he only thing we have is the right to cry for our dignity and the need to live in our land.<sup>30</sup>

It is difficult to justify calling these professions of indigenous spirituality pretextual or strategic, or emanating from a false consciousness. There may be some indigenous persons who do live inauthentic lives, but so do members of other groups. Religion has been called the ‘opiate of the people’, but the mystery of faith is a powerful reality common to many human beings around the globe.<sup>31</sup> In a multicultural global community, indigenous peoples’ value systems and world views, deeply spiritual, are at the centre of their demands.<sup>32</sup> Professor Reisman concluded that political and economic self-determination are important, ‘but it is the integrity of the inner worlds of peoples – their rectitude systems or their sense of spirituality – that is their distinctive humanity. Without an opportunity to determine, sustain, and develop that integrity, their humanity – and ours – is denied.’<sup>33</sup>

<sup>28</sup> Reisman, ‘International Law and the Inner Worlds of Others’, 9 *St Thomas L Rev* (1996) 25.

<sup>29</sup> Wiessner, ‘Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples’, 41 *Vanderbilt J Transnat’l L* (2008) 1141, at 1143; F. Wilmer, *The Indigenous Voice in World Politics: Since Time Immemorial* (1993), at 37, 54–55 (noting that because ‘modernization is believed to be a good in itself’, communities have rationalized actions that ‘[remove] obstacles to modernization’, thereby justifying the oppressive treatment of indigenous communities). See also R. Kosselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (trans. T. Presner et al., 2002), at 233 (‘[t]he concept of progress encompasses precisely that experience of our own modernity: again and again, it has yielded unforeseeable innovations that are incomparable when measured against anything in the past’).

<sup>30</sup> World Commission on Environment and Development (WCED) Public Hearing, Sao Paulo (28–29 Oct. 1985), quoted in World Commission on Environment and Development, *Our Common Future* (1987), at 4–19.

<sup>31</sup> For details see, e.g., M. Eliade, *The Sacred and the Profane* (1956). See also P.V. Beck et al., *The Sacred: Ways of Knowledge, Sources of Life* (1996).

<sup>32</sup> Jaime Martínez Luna, a Zapotec anthropologist, made this important point: ‘The need to survive causes us to view everything from a materialistic perspective. . . . But here is where the difference from indigenous thinking springs forth. *Comunalidad* is a way of understanding life as being permeated with spirituality, symbolism, and a greater integration with nature. It is one way of understanding that human beings are not the center, but simply a part of the great natural world. It is here that we can distinguish the enormous difference between Western and indigenous thought.’ Martínez Luna, ‘The Fourth Principle’, in Meyer and Alvarado (eds), *supra* note 21, at 85, 93–94.

<sup>33</sup> Reisman, *supra* note 29, at 33.



Similarly, the late Vine Deloria, Jr., revered leader of the US indigenous revival, stated that indigenous sovereignty 'consist[s] more of a continued cultural integrity than of political powers and to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty'.<sup>34</sup> 'Sovereignty', explains another great Native American leader, Kirke Kickingbird, 'cannot be separated from people or their culture'.<sup>35</sup>

This *differentia specifica* of indigenous peoples, the collective spiritual relationship to their land, is what separates them also from other groups generally, and diffusely, denominated 'minorities', and what has created the need for a special legal regime transcending the general human rights rules on the universal and regional planes. There have been eclectic interpretations of human rights conventions which protect certain minority traditions, as in the jurisprudence of the European Court of Human Rights regarding the Roma, and there have been specific treaties, albeit not widely ratified, which protect indigenous peoples, such as ILO Convention No. 169. The most comprehensive effort to safeguard indigenous peoples' cultures has, however, been made with the United Nations Declaration on the Rights of Indigenous Peoples of 13 September 2007, passed in the General Assembly by 143 states voting in the affirmative against only four states opposing, and 11 abstaining.<sup>36</sup> All of the opposing states have now reversed their position and endorse the Declaration,<sup>37</sup> making its support virtually universal. As stated in its preamble, the world community recognizes 'the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures, and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources'.

The threat to the survival of indigenous peoples' culture is what has motivated the claims listed above. It underlies the peoples' demands to live on their traditional lands, to continue their inherited ways of life, to self-government. Cultural preservation and flourishing is thus at the root of the claims as recognized by the states; this goal, not primarily political or economic objectives, inspires the positive law guarantees. In this broad sense, all the rights of indigenous peoples are cultural rights, and any interpretation of these rights, whether in UNDRIP or other instruments and prescriptions recognizing rights of indigenous peoples, ought to keep this *telos* in mind.

