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Indigenous peoples and human rights

Patrick Thornberry

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List of abbreviations

AC	Advisory Committee
AJIL	*American Journal of International Law*
ALR	Australian Law Reports
APAJ	Comision Juridica para el Autodesarollo de los Pueblos Originarios Andinos
ARIS	Anti-Racism Information Service
ATSIC	Aboriginal and Torres Strait Islander Commission
CD	Collection of Decisions of the European Commission of Human Rights
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CGTP	General Confederation of Workers of Peru
CISA	Indian Council of South America
CLR	Commonwealth Law Reports
COM	Committee of Ministers
CONFENIAE	Confederacion de Nacionalidades Indigenas de la Amazonia Ecuatoriana
CRC	Convention on the Rights of the Child
DLR	Dominion Law Report
DR	Decisions and Reports of the European Commission of Human Rights
EC	European Community
ECHR	European Convention on Human Rights; European Court of HR
ECOSOC	UN Economic and Social Council
EHRR	European Human Rights Reports
EJIL	*European Journal of International Law*
ESC (Committee)	Committee on Economic Social and Cultural Rights
FAT	Authentic Workers' Front [Mexico]
FCNM	Framework Convention for the Protection of National Minorities
GA	General Assembly

GAOR	GA Official Reports
HABITAT	Centre for Human Settlements
HGDP	Human Genome Diversity Project
HL	House of Lords
HR	Human Rights
HRC	Human Rights Committee
HRLJ	*Human Rights Law Journal*
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICEARD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICIHI	Independent Commission on International Humanitarian Issues
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ILC	International Labour Conference
ILCCR	ILO Conference Committee on the Applications of Standards
ILM	International Legal Materials
ILO	International Labour Organization
IMADR	International Movement Against All Forms of Discrimination and Racism
Inter-Am. CHR	Inter-American Court of Human Rights
IWGIA	International Work Group for Indigenous Affairs
JFBA	Japanese Federation of Bar Associations
Leg. Rep.	*The Legal Reporter*
NAILSS	National Aboriginal and Islander Legal Services Secretariat
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental Organisation
NTA	Native Title Act [1993]
NTAA	Native Title Amendment Act [1998]
OAS	Organisation of American States
OAU	Organisation of African Unity
OSCE	Organisation for Security and Cooperation in Europe
SC	Security Council
TMCC	Toledo Maya Cultural Council
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCED	UN Conference on Environment and Development
UNDM	Declaration of Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities
UNEP	UN Environment Programme
UNESCO	UN Educational, Scientific and Cultural Organisation
UNICEF	UN Children's Fund
UNTS	UN Treaty Series
WGIP	Working Group on Indigenous Populations
WGM	[UN] Working Group on Minorities
WHO	World Health Organisation
WWF	World Wide Fund for Nature

Introduction

Scope of the work: human rights instruments and principles

The present work does not attempt to explore the whole of international law as it connects with the indigenous. The focus is principally on *human rights instruments and principles*. A chapter also attempts to unravel some of the historical underpinnings of the relationship between indigenous peoples and the system we understand as international law. The author broadly shares the sentiments expressed by, *inter alios*, Brownlie and Merrills,[1] in support of the idea that human rights, or minority rights, or indigenous rights, are part of that system. On the other hand, human rights, minority and indigenous rights are capable of engendering important systemic modifications to international law, and have done so.[2] The explorations in the present work suggest a measure of openness in the articulation and application of human rights norms – that they are developmental, adaptive and sensitive to a degree to local interpretations – imperfectly expressed in doctrines such as the 'margin of appreciation'.[3] To this may be contrasted the idea that human rights should always try to mimic the court-centred domestic systems, and

[1] I. Brownlie (F. M. Brookfield, ed.), *Treaties and Indigenous Peoples* (Oxford, Clarendon Press, 1992); J. Merrills, 'Environmental protection and human rights: conceptual aspects', in A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press, 1996), pp. 25–41.

[2] The international community is witness to an ongoing realignment of sovereignty and human rights, producing issues around such as the *Pinochet* case (immunity and human rights), the NATO bombing of Kosovo (territorial integrity and human rights) and the emergence of the International Criminal Court (criminal responsibility and human rights). See P. Thornberry, '"Come, friendly bombs" – international law in Kosovo', in K. Drezov, B. Gokay and D. Kostovicova (eds.), *Kosovo: Myths, Conflict and War* (Keele, European Research Centre, 1999), pp. 75–91 (revised as *Kosovo: the Politics of Delusion* (London, Portland, Frank Cass, 2001).

[3] A particular favourite in the jurisprudence of the European Convention on Human Rights.

aspire to be definitional and precisely dispositive of disagreements. Bringing the assembly of indigenous peoples into relationship with international principles generates a string of questions. Deeper issues are to some extent masked by the presentation of instruments and principles below, which might be taken to assume an unproblematic benefiting of indigenous groups as a consequence of their active diplomacy and the good sense of governments.

Five elementary questions

Coherence

In the first place, some authors (and governments) reject attempts at conceptualising 'indigenous peoples' or downplay its significance. This leads to initial questions about *the coherence* of the concept of indigenous peoples. It is argued that the notion of indigenous peoples improbably welds together a range of self-defining groups too disparate to be regarded as a focus of specific treatment. Some governments have suggested that 'indigenous peoples' are only to be discerned in countries ruled by descendants of European settler populations, so that the term is meaningless in much of Africa and Asia: a recent UN study of treaties and agreements between indigenous peoples and States makes much the same point.[4] It is argued that questions of coherence and justification for the category of indigenous rights are interlinked – hence Richard Falk's observation that 'insistence on a distinct category is a matter of policy, not logic'.[5] On the other hand, it makes pedagogical sense to separate the discussion of existence criteria for indigenous peoples from justificatory arguments. Brownlie is hostile to the employment of the indigenous category, on the grounds that, *inter alia*, it 'smacks of nominalism and a sort of snobbery'.[6] 'Nominalism' suggests that there is no unifying substance, only a name.[7] Assertions that self-definition is the only criterion of indigenousness – saying in effect that indigenous peoples are simply what those who self-describe as indigenous take themselves to be[8] – deepen the nominalist trap.[9] 'Snobbery' raises the issue of

[4] See ch. 2 in this volume.

[5] In J. Crawford (ed.), *The Rights of Peoples* (Oxford, Clarendon Press, 1988), ch. 2, p. 32.

[6] *Treaties and Indigenous Peoples*, p. 63.

[7] Nominalism has been described as 'normally any view which treats a given (apparently non-linguistic) subject-matter in terms of words or language rather than in terms of substantial realities': A. R. Lacey, *A Dictionary of Philosophy* (London, Routledge, 1996), p. 231.

[8] P. Gilbert, *The Philosophy of Nationalism* (Boulder, Colorado, Westview Press, 1998), ch. 1, pp. 12–14.

[9] J. Packer appears to adopt such a freedom of association or largely subjectivist approach in the context of minority rights. In such cases, there is no need for definition/conceptualisation, but only for the free speech of unencumbered individuals: 'Problems in defining minorities', in D. Fottrell and B. Bowring (eds.), *Minority and Group Rights in the New Millennium* (The Hague, Kluwer, 1999), pp. 223–73.

justification of the indigenous case for separate recognition which, presumably, Brownlie does not consider to have been made out.[10] If Brownlie is right, 'indigenous' would survive – if at all – only as a signification without legal consequence. On the other hand, the need for conceptualisation nags away even when groups are pursuing minority rights or 'undifferentiated' human rights (for all, without distinction). If treaty bodies refer to indigenous peoples as objects of their concern, to whom or what are they referring? If we observe that the fabric of human rights could be stretched to accommodate indigenous world-views, whose world-views are they? Where is our perimeter of sense–signification in the employment of language?[11] And, if a large and growing indigenous network hammers at the doors of international organisations claiming recognition and justice, are they to be dismissed as self-deluding? The questions call for an examination of the concept of indigenous peoples, the subject of chapter 2.

Point: human rights and specific indigenous rights

Critics of the *usefulness or point* of linking specific rights to indigenous groups argue that there is no justification for a specific canon of rights, because existing international law and human rights principles are presumptively sufficient for all human beings and human groups.[12] If this is the case, the need for indigenous rights is weakened or collapses. If the critics are even partially correct, attention could profitably turn from the task of elaborating specific indigenous rights to the choice of pathways through the legal options, or to supplementing the analysis of the specific texts with analysis of general instruments of human rights. International law presents an opulent assembly of individual rights, rights of minorities, peoples' rights and specific rights of indigenous peoples. Corntassel and Primeau counsel that the existing body of human rights is sufficient to secure the cultural survival of the indigenous,[13] while Kingsbury suggests that indigenous rights are *sui generis* and resist subsumption.[14] This hardly exhausts the possibilities. The 'existing body of human rights' already includes indigenous rights, though

[10] Except in limited contexts such as ILO Conventions 107 and 169.

[11] G. Koubi, cited by Packer, 'Problems in defining minorities', p. 230.

[12] J. J. Corntassel and T. H. Primeau, 'Indigenous "sovereignty" and international law: revised strategies for pursuing "self-determination" ', *Human Rights Quarterly* 17 (1995), 342–65. Brownlie makes the limited claim that 'There can be little doubt that the normal application of human rights standards should take care of most of the claims of indigenous peoples' – *Treaties and Indigenous Peoples*, p. 62. He also notes (p. 68) 'the likelihood that acceptance of the norms relating to indigenous peoples will provide a firmer base for the pursuit of legal goals in the sphere of affirmative action than the orthodox principles and standards . . . concerning human rights'.

[13] Corntassel and Primeau, 'Indigenous sovereignty', 344–5.

[14] 'The applicability of the international legal concept of "indigenous peoples" in Asia', in J. R. Bauer and D. Bell (eds.), *The East Asian Challenge for Human Rights* (Cambridge, Cambridge University Press, 1999).

some might attribute a narrower meaning to 'human rights', stressing its essential individualism; a judicial response to this last point was offered in the Australian High Court case of *Gerhardy v Brown*, where Mason J stated that the concept of human rights, 'though generally associated in Western thought with the rights of individuals, extends also to the rights of peoples and the protection and preservation of their cultures'.[15] Further, indigenous individuals may and do benefit from navigating their way through charters of undifferentiated human rights or utilising rights of minorities. Much of the effort of later chapters is to explore the extent to which indigenous interests can be or are being progressed through general human rights instruments, including those which deal with aspects of human rights such as the principle of non-discrimination on grounds of race, and those devoted to a specific issue, such as the Convention on the Rights of the Child (CRC); minority rights are also addressed, bearing in mind that indigenous groups have utilised these rights to a significant extent. Instruments specific to indigenous peoples – International Labour Organization (ILO) conventions and emerging declarations – are also assessed. The problem with focusing on these 'undifferentiated' instruments is that the specific indigenous voice may be lost.

Modalities: self-determination and collective rights

Even if it conceded that the development of specific indigenous rights makes sense, questions arise concerning the appropriate modalities through which the rights should be advanced. The ramifications of self-determination are explored at various points in the book – in chapters on the human rights covenants, in connection with the UN draft Declaration on the Rights of Indigenous Peoples (infra), and as a general reflection. The role of this principle is highlighted by Article 3 of the draft Declaration with its simple statement that indigenous peoples 'have the right of self-determination', following the preambular notice that 'nothing in this Declaration may be used to deny any peoples their right of self-determination'. To those who would gainsay the indigenous claim, the Grand Council of the Crees

> notes simply that the right of self-determination applies universally to 'all peoples' and . . . indigenous peoples must not be deprived of a right simply because certain States want the right to be applied in a discriminatory manner to the prejudice of indigenous peoples. There is no reasonable justification for . . . efforts to . . . restrict or circumscribe the right . . . Let us call it what it is: racism, discrimination, prejudice.[16]

Indigenous advocacy has placed enormous emphasis on claims to self-determination, and many groups regard it as their key to advancement. The self-determination question connects with controversies on the content of

[15] (1985) 149 CLR 70, 104–05.

[16] Ambassador Ted Moses, Grand Council of the Crees, WGIP, 12th Session, July 1994 (on file with author).

rights. This is partly captured as the 'problem' of *collective or group rights*.[17] If peoples as such have rights, what of the individual 'members' of these peoples?[18] Put in the form of a counter-argument, it may be that the articulation of demands through the language of collective rights is impossible to square with the framework of human rights – an argument which reaches out to 'collectivities' of minorities as well as indigenous groups.[19] Those who speak for the indigenous variously privilege collective rights – they are 'of paramount importance'[20] or alternatively insist that individual and collective rights are both valid.[21] The Chairperson of the Aboriginal and Torres Strait Commission (ATSIC) structured a link between individual and collective in the statement that it

> is precisely because the collective rights have not been acknowledged that the individual rights of indigenous persons, for example the right to equality of opportunity in the provision of education, employment and health care – have not been realised in any nation in the world. Only when our collective identities have been recognised will the appalling disadvantages that we suffer as individuals be redressed.[22]

In the ATSIC view, collective rights are needed primarily – in the words of Kymlicka, as 'external protections' – 'to protect the group from the impact of external decisions (of the larger society)'.[23] In recent political theory literature, positions on collective rights questions are staked out by liberals, communitarians and post-liberals.[24] Discussions link with reflections on the

[17] The collection of essays edited by W. Kymlicka, *The Rights of Minority Cultures*, (Oxford, Oxford University Press, 1995), is very useful in this respect – in particular the essays by Van Dyke, Glazer, Johnston, Hartney and Kukathas. See also J. Baker (ed.), *Group Rights* (Toronto, University of Toronto Press, 1994).

[18] L. Green, 'Internal minorities and their rights', in Kymlicka, *Rights of Minority Cultures*, pp. 256–72.

[19] Hence for example, the arguments advanced by, *inter alios*, France, Japan, The Netherlands and Sweden before the Commission Drafting Group now charged with the preparation of the draft Declaration, warning that human rights were in essence individual rights, or that the draft Declaration was too unbalanced in favour of collective or group rights: E/CN.4/1997/102, paras. 108, 109, 112 and 113.

[20] Comments on the draft Declaration by the Indigenous Peoples' Preparatory Meeting, E/CN.4/Sub.2/AC.4/1990/3/Add.2.

[21] On the draft Declaration, the Inuit Circumpolar Conference and other indigenous groups submitted that, unless 'the meaning of a provision dictates otherwise, all of the rights in the draft Declaration should be understood to include both collective and individual dimensions' – E/CN.4/Sub.2/1990/NGO/14.

[22] Statement in WGIP, 11th Session, July 1993, cited by S. Pritchard, *An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples* (ATSIC, 1998).

[23] W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Oxford University Press, 1995), p. 35.

[24] J. Gray, *Post-Liberalism: Studies in Political Thought* (New York, Routledge, 1993). For a succinct review of positions, see I. Tatsuo, 'Liberal democracy and Asian orientalism', in *East Asian Challenge*, pp. 27–59.

nature of the self, identity and group membership, rights of entry and exit to communities,[25] and the stance of groups *vis-à-vis* processes of modernisation, globalisation and respect for the environment. Some of the argument goes to the heart of what we mean by 'collective' or 'group' rights – whether we envisage a collective right 'held jointly by those who make up the group', or a more 'corporatist' position, where the group is analogised to a right-bearing individual.[26] The debates raise issues about the character of human rights, and whether human rights principle is capable of embracing the claims of groups whose worlds may be considerably removed from notions of 'individualism'.[27] In the debates, international human rights may be claimed for one 'ism' or another as its own, with the assumption that human rights is simply that favoured theory writ large.[28] Such hegemonic appropriations are unlikely to do justice to the sheer complexity of human rights – nor to the possibilities inherent in any wide stream of political theory. Kymlicka regards the collective–individual rights debate as ambiguous and perhaps sterile, because what matters is how rights are differentiated towards groups in society, not who holds the right, 'the individual' or 'the collective'.[29] The issue has however been raised with fair consistency throughout the canon of human rights, and appears to matter very much, so the exploration of the relationship between individual and collective rights will, despite the strictures of Kymlicka, be explored through various succeeding chapters.

Culture and cultural practices

On a related point, Charles Taylor argues that it is reasonable to suppose that:

> cultures that have provided the horizon of meaning for large numbers of human beings . . . that have . . . articulated their sense of the good, the holy, the admirable – are almost certain to have something that deserves our admiration and respect, even if it is accompanied by much that we have to abhor and reject.[30]

[25] C. Kukathas, 'Are there any cultural rights?', in Kymlicka (ed.), *Rights of Minority Cultures*, pp. 228–56.

[26] There is an illuminating discussion of the consequences for human rights reasoning of these two conceptions in P. Jones, 'Human rights, group rights, and peoples' rights', *Human Rights Quarterly* 21 (1999), 80–107.

[27] See the later discussion of whether the emblematic Universal Declaration of Human Rights (UDHR) is completely 'individualist', in ch. 4 of this volume.

[28] This is particularly true of writers of a 'liberal' persuasion, and leads to criticisms of, for example, the claims of economic, social and cultural rights to be regarded as human rights – see for example M. Cranston, *What are Human Rights?* (London, Bodley Head, 1973). The more subtle writings incorporate reflections on a broader spectrum of internationally agreed norms.

[29] For a short critique of Kymlicka's position, see the chapter by the present author, 'Images of autonomy, etc.', in M. Suksi (ed.), *Autonomy: Applications and Implications* (The Hague, Kluwer, 1998), pp. 97–124.

[30] C. Taylor, 'The politics of recognition', in A. Gutmann (ed.), *Multiculturalism and the Politics of Recognition* (1992) cited by M. J. Perry, *The Idea of Human Rights: Four Inquiries* (New York, Oxford University Press, 1998), p. 489.

Taylor's reflection takes the enquiry into the realm of the cultural practices of indigenous groups and wider societies, and the extent to which cultural expression can be qualified in the name of human rights. The question has been brought out in some – particularly government – interventions in the drafting of the Declaration on Indigenous Peoples.[31] The clash between a 'human rights *culture*' and the world-views of particular *cultures* has generated a ton of writing on 'cultural relativism'.[32] Much of the literature centres on the 'challenge to human rights from Islamic,[33] African[34] or Asian[35] perspectives. The debates interface with the contemporary ferment of discussion on discrimination and caste, equality and hierarchy, the rights of women, the persistence of cruel traditional practices, etc. – debates which impact on indigenous peoples.[36] Theoretical positions (and practice statements) range from affirmations of the primordial value of cultural integrity[37] to robust assertions of the primacy of human rights, which are both praised and condemned as ineluctably Western.[38] The search has been on for analogues to human

[31] See in particular the many attributed remarks by government representatives at the 2nd Session of the Commission Drafting Group, E/CN.4/1997/102.

[32] See the selection of authors in H. J. Steiner and P. Alston (eds.), *International Human Rights in Context: Law, Politics, Morals* (Oxford, Clarendon Press, 1996), pp. 166–255.

[33] A. A. An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse, NY: Syracuse University Press, 1990).

[34] A. A. An-Na'im and F. M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives* (Washington, DC, Brookings Institution, 1990); A. A. An-Na'im, *Human Rights in Cross-Cultural Perspectives: Quest for Consensus* (Philadelphia, University of Pennsylvania Press, 1992).

[35] See Bauer and Bell, *East Asian Challenge*. See also the section 'Contemporary debate between the west and some Asian states', in Steiner and Alston, *International Human Rights*, pp. 226–40.

[36] 'Another form of mutilation which has been reported is introcision, practised specifically by the Pitta-Patta aborigines of Australia' – details of the administration of the practice follow this introduction: *Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children* (United Nations, 1997–2000), p. 5.

[37] See contributions to P. Schwab and A. Pollis (eds.), *Toward a Human Rights Framework* (New York, Praeger Publishers, 1982).

[38] For assertions of the practical necessity to modify cultural practices, see particularly chapters 6 and 9 in the present work on the International Covenant on Civil and Political Rights (ICCPR) and the (CRC). For a defence of human rights as they are, see J. Donnelly, *Human Rights in Theory and Practice* (Ithaca, Cornell University Press, 1989); and the same author's 'Human rights and Asian values: a defence of "western" universalism', in Bauer and Bell, *East Asian Challenge*, ch. 2. A spectrum of views appear in works published to commemorate the fiftieth anniversary of the UDHR in 1998 – see T. Evans (ed.), *Human Rights Fifty Years on: A Reappraisal* (Manchester and New York, Manchester University Press, 1998); T. Dunne and N. J. Wheeler, *Human Rights in Global Politics* (Cambridge, Cambridge University Press, 1999).

rights or homeomorphs,[39] for underpinning conceptions in non-Western cultures which could generate an 'unforced consensus', or the search is given up as futile[40] in that 'consensus is a horizon which is never reached'.[41] Related strands of argument seek to discern a set of principles which would justify or limit interference in societies whose practices are found unacceptable or repugnant.[42] The question of culture raises other practically important issues. The approaches of human rights bodies to the land–culture nexus, indigenous religion, heritage ('culture for sale'), education (culturally sensitive?), indigenous languages, etc., are appraised in the present work.

Dialogue and participation

The various 'international' evocations of indigenous rights suggest questions on the nature of the indigenous engagement with international law and institutions. For some, the basic injunction must be that indigenous peoples must work within the system – there is no other. International law is conceived as a kind of club and members must accept the rules. The disadvantage of this for those who did not 'make' the rules is obvious. This is like the stranger arriving in a country only to be met with the assimilationists' peremptory norm: 'when in Rome, do as the Romans do'. There are other approaches. The 'new' States of the United Nations era joined the international system in analogously disadvantaging terms, and although they have shown commendable loyalty and respect for its institutions, they have attempted change from within. Modifications of normative content have been achieved in substantive areas such as the proscription of racial discrimination; 'systemic' modifications have been slower. In the absence of brute power, the remedy for limited influence is dialogue in the hope that the force of the better argument is allowed to prevail.[43] Indigenous groups deploy formidable batteries of argument against government representatives using

[39] R. Pannikar, 'Is the notion of human rights a Western concept?', *Diogenes*, 120 (1982), 75, at 77–8.

[40] C. Taylor, 'Conditions of an unforced consensus on human rights', in Bauer and Bell, *East Asian Challenge*, ch. 5.

[41] J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester and New York, Manchester University Press, 1984), cited by A. Linklater, *The Transformation of Political Community* (Cambridge, Polity Press, 1998), p. 97. But see Lyotard's 'The other's rights', in S. Shute and S. Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures 1993* (New York, Basic Books 1993), pp. 135–47.

[42] The issue is tackled by Kymlicka in his various writings. See also J. Rawls, *The Law of Peoples* (Cambridge, MA and London, Harvard University Press, 1999) for an attempt to distinguish positions *vis-à-vis* 'Liberal peoples', 'decent hierarchical peoples' and 'tyrannies'.