<sup>34</sup> Deloria, Jr., 'Self-Determination and the Concept of Sovereignty', in J.R. Wunder (ed.), *Native American Sovereignty* (1996), at 118.

<sup>35</sup> K. Kickingbird *et al.*, *Indian Sovereignty* (1977), at 2.

<sup>36</sup> UN Press Release, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples', 13 Sept. 2007, available at: [www.un.org/News/Press/docs/2007/ga10612.doc.htm](http://www.un.org/News/Press/docs/2007/ga10612.doc.htm).

<sup>37</sup> The latest endorsement came from the USA, stated by President Barack Obama on 16 Dec. 2010, available at: [www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference](http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference). Previously, the other 'no' voters, i.e., Australia, New Zealand, and Canada, had declared their support. For details see 2010 ILA Interim Report, *supra* note 1, at 5.

## 4 The Positive Cultural Rights of Indigenous Peoples: UNDRIP and Its Context

The 2007 UN Declaration on the Rights of Indigenous Peoples is the most comprehensive answer yet to the demands of indigenous peoples. Its effect under positive international law, however, merits further scrutiny.

Without a doubt, UNDRIP is a milestone of indigenous empowerment.<sup>38</sup> Still, legally speaking, United Nations declarations, like almost any other resolution by the General Assembly, are of a mere hortatory nature: they are characterized as ‘recommendations’ without legally binding character.<sup>39</sup> There have been attempts to ascribe a higher degree of authority to General Assembly resolutions designated as ‘declarations’. In 1962, the Office of Legal Affairs of the United Nations, upon request by the Commission on Human Rights, clarified that ‘[i]n United Nations practice, a “declaration” is a formal and solemn instrument . . . resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected’.<sup>40</sup>

Though not legally binding *per se*, a declaration may be or become binding to the extent that its various provisions are backed up by conforming state practice and *opinio juris*.<sup>41</sup> To the extent that the Declaration reflects pre-existing customary international law or engenders future such law, it is binding on states which do not qualify as persistent objectors.<sup>42</sup>

Regarding the Declaration’s legal effect, another new development has to be taken into account: there may be standards of evaluation of state conduct, applied by inter-governmental bodies that cannot be counted among the traditional ‘sources’ of international law enumerated in Article 38(1) of the ICJ Statute. The vanguard in this development is the process of ‘universal periodic review’ instituted by the Human Rights Council. As standard of evaluation in this review, besides treaties the countries monitored are parties to, the Council uses the Universal Declaration of Human Rights.<sup>43</sup>

Similarly, in August 2008, Professor S. James Anaya, the United Nations Special Rapporteur on the rights of indigenous peoples, announced that he will measure state conduct *vis-à-vis* indigenous peoples by the yardstick of UNDRIP.<sup>44</sup> As a matter of

<sup>38</sup> Anaya and Wiessner, *supra* note 1.

<sup>39</sup> UN Charter, Arts 10, 11. The one formal exception, referring to budget allocations to member states (Art. 17(2) UN Charter) does not apply here.

<sup>40</sup> Economic and Social Council, *Report of the Commission on Human Rights* (E/3616/Rev. 1), at para. 105, 18th session, 19 Mar. – 14 Apr. 1962.

<sup>41</sup> *Ibid.*

<sup>42</sup> Anaya and Wiessner, *supra* note 1.

<sup>43</sup> Human Rights Council, Annex to Resolution 5/1, *United Nations Human Rights Council: Institution Building*, 18 June 2007, at para. 1, available at: [ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_5\\_1.doc](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_5_1.doc).

<sup>44</sup> According to UN Special Rapporteur S. James Anaya, UNDRIP represents ‘an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law . . . The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of United Nations human rights institutions, mechanisms and specialized agencies as they relate to indigenous peoples’: Human

policy direction, the standards of UNDRIP have also been urged to be implemented and 'mainstreamed' into the UN's, the ILO's, and UNESCO's policies and programmes.<sup>45</sup> Also, the concept of 'soft law' as a controversial compromise idea between formally binding, i.e., 'hard', international legal obligations and aspirational/emerging new law articulated in widely accepted, but formally non-binding international instruments has been offered to characterize the legal significance of UNDRIP.<sup>46</sup>

As to the content of UNDRIP, as stated above, the effective protection of indigenous culture is key to its understanding. This fundamental policy goal undergirds, in particular, the novel prohibition of ethnocide against indigenous peoples (Article 8(1) – going beyond the prohibition of genocide against them, as enunciated in Article 7(2)),<sup>47</sup> the prohibition of their forced removal and relocation (Article 10), their right to practise and revitalize their cultural traditions and customs, including the right to maintain, protect, and develop past, present, and future manifestations of such cultures (Article 11), including the right to manifest, practise, develop, and teach their spiritual and religious traditions, customs, and ceremonies, as well as the restitution and repatriation of ceremonial objects and human remains (Article 12). Article 13 guarantees indigenous peoples the right to 'revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies', etc. and obligates states to 'take effective measures to ensure that this right is protected'. An indigenous people's language is central to its culture – an ever more important issue in view of the accelerating threat that those languages will vanish and the need for this alarming downward spiral to be brought to a halt.<sup>48</sup>

Article 14 articulates 'individual and collective rights to education', including the right of indigenous peoples to 'develop and control educational systems that are consistent with their linguistic and cultural methods of teaching and learning' as well as the right of 'indigenous pupils' to be placed on an 'equal footing with non-indigenous

---

Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya (A/HRC/9/9), 11 Aug. 2008, at paras 85, 88, available at: [www2.ohchr.org/english/bodies/hrcouncil/docs/9session/A-HRC-9-9AEV.doc](http://www2.ohchr.org/english/bodies/hrcouncil/docs/9session/A-HRC-9-9AEV.doc).

<sup>45</sup> On its implementation see Rodríguez-Piñero Royo, "'Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration', in C. Charters and R. Stavenhagen (eds), *Making the Declaration Work. The United Nations Declaration on the Rights of Indigenous Peoples* (2009), at 314; Dorough, 'The Significance of the Declaration on the Rights of Indigenous Peoples and Its Future Implementation', in *ibid.*, at 264. On its mainstreaming in the UN see Burger, 'Making the Declaration Work for Human Rights in the UN System', in *ibid.*, at 304; and Stavenhagen, 'Making the Declaration Work', in *ibid.*, at 352.

<sup>46</sup> Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples', 58 *Int'l & Comp LJ* (2009) 957.

<sup>47</sup> Even though Art. 8(1) UNDRIP does not use the word 'ethnocide', it captures its essence: '[i]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture'.

<sup>48</sup> For a recent discussion of these issues see Dussias, 'Indigenous Languages under Siege: The Native American Experience', 3 *Intercultural Human Rts L Rev* (2008) 5; Kibbee, 'Minority Language Rights: Historical and Comparative Perspectives', 3 *Intercultural Human Rts L Rev* (2008) 79. See also Mancini and de Witte, 'Language Rights as Cultural Rights: A European Perspective', in Francioni and Scheinin (eds), *supra* note 2, at 247ff.

pupils' regarding 'access to all levels and forms of education within the State'.<sup>49</sup> Article 15 guarantees indigenous peoples the right to have 'their cultures, traditions, histories and aspirations . . . appropriately reflected in education and public information'. This includes the state's duty to combat prejudice and discrimination and to develop tools which 'promote tolerance, understanding and good relations among indigenous peoples and all other segments of society'. Article 16 grants indigenous peoples the right to 'establish their own media in their own languages', an important aspect of self-determination, and to have non-discriminatory access to non-indigenous media; also states have a 'duty to ensure that indigenous cultural diversity is duly reflected in non-indigenous media'.<sup>50</sup> These Articles are aimed at 'redressing wrongs (such as in the form of forced assimilation or discrimination in education, media, and public life), as well as repairing, restoring, and strengthening indigenous communities and cultures'.<sup>51</sup>

The key treaty provision supporting UNDRIP's rights to culture is Article 27 of the International Covenant on Civil and Political Rights (ICCPR):

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

Similarly, according to Article 15(1)(a) of the International Covenant on Economic and Social Rights (ICESCR), 'the States Parties to the present Covenant recognize the right of everyone to take part in cultural life'. These formulations reflect the desire of important nation-states to protect culture through (individual) rights of members of the group rather than (collective) rights of the groups themselves.<sup>52</sup> The jurisprudence of the respective treaty monitoring bodies has, however, moved ever more strongly in the direction of 'collectivizing'<sup>53</sup> these rights. The UN Committee for Economic, Social and Cultural Rights stated that minorities and indigenous peoples are guaranteed the freedom to practise and promote awareness of their culture,<sup>54</sup> defined in both individual and collective dimensions and as reflecting 'the community's way of life and thought'.<sup>55</sup> The Human Rights Committee's General Comment No. 23 on Article 27

<sup>49</sup> Graham, 'Education and the Media', 2010 ILA Interim Report, *supra* note 1, at 25–28.

<sup>50</sup> *Ibid.*, at 26.

<sup>51</sup> *Ibid.*, at 27.