[43] A presupposition of the Habermasian critical theory and its notion of discourse ethics: J. Habermas, *The Theory of Communicative Action* (London, Heinemann, 1989).

cosmopolitan skills honed in communal experience of oppression. Emphasis is placed throughout the present work on dialogue to resolve claims, dialogic approaches to sovereignty and much else. Dialogue to produce change depends on positioning or a platform from which to argue. Despite the emergence of the UN Working Group on Indigenous Populations (WGIP), indigenous groups are not – compared to States – securely positioned in the pantheon of international institutions. Hence the importance of the UN Permanent Forum on Indigenous Issues to advance their claims and if possible secure their interests at the international level, though its competences will be limited. For the local levels, observe the repeated reminders from treaty bodies to governments of the importance of the participation of indigenous and other groups in national decision-making. These considerations bring into play another facet of self-determination: confidence that this principle, above others, can promote indigenous control and national and international *locus standi*. Among other things, self-determination implies that the peoples can evaluate and influence the nature and levels of interactions with the non-indigenous world.

'The glass-ball country'

The ensemble of questions above leads to a fundamental query about the limits of contemporary human rights discourse and its potential to accommodate indigenous concepts, mores and world-views. In other words, are the 'rules of the human rights game' malleable enough to accommodate indigenous claims ideas without losing essential coherence. Moreover, have indigenous rights the potential to transform and enrich the codes and language of human rights without utterly subverting them? The present work can be read as exposition, more or less detailed, incorporating the author's reading of how the law is, even if much of what is revealed is characterised by principles and frameworks of discourse. It is much less than a *vade mecum* for strategists of indigenous rights, though it could point the strategist towards human rights pathways buried in the dense undergrowth of concept and instrument. Susan Marks has perceptively commented on the varieties of writing in the field of international law, on the unacknowledged ideologies they conceal.[44] She distinguishes between the positivist or problem-solving mode, the sceptical uncovering of indeterminacies, and the transformation of understanding through critique. Marks empathises principally with the last of these, but recognises the validity of other approaches, and the complexity of their overlaps and interactions. In the present work, the author has attempted to expound the law in an interpretative or hermeneutical mode, uncovering indeterminacies where they exist, and to explore

[44] S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford, Oxford University Press, 2000).

the dynamics in the human rights canon. Indigenous voices are heard. The voices and stories of indigenous peoples open out ideological presuppositions of the 'system' as a whole, leaving us with tough questions about justice, desert and power, 'about points of view and cultural perspectives . . . centres and peripheries, winners and losers',[45] which may ultimately shift our focus from indeterminacies towards affirmative critique.[46]

The author was spurred to reflection on indigenous issues through attendance at highly charged sessions of the WGIP in the 1990s. The discussions spanned an enormous range of questions, from the fundamental nature of international law, the history of international law, the meaning of the UN Charter, the politics of definition, through details of human rights, self-determination, environmental and resource rights, health issues, international economic law, etc. Debates raged through all the nuances of the draft Declaration – structure, function, philosophy, grammar and syntax, the lexicon of rights – everything. Arguments between government delegations and the indigenous seemed interminable, their position statements incommensurable. But there was also a sense of something shifting, of ideas grinding their way through the morass of argument and rebuttal, storytelling and complaint. The peoples suggest that a law which does not reach out to the varieties of human existence is stunted and deficient, that, in a profound moral sense, 'norms cannot be universally valid unless they have, or could commend, the consent of all those who stand to be affected by them'.[47] They are against the hegemonic projection of ethnocentric human rights into indigenous space, while conscious that human rights represent a contemporary instrumentality to underpin the survival of communities. To the extent that indigenous perspectives can generate responses from international law, and that we care to believe in at least some 'fusion of horizons' between indigenous and others,[48] we may conjecture with Richard Hughes the existence of a glass-ball country constantly expanding, protecting within its transparent walls the growth of a new justice and a new peace,[49] calling in one people after another through inherent powers of attraction. Competing against this Utopian projection there is all the evidence of enduring antinomies of perspective among peoples, of Darwinian struggle between sovereignties and their challengers; and of the profoundly ambiguous and often tragic relationship between indigenous peoples and the law of nations.

[45] D. Kennedy, cited in Marks, *Riddle of All Constitutions*, p. 146.

[46] 'In seeking to harness the power of indeterminacy in the struggle against domination, critique endorses the sceptical insistence that the self-understanding of those whose language and actions are implicated in international legal analyses must be taken seriously', Marks, *ibid*., p. 144. If this is 'critique' the present author goes along with it, keeping in mind that participants' views are not necessarily the last word.

[47] Linklater, *Transformation of Political Community*, p. 96.

[48] H.-J. Gadamer, *Truth and Method* (New York, Seabury Press, 1975), pp. 271–4.

[49] From R. Hughes, 'The glass-ball country', in *The Wonder-Dog: The Collected Children's Stories of Richard Hughes* (London, Chatto & Windus, 1977).

Part I

Indigenous peoples in international law: basic notions

1

We are still here

> My people have been here since time began. I know how the world began, and I know how the world will end.[1]

Identities and names

A great flow of contemporary discussion and debate has made an international public increasingly aware of the presence of peoples described as indigenous, who appear to exist in every inhabited region of the globe. Some names associated with the term 'indigenous' are familiar to a wide public: the Australian Aborigines, the Crees, the Guarani, the Igorot and Inuit, the Jumma and the Kuna, the Maasai, the Maori, the Mapuche and the Maya, the Mbuti (Pygmies), Miskitos and Mohawk, the Navajo, the San/Basarwa (Bushmen) of the Kalahari, the Saami, Sioux, Tuareg and Yanomami.[2] Knowledge of names may be matched by a rougher knowledge that the peoples are nomadic, sedentary, hunter-gatherers, pastoralists, surviving in tough environments – rainforests and deserts, the High Andes and the High Arctic. In some cases, a mode of society is built into the name, so the Jumma people derive from 'Jum', which means 'shifting cultivation'.[3] The names of most will perhaps be known only to a restricted or élite 'public' of administrators, anthropologists, environmentalists, geographers, historians, non-governmental organisations (NGOs) of many stripes, philanthropists, sociologists, writers. In some cases we have learned, or ought to have learned, to call the peoples by the names that they prefer; to avoid 'Eskimo' and say 'Inuit'.[4] Using the 'old' names in the descriptive vocabulary of our own cultures can signify dismissive or patronising ethnocentric

[1] Umatilla leader Armand Minthorn, cited in *Tri-City Herald*, 16 October 1999.

[2] See J. Burger *et al*., *The Gaia Atlas of First Peoples. A Future for the Indigenous World* (London, Gaia Books Ltd., 1991).

[3] Intervention of Rev. P. Bhikkhu, Commission Drafting Group, 18–29 October 1999 (on file with author).

[4] 'Inuit' means 'people'; 'Eskimo' comes from the Algonkian word meaning 'he eats it raw'.

attitudes towards 'primitive peoples'. Sometimes the discrimination is stubbornly embedded in a language. Hence the complaint of the Alliance of Taiwan Aborigines that the Chinese version of UN documents referred to them as *tuzu renmin*, meaning 'savage' or 'primitive', and their request that it should be changed to *yuanzu minzu*, meaning original peoples.[5] Peoples who choose a name based on their self-understanding may have to wait before the world's knowledge catches up with it. As one writer notes:

> We have a big problem when it comes to the name of our people. We have been called by many different names . . . like Bushmen and Basarwa. Bushmen means 'people from the Bush' and Basarwa means 'people who don't own anything'. Yet, we had things. We had our land and they took it away from us and started calling us 'peoples who don't own anything' But our real names are N/oakwe in Botswana and Ju/'hoansi in Namibia.[6]

It is also true that originally pejorative terms may have their uses in raising levels of recognition, and groups sometimes reclaim them.[7] For example, 'Bushman' may be pejorative, but it may stick better than 'San', or N/oakwe or Ju/'hoansi, and can be of use to the groups in reminding the world of their existence.[8] On 'Igorot', a writer from that group observes that this is 'a derogatory name they call us, meaning "barbarians", "pagans" or "uncivilized". But because the word . . . literally means "people of the mountains" it has since evolved as a term with which the peoples of the Cordillera identify themselves'.[9] On the colourful but patronising term 'Pygmy', it has been noted that 'Official government policy in Zaire is that Pygmies should be "emancipated" and considered as being no different from other citizens – indeed the use of the term "Pygmy" is officially banned. In practice

[5] Statement by the Delegation of Taiwan Aborigines, UN Working Group on Indigenous Populations, 19–30 July 1993 (on file with author).

[6] /'Augn!ao/'Un, 'The Nyae Nyae Farmers' Cooperative', in L. van der Vlist (ed.), *Voices of the Earth: Indigenous Peoples, New Partners and the Right to Self-Determination in Practice* (Utrecht, International Books/NCIP, 1994), pp. 109–12, at p. 109.

[7] 'Jumma' appears to be another notable example of this process: W. van Schendel, 'The invention of the "Jummas"': State formation and ethnicity in Southeastern Bangladesh', cited by B. Kingsbury, 'The applicability of the international legal concept of "indigenous peoples" in Asia' in Bauer and Bell, *East Asian Challenge*, pp. 336–77, at p. 361.

[8] Remarks on the transformation of pejorative terms into badges of honour in K. A. Appiah, 'Identity, authenticity, survival', in A. Gutmann, *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ, Princeton University Press, 1994), p. 161.

[9] M. Degawan, 'The land that touches the sky', in Van der Vlist, *Voices of the Earth*, pp. 89–95, at p. 89.

this means promoting sedentarization'.[10] The consequence or intention of this statement – which uses the morally improving language of emancipation and equality – is that recognition of the separate existence and cultural/economic organisation of the group is likely to be diminished in the consciousness of a broader public. This illustrates a paradox in indigenous and minority rights, that is, the deployment of edifying concepts like equality, which are eminently capable of working against group existence and identity.[11] Standing out as a subject of rights creates real dilemmas for groups in their relations with society as a whole.[12] The public assertion of a separate identity can provoke rejection and counter-reaction – a backlash – on the part of those in wider national communities who characterise themselves as competitors in rights and resources or claim against 'privileges' assigned to one group over another. As one strident political actor in Norway put it: 'If the Lapps go on enjoying different rights from other Norwegians . . . in ten years' time it will be like Bosnia – we'll be machine-gunning each other'.[13] A backlash is often available for indigenous peoples, and for others such as ethnic minorities who engage in a 'politics of recognition',[14] a 'politics of difference'[15] or simply a politics for the vindication of internationally recognised rights. The bad press for indigenous groups has also emerged from a dislike of the 'different' customs and practices of these 'others', which remains in evidence in contemporary appraisals of indigenous cultures from the standpoint of human and animal rights.[16]

[10] C. Dammers and D. Sogge, 'Zaire', in (Minority Rights Group (ed.)), *World Directory of Minorities* (London, Minority Rights Group, 1997), p. 525.

[11] There are a number of examples in the present work where identity rights are brought into conflict with 'homogenising' interpretations of principles of equality and non-discrimination.

[12] This issue is discussed extensively in the present work. For an excellent treatment of questions from the viewpoint of political theory, see W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Clarendon Press, 1995). See also the various essays in W. Kymlicka (ed.), *The Rights of Minority Cultures* (Oxford, Oxford University Press, 1995).

[13] According to a candidate for the Progress Party, cited in *Le Monde – Guardian Weekly*, 24 August 1997.