<sup>52</sup> Cf. Vrdoljak, 'Self-Determination and Cultural Rights', in Francioni and Scheinin (eds), *supra* note 2, at 41, 59, with reference to Professors Tomuschat and Rodley who share the opinion that a variety of individual guarantees make minority rights redundant: Tomuschat, 'Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights', in R. Bernhardt *et al.* (eds), *Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte, Festschrift für Hermann Mosler* (1983), at 952; and Rodley, 'Conceptual Problems in the Protection of Minorities: International Legal Developments?', 17 *Human Rts Q* (1995) 48, at 54–59.

<sup>53</sup> Åhren, *supra* note 9, at 107.

<sup>54</sup> General Discussion on the Right to Take Part in Cultural Life as recognized in Art. 15 of the ICESCR, UN Doc. E/1993/23, Ch. VII, at para. 205, as cited by Vrdoljak, at 58.

<sup>55</sup> *Ibid.*, at paras 204, 209, 210, and 213.

ICCPR states that this provision protects ‘individual rights’, but that the obligations owed by states are collective in nature.<sup>56</sup> In its jurisprudence, it has consistently stated that the right to enjoyment of culture, practice of religion, or use of language can be meaningfully exercised only ‘in a community’, i.e., as a group.<sup>57</sup> In the *Kitok* case, the Committee held that reindeer husbandry is a protected activity under Article 27 as the traditional livelihood of the Sami people.<sup>58</sup> In *Ominayak*, it concluded that the exploitation of timber, oil, and gas in the Lubicon Lake Band’s lands destroyed the indigenous people’s traditional hunting and fishing grounds and thus violated Article 27.<sup>59</sup> The two *Länsman* cases<sup>60</sup> as well as the *Apriana Mahuika* case<sup>61</sup> also state that Article 27 includes a dimension that protects indigenous peoples’ collective culture.<sup>62</sup> The right to self-determination under Article 1 applies to indigenous peoples as such, as clarified in the Committee’s General Comment No. 23.<sup>63</sup> The Human Rights Committee monitors this right, however, only under the state reporting procedure, not the individual complaint procedure under the Optional Protocol to the ICCPR.<sup>64</sup>

One of the other legal issues has been whether Article 27 requires positive measures to be taken to protect a culture. In its General Comment No. 23, the Committee observed 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 in 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.’<sup>65</sup>

It has also been argued that the establishment and development of indigenous cultural institutions and systems (that is, indigenous cultural autonomy) is properly located within the concept of collective cultural rights addressed by provisions such as Article 27, and not within the sphere of self-determination addressed by Article 1 of the ICCPR, for example – a concept referred to as essentially belonging to the political, or power, domain.<sup>66</sup> The better argument is, probably, a fusion of both: an

<sup>56</sup> General Comment No. 23, UN Doc. HRI/GEN/1/Rev.1, 38 (1994), at para. 6(2).

<sup>57</sup> Vrdoljak, at 61, with further references.

<sup>58</sup> *Kitok v. Sweden*, No. 197/1985, UN Doc. A/43/40 (1988), at 221ff.

<sup>59</sup> *Lubicon Lake Band (Bernard Ominayak) v. Canada*, No. 167/1984, UN Doc. A/45/40 (1990), Pt. 2, at 1.

<sup>60</sup> *Ilmari Länsman v. Finland*, No. 511/1992, UN Doc. CCPR/52/D/511/1992 and *Jouni E. Länsman v. Finland*, No. 671/1995, UN Doc. CCPR/C/58/D/671.1995.

<sup>61</sup> *Apriana Mahuika et al. v. New Zealand*, No. 547/1993, UN Doc. A/56/40 (2000), at 11ff.

<sup>62</sup> Åhren, *supra* note 9, at 107–108.

<sup>63</sup> General Comment No. 23, *supra* note 56, at para. 3(2) (self-determination is a ‘right belonging to peoples’); Vrdoljak, *supra* note 52, at 61.

<sup>64</sup> An example of such scrutiny is contained in the Concluding Observations on the Second and Third Reports of the USA: ‘[t]he State party should take further steps to secure the rights of all indigenous peoples, under articles 1 and 27 of the Covenant, so as to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture’: Concluding Observations of the Human Rights Committee, USA, UN Doc. CCPR/C/USA/CO/3/Rev.1 (18 Dec. 2006), at 12, para. 37. For further examples see Åhren, *supra* note 9, at 108 n. 100.

<sup>65</sup> General Comment No. 23, *supra* note 56, at para. 7.

<sup>66</sup> A. Xanthaki, *Indigenous Rights and United Nations Standards* (2007), at 215.

understanding of indigenous sovereignty, like that offered by famed Native American leader and scholar Vine Deloria Jr., as based on an essentially cultural foundation.<sup>67</sup> Other issues to be explored in this context are those relating to the work of UNESCO<sup>68</sup> on cultural diversity,<sup>69</sup> cultural heritage,<sup>70</sup> traditional knowledge,<sup>71</sup> and the emerging concept of *sui generis* intellectual property rights for indigenous peoples<sup>72</sup> in the context of the World Intellectual Property Organization, UNCTAD, the WTO,<sup>73</sup> and the Convention on Biological Diversity.<sup>74</sup>

Equally crucial to the effective protection of indigenous peoples' cultures is the safeguarding of their land. Being 'indigenous' means to live within one's roots.<sup>75</sup> Indigenous peoples, in a popular definition, have thus 'always been in the place where they are'.<sup>76</sup> While this definition may not reflect empirical truth as, historically, a great many migrations of human communities have taken place, the collective consciousness of indigenous peoples, often expressed in creation stories or similar sacred tales of their origin,<sup>77</sup> places them unequivocally and since time immemorial at the location of their physical existence. More importantly, their beliefs make remaining at that place a compelling dictate of faith.

The struggle of indigenous peoples led to a treaty which recognized the rights of groups, particularly with respect to resources, as formulated in the 1989 ILO Convention No. 169,<sup>78</sup> which has now been ratified by virtually all of the Latin American countries with significant indigenous populations.<sup>79</sup> It ensures indigenous peoples' control over their legal status, internal structures, and environment,<sup>80</sup> and it guarantees

<sup>67</sup> See *supra* note 34.

<sup>68</sup> Donders, 'A Right to Cultural Identity in UNESCO', in Francioni and Scheinin (eds), *supra* note 2, at 317ff.

<sup>69</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, available at: [www.unesco.org](http://www.unesco.org). For a discussion of both UNESCO conventions see Francioni, *supra* note 2, at 14–15.

<sup>70</sup> Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, available at: [www.unesco.org](http://www.unesco.org).

<sup>71</sup> Lenzerini, 'Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of their Traditional Knowledge', in Francioni and Scheinin (eds), *supra* note 2, at 119. See also McJohn and Graham, 'Indigenous Peoples and Intellectual Property', 19 *Washington U J L and Policy* (2006) 313.

<sup>72</sup> Wiessner and Battiste, 'The 2000 Revision of the United Nations Draft Principles and Guidelines on the Protection of the Heritage of Indigenous People', 13 *St Thomas L Rev* (2000) 383.

<sup>73</sup> Morijn, 'The Place of Cultural Rights in the WTO System', in Francioni and Scheinin (eds), *supra* note 2, at 285ff.

<sup>74</sup> For an overview of the pertinent work of various intergovernmental organizations see Wiessner, 'Indigenous Peoples', 10 *Yrbk Int'l Envtl L* (2000) 193; 11 *Yrbk Int'l Envtl L* (2001) 155; 12 *Yrbk Int'l Envtl L* (2002) 198; and 13 *Yrbk Int'l Envtl L* (2004) 249.

<sup>75</sup> Etymologically, the Latin word '*indigena*' is composed of two words, '*indi*', meaning 'within', and '*gen*' or '*genere*' meaning 'root': *Longman Dictionary of Contemporary English* (3rd edn, 1995), at 724.

<sup>76</sup> *The Longman Dictionary of Contemporary English Online*, Definition of 'indigenous', available at: [www.ldoceonline.com/dictionary/indigenous](http://www.ldoceonline.com/dictionary/indigenous) (11 May 2009).

<sup>77</sup> Beck *et al.*, *supra* note 31, at 102 (medicine men or shamans interpret the creation stories and determine how people 'must live in order to keep the balance of relationships that order the world').

<sup>78</sup> ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, reprinted in 28 *ILM* (1989) 1382.

<sup>79</sup> As of 15 Oct. 2010. Convention No. 169 has been ratified by 22 countries. For details see ILOLEX Database of International Labour Standards available at: [www.ilo.org/ilolex/english/newratframeE.htm](http://www.ilo.org/ilolex/english/newratframeE.htm).

<sup>80</sup> Cf. Firestone, Lilley, and Torres de Noronha, 'Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law', 20 *Am U Int'l L Rev* (2005) 219.

indigenous peoples' rights to ownership and possession of the total environment they occupy or use.<sup>81</sup>

In addition, global comparative research on state practice and *opinio juris* over a period of five years in the late 1990s reached certain conclusions about the content of newly formed customary international law regarding the rights and status of indigenous peoples. The worldwide indigenous renaissance had led to significant changes in constitutions, statutes, regulations, case law, and other authoritative and controlling statements and practices of states which had substantial indigenous populations. These changes included the recognition of indigenous peoples' rights to preserve their distinct identity and dignity and to govern their own affairs – be they 'tribal sovereigns' in the United States, the Sami in Lappland, the *resguardos* in Colombia, or Canada's Nunavut.<sup>82</sup> This move towards recognition of indigenous self-government was accompanied by an affirmation of native communities' title to the territories they traditionally used or occupied.