[14] Gutmann, *Politics of Recognition*; A. Linklater, 'Citizenship and sovereignty in the post-Westphalian European State', in D. Archibugi, D. Held and M. Kohler, *Re-Imagining Political Community* (Cambridge, Polity Press, 1998), pp. 113–37.

[15] I. M. Young, *Justice and the Politics of Difference* (Princeton, Princeton University Press, 1990).

[16] Random examples include: 'Arctic whaling tribes accused of cruelty', *The Times*, 20 October 1997; 'Battle of the bones' – Indians against "the ceaseless pursuit of knowledge"' – *The Times*, 4 October 1997; 'Colombian tribe rethinks decision to abandon twin babies', *The Oregonian*, 19 August 1999 – on saving U'wa twins from abandonment or drowning (twins are reportedly regarded as evil by the tribe).

The numbers game

The question of how many indigenous exist on the planet is contentious. Even where the peoples concerned are identified and 'quantified', they may be denied the use of the term 'indigenous', in case such a description introduces notes of priority and privilege or 'a sort of snobbery'[17] into intercommunal or community–State relations. The dispute about figures is usually politics rather than analytics, normative not cognitive, a question of imposing an outside will upon the people, of contesting their self-description. In some cases, disagreement is sincere, a matter of striving to understand the categorisation.[18] The contentious issue of description and definition – examined in detail later – has become important in the context of current legal politics. The growing respect for the principle of self-identification as an essential aspect of individual and group freedom complicates mere figures.[19] People exercise their preferences and choose to identify with a group or not.[20] Discrimination against a group may influence public declarations of group affiliation. Individuals change their minds.[21] Groups may consist in cultural formations with a history, or represent the creations of State laws.[22] Statistics

[17] I. Brownlie (F. M. Brookfield, ed.) *Treaties and Indigenous Peoples* (Oxford, Clarendon Press, 1992), p. 63.

[18] 'The accepted official nomenclature of the Northern minorities, and of their languages, no longer matches the level of our knowledge': N. Vakhtin, *Native Peoples of the Russian Far North* (London, Minority Rights Group, 1992), p. 8.

[19] The principle emerges at many points in succeeding chapters. A lapidary statement of the principle is contained in Article 1.2 of ILO Convention 169 on Indigenous and Tribal Peoples: 'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.

[20] Some legal systems are relatively freewheeling in this respect. In the related field of minority rights, Hungarian legislation allows individual choice whether to belong to a minority – or more than one minority: (initial) *Report submitted by Hungary under the Council of Europe Framework Convention for the Protection of National Minorities*, ACFC/SR (99) 10, p. 33.

[21] 'Increasing numbers of Guatemala's indigenous people will simply say they are Maya – perhaps adding their linguistic group to the term': P. Wearne, *The Maya of Guatemala* (London, Minority Rights Group, 1994), p. 6. In the context of Australia, it has been observed that 'the process of including an Aboriginal or Torres Strait Islander person in a data collection requires a conscious act of identification . . . The changing social and political climate in Australia in recent years has meant that Aboriginal and Torres Strait Islander peoples are more willing to identify themselves': *National Review of Education for Aboriginal and Torres Strait Islander Peoples, Statistical Annex* (Canberra, Australian Government Publishing Service, 1994), p. 4. For remarks on 'ethnic switching' in the context of the USA, see S. Wiessner, 'Rights and status of indigenous peoples: a global comparative and international legal analysis', *Harvard Human Rights Journal*, 12 (1999), 57–128.

[22] Hence the reference to recognition of tribal peoples in ILO Convention 169, who may be distinguished through the existence, *inter alia*, of 'special laws or regulations' (Article 1.1(a)).

abound but are not consistent.[23] 'Rough guides' to the figures are legion, and the present introduction is in a similar vein – the reader will already note the casual use of 'indigenous' in the present chapter. The Independent Commission on International Humanitarian Issues (ICIHI) claims general agreement on what, in detail, look like fuzzy statistics:

> there are an estimated 200 million indigenous people in the world totalling approximately 4 per cent of the global population . . . It is estimated that there are some 250,000 Aborigines in Australia, 300,000 Maoris in New Zealand, 60,000 Saami . . . 100,000 Inuits . . . in circumpolar States, some 30 to 80 million (the low figure being governments' estimates; the high figure that of the indigenous themselves) indigenous peoples in Central and South America and 3 to 13 million indigenous people in North America (depending if the Chicanos and Metis are included). In Asia, using a definition of indigenous peoples which includes tribal and nomadic peoples, there are estimated to be some 150 million . . . In the broader sense . . . several million in Africa could be included.[24]

A global tabulation prepared by the International Work Group for Indigenous Affairs (IWGIA) claimed 100,000 Inuit, 80,000 Saami and 1 million Russian indigenous, 1.5 million indigenous in North America, 13 Million in Mexico and Central America, 17.5 highland Indians and 1 million lowland Indians in South America, 14 million nomads in Africa, and 350,000 indigenous between the San/Basarwa and the Pygmies, 58 million indigenous in South and West Asia, 30 million in Southeast Asia, 67 million in East Asia, 250,000 Australian Aborigines and 350,000 Maoris.[25] This tabulation also listed 15 million Pacific people. In all, this amounts to just under 220 million.[26] Figures of the order of 200–300 million are now commonplace,[27] even in UN publications.[28] Many governments are alleged to undercount their indigenous population. 'Statistical ethnocide'[29] is always a possibility. In the context of the Adivasi population of Bangladesh, a study noted:

[23] Consider the underelaborated claims by S. Kulkarni – 'Fraudulent claims to tribal status' – in B. K. R. Burman and B. G. Verghese (eds.), *Aspiring to Be: The Tribal/Indigenous Condition* (New Delhi, Konark Publishers PVT LTD, 1998), pp. 243–52.

[24] *Indigenous Peoples: A Global Quest for Justice* (London and New Jersey, Zed Books, 1987), p. 11.

[25] *The Indigenous World 1993–94* (Copenhagen, IWGIA, 1994), pp. 4–5.

[26] Also J. Burger, *The Gaia Atlas*, and the same author's *Report from the Frontier: The State of the World's Indigenous Peoples* (London and New Jersey, Zed Books, 1987).

[27] See the foreword by J. P. Pronk in van der Vlist, *Voices of the Earth*.

[28] *Seeds of a New Partnership; Indigenous Peoples and the United Nations* (New York, United Nations, 1994); *The Rights of Indigenous Peoples: Fact Sheet No. 9 (Rev. 1)* (Geneva and New York, United Nations, 1997), p. 3.

[29] 'The systematic under-enumeration of Indians in the national censuses': R. Stavenhagen, 'Indigenous peoples, the State and the UN system: claims, issues and proposals', *The Thatched Patio*, 2(3) (May 1989), 1–23, 4.

> Many observers feel that undercounting has been done deliberately to emphasize the marginality of the Adivasi population. Lower numbers mean that their legitimate demands can be more easily dismissed or ignored by governments and thus excluded from relief aid or development programmes.[30]

Examples of possible undercounting from South and Central America include Guatemala (official figure 2.5 million; unofficial figure almost 4 million), Mexico (official figure just over 5 million; 12 million unofficial) and Peru (official 3.6 million; unofficial 9.1 million).[31] While figures shift, depending on who defines and who counts, the complexity of the indigenous world presented to us appears formidable. Writing on biodiversity, Gray observes that

> the world biodiversity crisis is matched by a world 'cultural diversity' crisis. Indigenous peoples live predominantly in areas of high biodiversity while at the same time comprise 95 percent of the cultural diversity in the world.[32]

Despite claims that ethnocidal[33] processes have been at work, the complexity of the indigenous world still astounds, considering that absolute numbers may not be great. Random examples, some presented by indigenous organisations, include Mayas in Guatemala:

> The Mayas live in 22 inhabited areas, most of them being located in the Western part of the country and each one having its own language; four of them are the most important languages spoken: K'iche, Mam, Kaqchikel and K'ek'chi and less important ones such as Tzutuhil, Q'anjobal, Pocomam, Pocomchi, Chu, Ixil, Jacalteco, Aguateco and others.[34]

There are some nine Saami dialects for that small population (by world standards): South, Ume, Pite, Lule, North, Inari, Skolt, Kildin and Ter.[35]

[30] R. W. Timm, *The Adivasis of Bangladesh* (London, Minority Rights Group, 1991), p. 11.

[31] B. S. Helms, *Indigenous Peoples in Latin America and the Caribbean: IFAD Policy and Projects*, International Fund for Agricultural Development, UN Doc. E/CN.4/1994/AC.4/TM.4/CRP.3, p. 4.

[32] A. Gray, *Between the Spice of Life and the Melting Pot: Biodiversity Conservation and its Impact on Indigenous Peoples* (Copenhagen, IWGIA Document 70, 1991), p. ii.

[33] For a succinct definition, see R. Stavenhagen, *The Ethnic Question; Conflicts, Development and Human Rights* (Tokyo, United Nations University Press, 1990), p. 87.

[34] 'The social, political and economical situation of the Maya peoples in Guatemala', paper presented by the Association Retono de la Sabiduria del Pueblo Maya Kaqchikel, to the UN Working Group on Indigenous Populations, July 1994, p. 1 (on file with author).

[35] *The Saami – The Indigenous People of Norway* (Oslo, Norwegian Ministry of Local Government and Labour, Division of Saami Affairs, undated, but referring to events up to 1993), p. 5.

The Saami are only one of seventy-one circumpolar peoples.[36] Roraima State in the upper North of Brazil

> has a population of 35,000 natives among which we count Yanomami (7,000), Macuxi (11,000), Wapixana (5,000), Ingariko (1,000), Wai-Wai (1,000) and Taurepang as well as 10,000 natives that live at the periphery of the state cities.[37]

San groups in Namibia – some the subject of intensive anthropological scrutiny – include the Hei//om, !Khu, Ju/'hoansi, !Xu (or Vasekele), Khwe, Naron, //Khuau-//esi, !Xo, Nharo, /Nu-//en and/Auni.[38] The total number for this complex population is 33,100. At the other end of the scale, some 51 million Adivasis are claimed for India.[39] It may be added that, besides languages and the modes of association with lands and territories, indigenous complexity also relates to forms of political organisation, kinship and family organisation, systems of property, beliefs and spirituality, worlds of knowledge and histories – all that can be comprised or imagined in portmanteau terms like 'culture', 'ethnicity', 'religion' and the rest. Groups presenting themselves at international fora represent only a small part of this complexity, but just sufficient to suggest a world of disparate groups who discern kinship with others and proclaim a distinctive commonality of claims.

The distress of the indigenous

Indigenous peoples experience the full range of rights abuses and other assaults upon their dignity. The ICIHI devoted a chapter to indigenous 'victims'. In this, they noted major differences in unemployment rates for the indigenous as against the non-indigenous, observing that in 'Africa, Asia and Latin America, indigenous peoples are the poorest of the poor'.[40] Besides poverty, the Commission referred to questions which press hardest on the indigenous such as debt-bondage, poor health, high infant mortality and low life-expectancy. Suicide disproportionately affects some indigenous communities – it is claimed, for example, that the Innu of Labrador have the highest suicide rate in the world.[41] In a loss of cultural diversity, the Commission estimates that eighty-seven Indian groups in Brazil alone have become extinct in this

[36] E. Siuruainen and P. Aikio, *The Lapps in Finland* (Helsinki, Society for the Promotion of Lapp Culture, 1977); Minority Rights Group (ed.), *Polar Peoples; Self-Determination and Development* (London, Minority Rights Group, 1994).

[37] 'Brazilian Amazonian coordination of indigenous organizations', intervention at the 12th Session of the UN Working Group on Indigenous Populations, 1994.

[38] Minority Rights Group (ed.), *World Directory of Minorities* (London, Minority Rights Group, 1997), p. 503; *IWGIA Newsletter 2193*, p. 25.

[39] International Commission on International Humanitarian Issues (ICIHI), p. 11.

[40] ICIHI, pp. 16–17.

[41] *Canada's Tibet – the Killing of the Innu* (London, Survival International, 1999).

century as a consequence of epidemic diseases.[42] Of the more than 200 languages spoken by Australian Aboriginals, no more than 20 or 30 are used now, and 'only a few of these have any chance of being spoken in a hundred years' time'.[43] General elements in their story include the neglect of indigenous culture by educational systems, the pernicious effects of education by fundamentalist missions, political disenfranchisement, police abuse, suicide,[44] multiple forms of cultural and social trauma, including the removal of aboriginal children from their families for purposes of assimilation,[45] and the dumping of 'integrated' indigenous on the fringes and shanty-towns of cities:

> To be 'integrated' in this negative way into the dominant society is nothing short of ethnocide; which means that people are denied the right to enjoy, develop and disseminate their own culture and language. This has been the fate of many millions of indigenous peoples since colonization and today remains a threat to millions more.[46]

To these may be added the actual or potential effects of transmigration and relocations, mining operations, dam building, logging operations, military quarantines, settler encroachment, environmental degradation of all kinds, private violence and violence by the State.[47] A formidable programme of violence; a host of issues for action and reflection.

It will not do simply to present the indigenous only as victims. It is often observed that they have much to offer to the world at large in their arts, their social conceptions, their world view and spirituality, their models of utilisation of scarce resources and that theirs is a distinctive voice or voices.[48]

[42] *Ibid.*, p. 18.

[43] 'Australian languages', in *Aboriginal Australia, Culture and Society* (Canberra, Commonwealth of Australia, 1992). On the other hand, censuses reveal an upward trend in the number of individuals identifying themselves as Aboriginal: whereas in the census of 1981, fewer than 200,000 individuals declared themselves to be Aboriginal, in the 1996 census, this figure had increased to 386,000, a rise of some 55 per cent: see Wiessner, 'Rights and status', 74.

[44] 'the first known suicides in Yanomami history' – Wiessner, 'Rights and status', citing a conversation with G. Goodwin-Gomez, 77. See also G. Goodwin-Gomez, 'Indigenous rights and the case of the Yanomami Indians in Brazil', in C. P. Cohen (ed.), *Human Rights of Indigenous Peoples* (Ardsley, NY, Transnational Publishers, 1998), pp. 185–99. See also n. 40 in this chapter.

[45] The subject of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, undertaken by the Human Rights and Equal Opportunity Commission of Australia. The National Inquiry was established by the Federal Attorney General in 1995, and submitted its report in 1997. The Inquiry estimated that between one in three and one in ten indigenous children were forcibly removed from their families and communities between 1910 and 1970.

[46] ICIHI, p. 21.

[47] F. Wilmer, *The Indigenous Voice in World Politics* (London and New Delhi, Sage Publications, 1993).

[48] There is a rich collection of entries in R. Moody (ed.), *The Indigenous Voice: Visions and Realities* (Utrecht, International Books, revised 2nd edn, 1993).

If, as Gray suggests, the peoples cumulatively ride high on the register of cultural diversity, they have many models to offer, not just one. As a representative of the World Bank put it: 'To ignore indigenous cultures is like burning the library before we read the books'.[49] Of course, peoples other than indigenous peoples also suffer privations, and the twentieth century produced more than its share in all continents.[50] Jacques Derrida paints a dramatic picture:

> Never have violence, inequality, exclusion, famine, and . . . economic oppression affected as many human beings in the history of the earth and humanity . . . let use never neglect this macroscopic fact, made up of innumerable singular sites of suffering: no degree of progress allows one to ignore that never before, in absolute figures, have so many men, women and children been subjugated, starved or exterminated.[51]

Allowing for hyperbole, Derrida's comment sits uncomfortably with celebrations of universal, transformative and redemptive human rights. Many indigenous privations are shared with the populations of the Third World. Others are specific to the indigenous, in the sense of impacting upon them as fragile societies or directed at them because they are indigenous – a 'singular site of suffering' – hence Falk's point that indigenous experience is not just 'an abstraction that can be lumped together with other categories of injustice'.[52] In an argument for collective rights, a representative of the Grand Council of the Crees stated that when indigenous peoples are attacked, 'individuals suffer the pain . . . But they suffer because they are perceived by their attackers as members of a group'.[53]

The Working Group on Indigenous Populations

In recent decades, representatives of the peoples have sought to engage with international law and institutions, notably but not exclusively the global and regional institutions concerned with human rights. There is now in existence what may be called 'an' or 'the' international indigenous movement. Indigenous organisation at the international level has deep roots in the twentieth

[49] A. Sfeir-Younis, 'Role of indigenous people in the next millennium: World Bank policies and programs', WGIP, 28 July 1999 (on file with author).

[50] See for example M. Mazower, *The Dark Continent: Europe's Twentieth Century* (London, Penguin Books, 1998).

[51] J. Derrida (P. Kamuf, trans.), *Specters of Marx* (1994), p. 85, cited in S. Marks, 'The end of history? Reflections on some international legal theses', EJIL 3 (1997), 449–77, at 457.

[52] R. Falk, 'The rights of peoples (in particular indigenous peoples)', in J. Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988), pp. 17–37, at p. 21.

[53] Commission Drafting Group, 25 October 1996 (on file with author).

century.[54] The development of the contemporary movement was spurred on by the example of decolonisation of the empires of the West, by the civil rights struggles of the 1960s, by the Cold War with the mutual probing between East and West of internal human rights issues, by problems with the concept of development and its neglect of indigenous factors;[55] by an alliance (sometimes) with environmentalists[56] and the growth of international human rights law including its sharp focus on racism.[57] National indigenous organisations flourished through the 1960s in Australia, Canada and the United States, with Central and South America following in the 1970s.[58] The international organisations of indigenous peoples emerged largely in the 1970s. The first international conference of non-governmental organisations on indigenous issues – the NGO Conference on Discrimination against Indigenous Populations – was held in Geneva in 1977, producing a Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere.[59] This was followed by a Geneva Conference on Indigenous Peoples and the Land in 1981.[60] The World Council of Indigenous Peoples was formed in 1975.[61] In 1977, the International Indian Treaty Council gained consultative status with the UN Economic and Social Council (ECOSOC), the first

[54] D. Sanders, 'The legacy of Deskaheh: indigenous peoples as international actors', in Cohen, *Human Rights of Indigenous Peoples*, pp. 73–88; W. A. McKean, *Equality and Discrimination under International Law* (Oxford, Clarendon Press, 1983), pp. 14–15.

[55] Hence the attention given by UNCED to indigenous issues.

[56] The two viewpoints are not always in harmony, as evidenced by headlines such as 'Arctic whaling tribes accused of cruelty', *supra*, n. 16. See Gray, *Between the Spice of Life*. Exemptions from restrictions on whaling have been made for aboriginal whaling by the International Whaling Commission under the International Convention for the Regulation of Whaling 1946; analogous exemptions for aboriginal communities also exist under the Convention on Conservation of North Pacific Fur Seals 1976, and the Oslo Agreement of the Conservation of Polar Bears 1973, see C. de Klemm in collaboration with C. Shine, *Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems* (Gland, Switzerland, and Cambridge, World Conservation Union, 1993), pp. 91, 185, 210. See also Ö. Ülgen, 'The labour exploitation of indigenous peoples: the interface between labour law and human rights law' (unpublished doctoral thesis, Nottingham University, 1999), ch. VII.

[57] The United Nations is now into its Third Decade to Combat Racism and Racial Discrimination – the first decade was proclaimed by GA resolution 3057 (XXVIII), of 2 November 1973. In addition, there were two World Conferences to Combat Racism and Racial Discrimination held at Geneva in 1978 and 1983; a third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance took place in August–September 2001 in Durban, South Africa.

[58] A. Gray, *Indigenous Rights and Development; Self-Determination in an Amazonian Community* (Providence, Oxford, Berghahn Books, 1997), p. 10.

[59] Text reprinted in UN Doc. E/CN.4/Sub.2/476/Add.5, annex 4 (1981).

[60] There is a chronology of international indigenous activism in Wilmer, *Indigenous Voice*, pp. 211–14.

[61] D. E. Sanders, *The Formation of the World Council of Indigenous Peoples* (Copenhagen, IWGIA Document 29, 1977).

indigenous organisation with rights of participation in UN meetings.[62] Others have followed.[63] Some sixteen organisations of indigenous peoples have consultative status with ECOSOC.[64]

Since 1982, indigenous groups of all kinds converged on the WGIP. The meeting makes a vivid impression on even the casual observer. The indigenous crowd the chamber, often donning the costume of their people, contrasting with the sober attire of the diplomats and the (usually) casual attire of non-indigenous experts. A handful of governments choose to include indigenous representatives on their delegation. The room is full of bustle and noise, with perhaps five hundred or more present. Walkouts have been staged from time to time. In UN fashion, people come and go constantly. Meetings are often commenced by prayers. Much of the time is spent in making and listening to the earnest interventions – statements – of representatives of governments, of UN agencies, of the indigenous, and the rest. This annual meeting was set up by ECOSOC of the United Nations in 1982[65] as a subsidiary organ of the Sub-Commission on Prevention of Discrimination and Protection of Minorities – recently renamed the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission).[66] The

[62] *Indigenous Peoples: A Global Quest for Justice*, pp. 32–3.

[63] J. Burger, 'The United Nations and indigenous peoples', in L. van de Fliert (ed.), *Indigenous Peoples and International Organisations* (Nottingham, Spokesman, 1994), pp. 90–103, p. 91.

[64] Consultative arrangements with NGOs are governed by ECOSOC resolution 1296 (XLIV), 1968. The indigenous organisations with consultative status are: Aboriginal and Torres Strait Islander Commission; Asociación Kunas Unidos por Nabguana, Four Directions Council, Grand Council of the Crees (Quebec), Indian Council of South America (CISA), Indian Law Resource Centre, Indigenous World Association, International Indian Treaty Council, International Organization of Indigenous Resource Development, Inuit Circumpolar Conference, National Aboriginal and Islander Legal Services Secretariat (NAILSS), National Indian Youth Council, Saami Council, Sejekto Cultural Association of Costa Rica, Yachay Wasi and World Council of Indigenous Peoples.

[65] The creation of the Working Group was proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 2 (XXXIV) of 8 September 1981, endorsed by the Commission on Human Rights in resolution 1982/19 of 10 March 1982, and authorised by the Economic and Social Council in resolution 1982/34 of 7 May 1982. The first two sessions were chaired by Mr Asbjorn Eide of Norway, succeeded by Mme Erica-Irene Daes of Greece who has occupied the position, except in 2000, chaired by Mr Alfonso Martinez, the expert from Cuba.