In many countries, domestic law now mandates a practice which would have been unthinkable only a few years ago: the demarcation and registration of First Nations' title to the lands of their ancestors. Indigenous people achieved this dramatic victory through several means: a peace treaty in Guatemala, constitutional and statutory changes in countries such as Brazil,<sup>83</sup> and modifications of the common law in Australia and other states. Indigenous culture, language, and tradition, to the extent that they have survived, are increasingly inculcated and celebrated.<sup>84</sup> Treaties of the distant past are being honoured, and agreements are fast becoming the preferred mode of interaction between indigenous communities and the descendants of the former conquering elites. This now very widespread state practice and *opinio juris* regarding the legal treatment of indigenous peoples allowed the following conclusion in 1999:

First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life. Second, they hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice. Third, indigenous peoples

<sup>81</sup> Convention No. 169, *supra* note 78, Arts 1–19.

<sup>82</sup> Wiessner, *supra* note 29, at 1156.

<sup>83</sup> For a recent reaffirmation of the Constitution's guarantee to indigenous peoples of their right to their traditional lands see the 19 Mar. 2009 decision of the Brazilian Supreme Court in *Raposa Serra do Sol*, a vast indigenous area located in the Amazonian state of Roraima defended against the claims of invading rice farmers and senators of the state; see 'Supreme Court upholds the demarcation of Raposa Serra do Sol land', available at: [www.braziljusticenet.org/606.html#Supreme](http://www.braziljusticenet.org/606.html#Supreme) (25 May 2009).

<sup>84</sup> On the developments in Africa see van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems', 104 *AJIL* (2010) 29. See also the most recent decision of the African Commission on Human and Peoples' Rights recognizing collective rights to land of the Endorois people in Kenya, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, at paras 187 and 205, available at: [www.unhcr.org/refworld/docid/4b8275a12.html](http://www.unhcr.org/refworld/docid/4b8275a12.html), following the earlier decision to the same effect in *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, at para. 63, available at: [www.escri-net.org/caselaw/caselaw\\_show.htm?doc\\_id=404115](http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=404115) (both accessed 30 Dec. 2010); and the South African Constitutional Court's restoration of indigenous lands in *Alexkor Limited v. The Richtersveld Community and Others*, 2003 (19) SA 48–51 (CC).

have a right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.<sup>85</sup>

The Inter-American Commission on Human Rights made the key step from the global research effort to a practical application of those conclusions to the international legal status of indigenous peoples. Referring to this study and the opinions of other international legal scholars to argue for a new principle of customary international law,<sup>86</sup> the Inter-American Commission submitted the case of an indigenous group in the rainforest of Nicaragua to the Inter-American Court of Human Rights. The tribunal, in its celebrated *Awas Tingni* judgment of 31 August 2001,<sup>87</sup> affirmed the existence of an indigenous people's collective right to its land. It stated:

Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention – which precludes a restrictive interpretation of rights –, it is the opinion of this Court 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, which is also recognized by the Constitution of Nicaragua.

Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; 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.<sup>88</sup>

<sup>85</sup> Wiessner, *supra* note 22, at 128. See also Anaya and Williams, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System', 14 *Harvard Human Rts J* (2001) 33; S.J. Anaya, *Indigenous Peoples in International Law* (2nd edn., 2004), at 49–72; Oguamanam, 'Indigenous Peoples and International Law: The Making of a Regime', 30 *Queen's LJ* (2004) 348. For a concurring analysis of indigenous land rights under customary international law and UNDRIP see Stevenson, 'Indigenous Land Rights and the Declaration on the Rights of Indigenous Peoples: Implications for Maori Land Claims in New Zealand', 32 *Fordham Int'l LJ* (2008) 298. A recent monograph on the protection of groups in international law also concluded that 'there is sufficient proof of State practice and *opinio juris* among States to suggest the existence of a right to autonomy for indigenous peoples in international law': N. Wenzel, *Das Spannungsverhältnis zwischen Gruppenschutz und Individuenschutz im Völkerrecht* (2008), at 508. Weller, 'Settling Self-Determination Conflicts: Recent Developments', 20 *EJIL* (2009) 111, at 116 agrees.