[66] The Sub-Commission was set up by the Commission on Human Rights at its first session in 1947, under the authority of ECOSOC resolution 9 (II) of 21 June 1946. The Sub-Commission's new title was authorised by ECOSOC in 1999. For a useful general review of the work of the Sub-Commission, see A. Eide, 'The Sub-Commission on Prevention of Discrimination and Protection of Minorities', in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford, Clarendon Press, 1992), pp. 211–64.

mandate is to review developments on the promotion and protection of the human rights and fundamental freedoms of indigenous populations, and give special attention to the evolution of standards concerning their rights.[67] The WGIP has been described as 'politics', 'performance', 'social drama',[68] 'where the sublime meets the ridiculous'[69] – the latter perhaps including the international lawyers who 'preen themselves', 'resplendent in the latest theories of self-determination', 'clutching copies of their latest tomes on human rights'.[70]

The WGIP, which has met annually since 1982 with the exception of 1986,[71] formally consists of five members of the Sub-Commission, but the proceedings are open to States, intergovernmental and non-governmental organisations, organisations of indigenous peoples, and individuals, indigenous or otherwise. Participation of indigenous representatives at the meeting is assisted by a Voluntary Fund established by the General Assembly (GA) of the UN in 1985.[72] The annual event attracts increasing numbers of participants. At the first session in 1982, twelve States and an observer from the PLO attended.[73] Three organisations of indigenous peoples with ECOSOC consultative status were present,[74] along with eleven indigenous organisations without such status.[75] In 2000, forty-five member States attended, along with representatives of 248 indigenous and other NGOs: a total of 1,027 persons attended the session.[76]

[67] Comments on 'populations' and 'peoples' as appropriate terminology are made in ch. 2.

[68] I. Sjorslev, 'Politics and performance; reflections of the UN working group on indigenous populations', *Indigenous Affairs*, 3(94): 38–42.

[69] A. Gray, 'The UN working group – where the sublime meets the ridiculous', *IWGIA Newsletter*, 4(92): 23–7.

[70] *Ibid.*, 25.

[71] In 1986, a workshop on indigenous rights was sponsored by the Anti-Slavery Society for the Protection of Human Rights and the World Council of Indigenous Peoples, and chaired by Mme Daes. The 5th Session of the Working Group was postponed from 1986 to 1987. The cancellation was attributed to a UN budgetary crisis. The report of the 'substitute' Workshop is contained in UN Doc. E/CN.4/Sub.2/AC.4/1987/WP.4/Add.1.

[72] For the background to the Fund, its *modus operandi* and a questionnaire for applicants, see *The Rights of Indigenous Peoples*, Fact Sheet No. 9 (Rev.1), World Campaign for Human Rights, UN Centre for Human Rights, Geneva 1997. The Voluntary Fund was established pursuant to General Assembly resolution 40/131 of 13 December 1985. In resolution 50/156 of 21 December 1995, the GA decided that the Fund should also be used to assist indigenous representatives to participate in the Commission Drafting Group. By resolution 48/163 of 21 December 1993, the GA authorised the Secretary-General to establish the Voluntary Fund for the International Decade of the World's Indigenous People.

[73] Report of the 1st Session of the Working Group on Indigenous Populations, UN Doc. E/CN.4/Sub.2/1982/33, paras. 4 and 5.

[74] The International Indian Treaty Council; World Council of Indigenous Peoples; Indian Law resource Centre: Report of the 1st Session, para. 7(a).

[75] *Ibid.*, para. 8.

[76] E/CN.4/Sub.2/2000/24, para. 6.

The Permanent Forum

Despite the success of the WGIP, the Secretary-General noted the absence of an ongoing UN mechanism for indigenous people.[77] The idea of a Permanent Forum for Indigenous People stems from a recommendation of the World Conference on Human Rights in 1993,[78] backed up by the General Assembly of the UN.[79] The establishment of the Forum is also recognised as one of the objectives of the International Decade of the World's Indigenous People. In 1998, the Commission on Human Rights decided to establish a Working Group (the Forum Working Group) to elaborate proposals for a Permanent Forum.[80] Following this, the Commission decided at its 2000 session to recommend to ECOSOC that a 'Permanent Forum on Indigenous Issues' should be established:[81] ECOSOC duly obliged by consensus resolution of 31 July 2000.[82] The Forum consists of 16 members, 8 nominated by governments and 8 appointed by the President of ECOSOC on the basis, *inter alia*, of 'broad consultations with indigenous organizations', including 'local indigenous consultation processes'.[83] Forum members participate as independent experts, with indigenous access through consultative status organisations and WGIP observer procedures. The Forum will advise ECOSOC on indigenous issues 'relating to economic and social development, culture, the environment, education, health and human rights',[84] providing expert advice, raising awareness and disseminating information. The work will be governed by the principle of consensus.[85] ECOSOC will evaluate the Forum five years after establishment.[86] The mandate of the Forum implies a considerable overlap with the WGIP – the language of the Commission resolution clearly raises questions about the WGIP's future.[87] The future of the WGIP may also be called in question by the decision of the Commission on Human Rights in 2001 to appoint a Special Rapporteur

[77] *Review of Existing Mechanisms, Procedures, and Programmes within the United Nations Concerning Indigenous People*, UN Doc. A/51/493.

[78] UN Doc. A/CONF.157/24, Part I, sect. II, para. 32.

[79] General Assembly resolution 48/163.

[80] Commission resolution 1998/20, 9 April 1998. See the *Report of the Open-Ended Inter-Sessional Ad Hoc Working Group on a Permanent Forum for Indigenous People in the United Nations System*, E/CN.4/1999/83, 25 March 1999.

[81] UN Doc. E/CN.4/RES/2000/87, 28 April 2000.

[82] Press Release ECOSOC/5932. See also ECOSOC resolution 2002/22.

[83] Para. 1.

[84] Para. 2. The first session of the Forum was held in May 2002.

[85] Para. 3.

[86] Para. 7.

[87] The preamble stresses that 'the establishment of the Permanent Forum should lead to careful consideration of the future of the Working Group'; substantive paragraph 8 looks to a review of UN work on indigenous issues 'with a view to rationalizing activities, avoiding duplication and overlap and promoting effectiveness'.

on the situation of human rights and fundamental freedom of indigenous people.[88] The Special Rapporteur will gather information from all relevant sources concerning violations of indigenous rights, will formulate recommendations and proposals to prevent and remedy violations, working in close relation with other rapporteurs, etc.[89] The Rapporteur is explicitly invited to incorporate a gender perspective in carrying out the mandate and to pay special attention to violations of the rights of indigenous children.[90] The demise of the WGIP (if and when that occurs) is not explicitly envisaged in the Commission's resolution; on the contrary, the Special Rapporteur is enjoined in paragraph 4 to take into account all relevant recommendations of the WGIP and the Permanent Forum.

The draft Declaration

In the 1980s and 1990s, the WGIP drafted a radical Declaration on the Rights of Indigenous Peoples (the draft Declaration),[91] a text currently being 'processed' by a Working Group of the Human Rights Commission (the Commission Working Group or Drafting Group) as part of a procedure which is intended to lead to its promulgation by the UN General Assembly.[92] Besides the dramatic claim that indigenous peoples enjoy a right of self-determination,[93] the draft Declaration demands that States observe a range of collective rights,[94] respect indigenous autonomy and customary law and institutions,[95] protect the peoples from genocide and ethnocide,[96] abstain from removing them from their lands or territories,[97] respect their traditions and indigenous knowledge,[98] educate them in their own languages,[99] restore and protect the environment,[100] respect indigenous citizenship[101] and allow

[88] E/CN.4/RES/2001/57, 24 April 2001.

[89] *Ibid.*, para. 1.

[90] *Ibid.*, paras. 2 and 3. The first report of the Special Rapporteur is E/CN.4/2002/97.

[91] For an unelaborated suggestion that the WGIP went beyond 'its designated mandate' in drafting a Declaration, see Wiessner, 'Rights and status', 101.

[92] The Drafting Group was set up by resolution 1995/32 of the Commission on Human Rights, 3 March 1995. The Commission initiative was prompted by General Assembly resolution 49/214 of 23 December 1994.

[93] See particularly Article 3.

[94] Most of the rights in the draft involve the formula 'indigenous peoples have' – the various rights.

[95] Notably in Parts III and VII.

[96] Part II, notably Articles 6 and 7.

[97] Article 10; part VI.

[98] Part III.

[99] Part IV.

[100] Part VI, notably Article 28.

[101] Articles 8, 9, 32, 33, and 34.

international adjudication of treaties and agreements between States and the indigenous.[102] The text recites that the 'rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.[103] A constant of indigenous argumentation is that these rights are already enshrined in international law – the draft 'was an accurate statement of customary law'[104] – and are simply being denied to indigenous groups. Hence the need for specific application to the indigenous so that the draft Declaration is merely a 'further . . . step forward for the promotion and protection of the rights and freedoms of indigenous peoples'.[105] Representatives of States do not always see it this way – many would rule the present text out of court as subversive of international law and human rights. Although there are critical voices among the peoples on the norms and processes involved,[106] indigenous representatives have participated with Working Group experts in drafting the Declaration, and press for its adoption by the GA.[107] The process has been driven by the indigenous. The text makes formidable demands upon governments for the attainment of a variety of objectives with heavy implications for State resources. Besides constituting a reductionist measurement of indigenous claims, the draft allows us, imperfectly, to get a purchase on the notion of an indigenous view. The text is an emblematic synthesis of indigenous claims of right, cultural statements, and world-views, suggesting the dim outline of a relationship between indigenous peoples, States and the culture of human rights.[108] Hence the straining patriotism of the effort to defend its integrity in the cool climate of the Human Rights Commission,[109] refusing negotiation until the last.[110]

[102] Article 36.

[103] Article 42.

[104] Representative of the International Organization for Indigenous Resource Development, E/CN.4/1997/102, para. 60.

[105] Preamble.

[106] J. Sayers and S. Venne, '11th session of the Working Group on Indigenous Peoples' *Fourth World Bulletin*, 3(1) (1993), 1–3, 20.

[107] The text of the draft Declaration was included in the *Report of the Working Group on its Eleventh Session*, UN Doc. E/CN.4/Sub.2/1993/29, annex 1. See also UN Doc. E/CN.4/Sub.2/1994/2/Add.1, *Technical Review of the United Nations draft Declaration on the Rights of Indigenous Peoples.*

[108] For an illuminating expression of the idea of human rights as culture, see O. Yasuaki, 'Toward an intercivilizational approach to human rights', in Bauer and Bell *East Asian Challenge*, ch. 4.

[109] Where, unlike the WGIP, States predominate.

[110] The initial meetings of the Commission Drafting Group were marked by a widespread refusal on the part of indigenous representatives to negotiate the text. At the 1999 meeting, indigenous participants set out criteria for reviewing proposed changes, which should be: 'reasonable, necessary and improve or strengthen the text', 'consistent with . . . fundamental principles of equality, non-discrimination and the prohibition of racial discrimination' (E/CN.4/1999/WG.15/CRP.2).

Other fora, other instruments

On the face of it, indigenous peoples appear to have succeeded to a remarkable degree in informing the international community of their case. A variety of international regimes have discovered an indigenous perspective in their work. There is indigenous-specific 'hard law' in the system, notably at the level of the ILO: a convention in 1989 concerning Indigenous and Tribal Peoples in Independent Countries,[111] elaborated as a partial revision of a convention of 1957 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.[112] There is evidence of a remarkable shift in perception between the conventions of 1957 and 1989, reflecting in part the greater indigenous participation in international affairs in the intervening years. In reading the earlier convention, it is impossible to avoid the feeling that the peoples were regarded as a relic of the past, soon – or fairly soon – to be 'developed' or 'integrated' out of existence. The intentions appear to have been benign – under the influence of 'indigenist' perspectives[113] rather than indigenous rights. The convention of 1989 was drawn up in a different spirit. It is a radical document which recognises the presence of indigenous peoples, through the force of self-definition, historicity and cultural indelibility. It evinces respect for their societies, their characteristic modes of existence and holistic social constructs, and is characterised by the affirmation of collective as well as individual rights. The convention moves from describing the groups as populations in 1957 to peoples in 1989, though it does not move as far as proposing their right to self-determination. There are also many hard law texts where the indigenous are not the main focus, but have become a pressing concern. In such cases, the text contains a larger plan, such as the preservation of biodiversity[114] or the elimination of racial discrimination, or the general protection and promotion of human rights.