<sup>86</sup> Final Written Arguments of the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights in the Case of *Mayagna Indigenous Community of Awas Tingni v. Republic of Nicaragua*, 19 *Arizona J Int'l & Comp L* (2002) 327, at 349.

<sup>87</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 Aug. 2001, Inter-Am Ct HR, reprinted in 'The Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*', 19 *Arizona J Int'l & Comp L* (2002) 395. For details of this case see Anaya and Grossman, 'The Case of *Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*', 19 *Arizona J Int'l & Comp L* (2002) 1.

<sup>88</sup> *Awas Tingni* case, *supra* note 87, at paras 148–149.



Other decisions in the same vein followed, including a recent decision involving Suriname.<sup>89</sup> The decisions of the Inter-American Court of Human Rights broke new ground as they radically re-interpreted Article 21 of the Inter-American Convention, the right to property – a provision, like all the other guarantees of the document, originally focused on rights of individuals. As the Court's jurisdiction *ratione materiae* is limited to the adjudication of violations of the treaty, the Court wisely did not base its decision on customary international law, as this could constitute an *excès de pouvoir*, an act *ultra vires*, outside the range of powers granted it by the constituting nation-states.<sup>90</sup>

Still, such a radical re-interpretation of the treaty can only be based on a significant shift in the normative expectations of the states. It is most conceivable that the evidence for such a shift is found in the same material that has been adduced to prove customary international law: pertinent state practice and *opinio juris*. It is no surprise that courts not bound by such jurisdictional restraints clearly express their legal opinion. On 18 October 2007, Chief Justice A. O. Conteh of the Belize Supreme Court concluded, 'Treaty obligations aside, it is my considered view that both customary international law and general international law would require that Belize respect the rights of its indigenous people to their lands and resources.'<sup>91</sup>

In this view, Article 26 UNDRIP simply summarizes pre-existing customary international law:

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.

Related key guarantees include indigenous peoples' rights to participate in decision-making in matters which would affect their rights (Article 18) and states' obligations to 'consult and cooperate in good faith with the indigenous peoples concerned' to obtain their 'free, prior and informed consent' to legislative and administrative decisions which 'may affect them' (Articles 19, 32(2)). There are also rights to the

<sup>89</sup> *Saramaka People v. Suriname*, 28 Nov. 2008, Inter-Am Ct HR, Preliminary Objections, Merits, Reparations, Costs, Ser. C, No. 172. See also *Moiwana Village v. Suriname*, 15 June 2005, Inter-Am Ct HR, Ser. C, No. 124; *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005, Inter-Am Ct HR, Ser. C, No. 125; *Sawhoyamaya Indigenous Community v. Paraguay*, 29 Mar. 2006, Inter-Am Ct HR, Ser. C, No. 146.

<sup>90</sup> Wiessner, *supra* note 19, at 147–148.

<sup>91</sup> *Aurelio Cal v. Attorney General of Belize*, 18 Oct. 2007, Sup Ct of Belize, Judgment, at para. 127, available at: [www.elaw.org/node/1620](http://www.elaw.org/node/1620) (25 May 2009).

improvement of their social and economic conditions (Articles 17, 21, 22, and 24); rights to development (Article 23) and international cooperation (Articles 36, 39, 41, and 42); treaty rights (Article 37); as well as certain rights to redress and reparations (e.g., Articles 8(2), 28).

The ILA Committee on the Rights of Indigenous Peoples' 2010 Interim Report has updated the search for state practice and *opinio juris* and supported, with ever more examples of domestic and international practice, the results reached earlier, including the finding of customary international law including the right to autonomy or self-government; the right to the recognition and preservation of cultural identity; the right to traditional lands and natural resources; and the right to reparation and redress for the wrongs suffered.<sup>92</sup>

Substantive limits to indigenous peoples' autonomy, where stated, are formulated in terms of international standards of human rights (Articles 34, 46(2)). This language is best construed as referring to such human rights standards as have achieved the status of customary international law.<sup>93</sup> Pursuant to Article 46(2), limitations of UNDRIP rights by national laws have to conform with such international human rights obligations and have to 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'. According to Article 46(3), the provisions of UNDRIP shall be interpreted in accordance with 'principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith'. These principles are intended to serve as an interpretative framework of UNDRIP and not as a substantive limit to its rights.