Relevant treaty bodies in the UN system deal with indigenous issues within the parameters of their work of implementing human rights standards: as explained below, much of the present work is taken up with elaboration and analysis of the work of the treaty bodies at global and regional levels.

[111] Convention No. 169, adopted at the 76th Session of the International Labour Conference on 27 June 1989.

[112] Convention No. 107, adopted at the 40th Session of the International Labour Conference, 26 June 1957.

[113] Gray, *Indigenous Rights*, pp. 49–51. According to Gray, the integration of indigenous peoples into the social structure of the nation-state was a key tenet of 'indigenists'. The author comments that 'while indigenism sought to reduce the socio-economic disadvantages facing indigenous peoples, its effect was to tie them more securely into the national identity' (p. 51).

[114] As in the United Nations Convention on Biological Diversity 1992, text in *International Legal Materials*, 31 (1992), 818.

The indigenous imprint can now be read in a variety of legal and quasi-legal fields, suggesting that reflection on the rights is becoming systemic. Questions concerning indigenous peoples now feature regularly on the agendas of the General Assembly,[115] the Commission on Human Rights[116] and its subordinate body, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights). UN Specialised agencies in addition to the ILO are also heavily involved in indigenous issues. According to the UN Secretary-General, 'UNESCO's policy in the area of indigenous issues is a long-term task based on regular and progressive consultation with indigenous partners'.[117] Other bodies and agencies with a connection to indigenous issues include the Commission for Sustainable Development, the World Health Organization, UNICEF, the UN Population Fund, UNDP, the UN Environment Programme, and the Centre for Human Settlements. Activities include meetings on indigenous issues, policy guidelines and research activities related to indigenous peoples, programmes and projects.[118] In 1991, the World Bank issued a directive concerning indigenous peoples, replacing a statement[119] of 1982,[120] with policy guidance designed to '(a) ensure that indigenous people benefit from development projects, and (b) avoid or mitigate potentially adverse effects on indigenous people caused by bank-assisted activities'.[121] The World Bank states that the broad objective of the Directive is to ensure that the development process fosters full respect for the dignity, human rights and cultural uniqueness of indigenous peoples. The Bank is also involved in research on indigenous peoples relating to popular participation, management of natural resources and conservation

[115] A separate agenda item entitled 'International Decade of the World's Indigenous People'.

[116] In 1996 the Commission decided to include a separate item on its agenda entitled 'indigenous issues' – decision 1996/102. Three resolutions on indigenous questions were passed by the Commission in 1997 – resolutions 30, 31 and 32. According to the representative of the USA to the WGIP in 1998, 'the establishment of a separate agenda item for indigenous issues has given [these] issues a much higher profile' (on file with author).

[117] UN Doc. A/51/493, para. 79. For an account of some UNESCO work, see M. C. van Walt van Praag and O. Seroo (eds.), *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Barcelona, UNESCO Centre of Catalonia, 1999).

[118] *Review of the Existing Mechanisms, Procedures and Programmes within the United Nations Concerning Indigenous People*, UN Doc. A/51/493, 30 September 1996.

[119] S. H. Davis, 'The World Bank and indigenous peoples', summary of a paper for the International Conference on the Right to Self-Determination of Indigenous Peoples, Antwerp, 14–15 January, 1994 (on file with author).

[120] *Operational Manual* statement 2.34. This is being revised in consultation with indigenous organisations.

[121] For the text, see 'The World Bank *Operational Manual*', *IWGIA Newsletter*, 3(91): 19–22.

of biological diversity.[122] The notion of 'cultural sustainability' is claimed to be a key element in the Bank's approach.[123] The World Bank Inspection Panel has dealt with a number of indigenous questions arising from projects.[124]

The year and the decade

In further initiatives, 1993 was declared by the General Assembly of the United Nations as the International Year for the World's Indigenous People[125] – routinely described in UN documents as the International Year *of* the World's Indigenous People.[126] The World Conference on Human Rights, held in Vienna from 14–25 June 1993 went further and recommended that 'the General Assembly proclaim an international decade of the world's indigenous people'.[127] The year and the decade are for indigenous *people*, not *peoples*. This is the UN's 's' question, the subject of occasional demonstrations by the indigenous where they remind their audience that they are *peoples* as well as people. The theme of the decade is 'indigenous people: partnership in action'. Among the objectives of the decade is the cardinal one of 'the promotion and protection of the rights of indigenous people and their empowerment to make choices which enable them to retain their cultural identity while participating in political, economic, and social life, with full respect for their cultural values, languages, traditions and forms of social organization'.[128] Another is 'the adoption of the draft United Nations

[122] UN Doc. A/51/493, para. 73.

[123] 'The aims and goals of sustainable development will never be achieved if societies do not attain cultural sustainability. The role of cultural capital is central in satisfying the aims and goals of sustainable development': Sfeir-Younis, 'Role of indigenous people'.

[124] For an interesting critique focusing on education, see *Annual Report of the Special Rapporteur on the Right to Education*, E/CN.4/2001/52, 11 January 2001, paras. 31–41.

[125] In resolution 45/164 of 18 December 1990, the General Assembly of the UN decided on 1993 as the International Year. The year was proclaimed in General Assembly resolution 47/75 of 14 December 1992. For the background to the year, consult the annex to General Assembly resolution 46/128 of 17 December 1991. See also Boutros Boutros-Ghali, 'The International Year for the world's indigenous people', in P. Morales (ed.), *Indigenous Peoples, Human Rights and Global Interdependence* (Tilburg, International Centre for Human and Public Affairs, 1994), pp. 35–8.

[126] The difference between *for* and *of* is not much – the former 'suggests that indigenous peoples belong to the "world", rather like a common heritage': Gray, *Indigenous Rights*, p. 129. The use of *people* is much more contentious: see ch. 2 in this volume.

[127] Vienna Declaration and Programme of Action, II, 32, Doc. A/CONF.157/23, 12 July 1993.

[128] Programme of Activities for the International Decade of the World's Indigenous People, General Assembly resolution 50/157, 21 December 1995, annex, para. 4.

Declaration on the Rights of Indigenous Peoples and the further development of international standards as well as national legislation for the protection and the promotion of the human rights of indigenous people'.[129]

Summits

A feature of recent UN activities is the proliferation of global conferences on issues of the day, and summits of heads of State and governments. These high-level conferences stand in an oblique relationship to international law principles. On the one hand, the language tends to take the form of recommendations and activity promotion. On the other hand, the broad participation of States produces texts which mirror elements of an international consensus. The incorporation of reflections on indigenous rights in such meetings is of considerable significance for the direction of international law, since although the commitments of States may not be expressed as hard law, they are commitments none the less. The conferences also usually set out detailed frameworks for action. The 1992 United Nations Conference on Environment and Development (UNCED) devoted considerable attention to indigenous issues[130] – which had been ignored at the 1972 Stockholm Conference on the Human Environment. Principle 22 of the Rio Declaration[131] notes the vital role of indigenous peoples and their communities in environmental management and development 'because of their knowledge and traditional practices'; accordingly, 'States should recognize and duly support their identity, culture and interests' and 'enable their effective participation in the achievement of sustainable development'. Chapter 26 of Agenda 21 is dedicated to 'Recognizing and Strengthening the Role of Indigenous People and their Communities'.[132] Paragraph 1 of Chapter 26 set out a basis for action in underlining the link between indigenous peoples and the world's need for environmentally sensitive development:

> In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.[133]

[129] *Ibid.*, para. 6.

[130] The Conference 'was more sympathetic – but in a rather superficial manner – to the environmental needs of the indigenous peoples': M. H. Arsanjani, 'Environmental rights and indigenous wrongs', *St Thomas Law Review*, 9 (1996), 85–92, at 90.

[131] June 1992; text endorsed by the UN General Assembly in resolution 47/190. See P. W. Birnie and A. Boyle, *Basic Documents on International Law and the Environment* (Oxford, Clarendon Press, 1995), pp. 9–14.

[132] Also Chapters 10 and 15 of Agenda 21.

[133] Doc. A/CONF.151/26 (vol. III), 14 August 1992, 26.1.

In a parallel development, indigenous peoples met in a large gathering to coincide with the Earth Summit and adopted their own declaration on environment and development,[134] which delivered a message to the international community more clearly premised on indigenous consent and control over development strategies and policies. The importance of local forms of knowledge for sustainable development and other environmental desiderata is also present in the Convention on Biological Diversity and other environmental instruments.[135] The UNCED Statement of Forest Principles also makes extensive references to indigenous people.[136] Other UN summits and conferences on various global issues have addressed indigenous concerns.[137] Besides the World Conference on Human Rights, Principle 14 of the Programme of Action of the International Conference on Population and Development stated that, in considering the population and development needs of indigenous people, 'States should recognise and support their identity, culture and interests, and enable them to participate fully in the economic, political and social life of the country'. In similar vein, the Copenhagen Declaration on Social Development and the Programme of Action of the World Summit for Social Development make extensive references to indigenous people. The Beijing platform for Action of the Fourth World Conference on Women, *inter alia*, encourages the adoption of the draft Declaration on the rights of indigenous people, the translation of key rights instruments into indigenous languages, and, in an uncommon delineation of action to be taken to increase participation and access of women to media, encourages media industry and training institutions 'to develop, in appropriate languages, traditional, indigenous and other ethnic forms of media, such as story-telling, drama. poetry and song, reflecting their cultures, and utilize these forms of communication to disseminate information on development and social issues'.[138] The HABITAT Agenda resulting from the Second UN Conference on Human Settlements, devotes an extensive range of prescriptions to 'indigenous people', 'indigenous women' and 'indigenous children'.[139] In some references, the conference dealt with issues which are peculiarly appropriate to the indigenous, such as the 'legal traditional rights of indigenous people to land'; in other cases, indigenous peoples are placed alongside refugees, community groups, and others including 'those belonging to vulnerable or

[134] Indigenous Peoples Earth Charter, Kari-Oca Conference, 25–30 May 1992.

[135] Consult *A Short Guide to Environmental and Intellectual Property Issues Relating to Indigenous Peoples*, a listing prepared for the WGIP: UN Doc. E/CN.4/Sub.2/AC.4/1996/CRP.2.

[136] Extract in Van de Fliert, *Indigenous Peoples*, p. 188.

[137] The UN Secretariat issued a *Compilation of Extracts of Declarations and Programmes of Action Pertaining to Indigenous People from High-level United Nations Conferences* in UN Doc. E/CN.4/Sub.2/AC.4/1996/5/Add.1, 12 June 1996.

[138] Strategic Objective J.1, para. 242 (d).