## 5 Looking to the Future: Conclusions and Recommendations

Over the last half-century, the legal status of indigenous peoples around the world has significantly improved. Substantial challenges, though, remain, particularly in the areas of enforcement and implementation. In sum, the state of indigenous peoples worldwide and pertinent recommendations are as follows:

1. Indigenous peoples are vulnerable organic groups with a special relationship to their ancestral lands. The international legal regime that is emerging or has emerged to ensure their protection and flourishing is a tailor-made response to their needs and aspirations as they articulate them themselves. Its policy basis, as internationally agreed upon, is the goal of *cultural diversity* – motivated variously by the respect for the autonomy of a radically different way of life or the general

<sup>92</sup> For detailed research see the chapter by the Committee's Rapporteur, Professor Federico Lenzerini, 'The Rights of Indigenous Peoples under Customary International Law', 2010 ILA Interim Report, *supra* note 1, at 43–52.

<sup>93</sup> Cf. 2010 ILA Interim Report, *supra* note 1, at 15.

- public's enjoyment of its artistic products or the learning of lessons from it for dealing with nature and life in general.
2. This guiding light of safeguarding the cultures of indigenous peoples has led to prescriptions which not only protect against physical and legal encroachments upon the people, their languages, and rituals, as well as the lands inextricably linked to their traditional ways of life; they also mandate governmental efforts affirmatively to foster the education of indigenous people in their native tongue, the inculcation of their culture in state media, and the development of media of their own to encourage the flourishing of their cultural heritage.
  3. For this goal of addressing the threat to indigenous communities to work, both individual and collective rights are needed. As explained above, the individual cannot live without the community he or she is an essential part of, and the community cannot survive without its individual members; both influence each other. Rights of both the community and its individual members thus constitute the proper legal response. The traditional dichotomy of individual and collective rights, with a wary eye on the latter, needs to be overcome to ensure the cultural survival of threatened and vanishing communities and traditions. In its place, an order of human dignity with specific functional rules needs to be established which works to allow indigenous peoples to survive and to flourish. To that end, it makes sense to define flourishing, with policy-oriented jurisprudence, as the maximization of access by all to all things humans value – here, within the indigenous group and beyond. One key value here is rectitude, as the law of human relations within the indigenous group and with the living and non-living resources of the people has been determined by traditions from time immemorial; another one is affection, the bond of family and ethnic community.
  4. Misunderstandings have arisen regarding the claims of indigenous peoples, particularly those to land and natural resources as well as those to self-determination. These claims can be properly understood only by linking them to their *raison d'être*, i.e., the cultural survival and flourishing of indigenous peoples. Cultural rights thus include not only rights to culture narrowly conceived, i.e., protection of language, customs, and traditions, but also the culturally bounded right to property and the culturally grounded right to self-determination.
  5. As their traditional lands are critical to the survival of the culture of indigenous peoples, the legal status of these properties ought to reflect this essential purpose. As the purpose of individual property law protections has been redefined from the maximization of economic benefits to the flourishing of humans<sup>94</sup> beyond the accumulation of wealth, the protection of indigenous cultures through collective property rights has to be guided by similar criteria of the blossoming of peoples. The management of indigenous property rights, properly understood, would thus be guided by the culture of the people holding them, dynamic as this concept is. This would, in some cases, as in the US in the absence of formal ownership rights

<sup>94</sup> Radin, 'Property and Personhood', 34 *Stanford L Rev* (1982) 957.

which are often held by the federal government, mean a right to use coupled with an obligation of stewardship toward the resource, for the benefit of future generations of the community and for the planet.<sup>95</sup> In other cases, as *Saramaka* taught, full ownership might be the solution. Even then, the Court trusts in the use of this collectively held land to the benefit of the community long-term.

6. Indigenous self-determination also is best understood from its cultural foundation. As Vine Deloria Jr. said, the purpose of the sovereignty of an indigenous people is to protect its cultural integrity. The indigenous community should govern itself, in order to continue the life of its culture and its members and have it flourish. This would inform the exercise of its authority and control. The structures of decision making also could be tied to the culture, as they would sanction the authority and control of, say, traditional elders without the need of periodic democratic reaffirmation, by ballot, of their leadership role. As part of a global community, though, indigenous self-government would still be bound, as to the substance of their decisions, by the outer limits any sovereign experiences, i.e., universal standards of human rights.
7. Ultimately, it is up to each indigenous community, and its members, to decide whether they wish to continue their inherited ways of life, modify, or abandon them. Governments should not create living museums of peoples. As culture is in constant flux, the only recommendation would be that such changes, by both indigenous communities and individuals, be voluntary and informed by knowledge about the various alternatives available, as well as the provision of government aid to support the option of living the traditional ways of life on one's traditional lands.

<sup>95</sup> Carpenter, Katal, and Riley, 'In Defense of Property', 118 *Yale LJ* (2009) 1022, at 1124–1125.