[139] Istanbul, 3–14 June 1996; extracts from the HABITAT Agenda prepared for the WGIP, UN Doc. E/CN.4/Sub.2/AC.4/1996/CRP.1.

disadvantaged groups'. The 2001 World Conference Against Racism incorporates extensive references to indigenous peoples; regional preparatory meetings, notably those of Santiago de Chile and Tehran, also formulated recommendations on indigenous rights.[140]

Regional organisations

At the regional level, the inter-American human rights institutions have dealt with indigenous issues on a number of occasions.[141] The Commission began consultations in 1992–93 'Concerning the Future Inter-American Legal Instrument on Indigenous Rights',[142] having recognised the need for such an instrument since the late 1980s.[143] This consultation eventuated in a 'Draft of the Inter-American declaration on the Rights of Indigenous Peoples', approved by the Inter-American Commission on Human Rights on 18 September 1995,[144] and a Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Commission on 26 February 1997.[145] At the (mainly) European regional level, the OSCE Helsinki Document 1992, 'The challenges of change', noted the particular problems of indigenous populations in the exercise of their rights.[146] The European Parliament has issued a stream of resolutions concerning indigenous peoples in the Amazon, Burma, Canada, India and Bangladesh, Mali and Niger, Mexico, Sarawak and the Sudan.[147] The most sweeping is the Parliament's resolution 'on action required internationally to provide effective protection for indigenous peoples'. This declares, *inter alia* that 'pursuant to UN provisions, and in the context of a non-violent and fully democratic procedure with due regard for the rights of other citizens, indigenous peoples have the right to determine their own destiny by choosing their institutions, their political status and that of their territory'.[148] Other organs of the European Union have also expressed interest and concern for indigenous peoples, mostly in connection with development policies.[149]

[140] The insertion of the references to *indigenous people* in the Asian Declaration and Plan of Action (Tehran, A/CONF.189/PC.2/9) is instructive in view of resistance to the notion of indigenousness in some countries of Asia – see ch. 2 in this volume.

[141] See ch. 11 of this volume.

[142] *Annual Report of the Inter-American Commission on Human Rights 1992–93*, OEA/Ser.L/V/II.83, Doc. 14, corr.1, 12 March, 1993, pp. 263–310.

[143] O. Kreimer, 'The beginnings of the Inter-American Declaration on the Rights of Indigenous Peoples', *St Thomas Law Review*, 9 (1996), 271–93.

[144] OEA/Ser/L/V/II.90, Doc. 9 rev.1, 21 September, 1995.

[145] 1,333rd session, 95th regular session.

[146] Ch. VI, The Human Dimension, para. 29.

[147] Van de Fliert, *Indigenous Peoples*, annex I.

[148] A3-0059/93, 9 February 1994.

[149] European Council resolution of November 1998 entitled 'Indigenous peoples within the framework of the development cooperation of the Community and Member States'.

2

Who is indigenous?: Concept, definition, process

> 'When *I* use a word', Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less'.[1]

The previous chapter presented raw statistics which claim to account for an indigenous world. The variability of data suggests that further effort is needed to appraise the underlying concepts through a legal/conceptual lens. The draft Declaration does not define the subjects of its concern. The WGIP 'floated' along for years without undertaking a serious examination of the scope of its developing standards, with the definition proposed by Sub-Commission Special Rapporteur Martinez-Cobo functioning as a vague gatekeeper – the WGIP performs its tasks 'bearing in mind' his report.[2] Despite embracing sundry groups from all continents,[3] the Working Group was stirred by the arrival in the 1990s of representatives of the Boers and Rehoboth Basters, claiming to be indigenous.[4] 'Regular' attenders were unhappy about the new presence. The arrivals made definition appear more pressing.[5] The politics

[1] Lewis Carroll, *Alice's Adventures in Wonderland* (1865), ch. 6.

[2] The study was already underway at the time of the first session of the WGIP in 1982 but had not been completed – E/CN.4/Sub.2/1982/33, para. 1; see D. Sanders, 'The legacy of Deskaheh: indigenous peoples as international actors', in Cohen (ed.), *Human Rights of Indigenous Peoples*, p. 75.

[3] This was not necessarily true of indigenous 'umbrella' organisations such as the World Council on Indigenous Peoples, which was slow to accept members from Asia and the Pacific; B. Kingsbury, 'The applicability of the international concept of "indigenous peoples" in Asia', in Bauer and Bell, *East Asian Challenge*, pp. 336–77, p. 358.

[4] See the paragraph on the Basters in the entry for Namibia in Minority Rights Group (ed.), *World Directory of Minorities* (London, Minority Rights Group, 1997), p. 504.

[5] The Chairperson/Rapporteur of the WGIP, M. Daes, made important contributions to the debate: see *Note on Criteria which might be Applied when Considering the Concept of Indigenous People*, E/CN.4/Sub.2/AC.4/1995/3, 21 June 1995; *Working Paper on the Concept of 'Indigenous People'*, E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996; *Supplementary Working Paper on the Concept of 'Indigenous Peoples'*, E/CN.4/Sub.2/AC.4/1997/2, 16 June 1997.

of definition were further sharpened by the presentation in 1998 and 1999 of a UN study on treaties, agreements and other constructive arrangements between indigenous peoples and minorities (the Alfonso Martinez report).[6] Chief among the study's conclusions is that specific 'indigenous peoples' are marked out in the Americas and Australasia, and that the notion makes little sense in the context of Africa and Asia, where all are 'indigenous'.[7]

Alfonso Martinez also argues that 'minority' is a notion frequently and improperly confused with 'indigenous people'. His reference is a reminder that the upsurge in ethnic consciousness, the 'politics of recognition',[8] etc., has not only implicated the indigenous, but has also been associated with the growth of provision for minority rights in international law.[9] The story of minority rights as an early conception of international law is not the same story as for indigenous peoples,[10] nor is the rights content. But there are overlaps.[11] Parallel to the WGIP, there is the UN Working Group on Minorities (WGM). Key texts of minority rights include Article 27 of the International Covenant on Civil and Political Rights (ICCPR), Article 30 of the CRC, the UN Declaration on the Rights of Persons Belonging to Minorities (UNDM), and the Council of Europe's Framework Convention for the Protection of National Minorities.[12] The recent growth of awareness and the emergence of specific standards on minority issues took a different trajectory from developments in indigenous rights. For minorities, key

[6] Final report by M. A. Martinez, E/CN.4/Sub.2/1999/20, 22 June 1999; an unedited version was presented to the WGIP in 1998.

[7] For contemporary reflections on the concept of indigenous peoples in the Asian context, see B. Kingsbury, ' "Indigenous peoples" in international law: a constructivist approach to the Asian question', AJIL 92 (1998), 414–57, and the same author's 'The applicability of the international legal concept of "indigenous peoples" in Asia', in Bauer and Bell, *East Asian Challenge*, pp. 336–77; B. K. R. Burman and B. G. Verghese, *Aspiring to Be: The Tribal/Indigenous Condition* (Delhi, Konark Publishers PVT LTD., 1998).

[8] See chs 1 and 17 of this volume.

[9] The utility of a minority rights strategy for indigenous groups is assessed in chapters 6 and 12 of this volume.

[10] P. Thornberry, 'On some implications of the UN declaration on minorities for indigenous peoples', in E. Gayim and K. Myntti (eds.), *Indigenous and Tribal Peoples – 1993 and After* (Rovaniemi, Northern Institute for Environmental and Minority Law, 1995), pp. 46–91.

[11] For an account of the development and content of minority rights up to 1990, see the present author's *International Law and the Rights of Minorities* (Oxford, Clarendon Press, 1991). The most useful later treatment is A. Spiliopoulou-Akermark, *Justifications of Minority Protection in International Law* (Uppsala, Iustus Forlag, 1997). See also C. Brölmann, R. Lefeber and M. Zieck, *Peoples and Minorities in International Law* (Dordrecht, Martinus Nijhoff Publishers, 1993); A. Fenet, G. Koubi, I. Schulte-Tenckhoff and T. Ansbach, *Le Droit et les Minorités* (Brussels, Emile Bruylant, 1995); A. Phillips and A. Rosas (eds.), *Universal Minority Rights* (London and Åbo, Minority Rights Group and Åbo Akademi, 1995).

[12] All of these texts are discussed in later chapters.

political events and processes include the unravelling of the Soviet Union and Yugoslavia in the 1990s, with all the passions and suffering thereby unleashed. International organisations reacted at different speeds, depending upon political configuration and *modus operandi*. A thin array of specific standards in 1989 had been replaced by a panoply of minority rights in 2000.[13] The discourse of minority rights impacts on indigenous peoples both positively and negatively. Positively, it helps to raise awareness of ethnic/cultural issues; negatively, it implicates indigenous groups in any backlash against the strident assertions of ethnic exclusivity associated with events in the former Yugoslavia and elsewhere.[14]

The present chapter takes a preliminary look at indigenous peoples through a selection of general statements which represent key indicators of international law and practice. The further elaboration of concepts through the matrix of human rights practice is reserved for later chapters. Most of the instruments and statements assessed here and elsewhere were drafted primarily by governments and thus reflect a largely external view.[15] In contrast, the draft Declaration and indigenous statements can be quarried to provide a window on the self-understanding of indigenous groups.[16] The chapter deals in the broad conceptualisation of the issue, including complications from the 'neighbour effects' of rights of minorities and rights of peoples generally. The narrower question of definition is also accounted for. Conventional approaches to concept and definition involve recourse to subjective (the will to survive) and objective factors (possession of distinct 'characteristics'). These have been supplemented by problematising approaches which seek to illuminate the web of ethical, political and epistemological considerations justifying the use of 'indigenous', and its contestation.[17]

Kennewick reflections

'Indigenous' is a term of ordinary language in English and Spanish; it may have less resonance in other languages.[18] The term carries a span of meanings. Consider the Kennewick case. One of the oldest human skeletons ever found in North America was discovered on 28 June 1996 in the Columbia

[13] P. Thornberry, 'In the strongroom of vocabulary', in P. Cumper and S. Wheatley (eds.), *Minority Rights in the 'New' Europe* (Dordrecht, Martinus Nijhoff, 1999), pp. 1–14.

[14] See the introduction to this volume.

[15] The degree of indigenous input into the various schemes varies widely.

[16] As elsewhere in the present work, the draft Declaration is taken to approximate a generalised indigenous 'position' on many issues.

[17] See the interesting attempt by Kingsbury to advance our understanding through a 'constructivist' approach at n. 7 above.

[18] Kingsbury, '"Indigenous peoples" in international law', 422.

river near Kennewick, Washington by two residents of nearby West Richland.[19] The skeleton was radiocarbon dated to 8410 BP.[20] Examination revealed skull features untypical of modern American Indians. Similar skull features to Kennewick – a taller, narrower morphology than for the Indians – have been described as 'pre-mongoloid', 'proto-mongoloid', 'archaic-mongoloid' and 'proto-caucasoid'.[21] The skeleton fell within the territory of the Umatilla Indians, who in coalition with other tribes filed a claim for the skeleton under the Native American Graves Protection and Repatriation Act.[22] In accordance with their religion, the Umatilla proposed to bury the bones in a place known only to them.[23] A group of anthropologists mounted a legal challenge to the Umatilla plans. The bones were held in the custody of the US Army Corps of Engineers. The use of terms such as 'proto-caucasoid' led to claims that the skull was 'Caucasian', and that such 'Caucasians' were the earliest peoples of North America, predating the American Indians.[24] Such claims go beyond the cautious descriptions of archaeologists and anthropologists, some of whom content themselves with remarking on the distinctiveness of the 'Paleoindian sample' compared to more recent Holocene[25] American Indians. In this, 'Kennewick Man' joined 'Wizard's Beach Willie' and the 'Spirit Cave Mummy' as 'bones of contention'.[26] Legal battles between Indian groups and scientists represent only the tip of the iceberg. Kennewick, widely referred to as a 'White Man', provoked further tabloid claims of the inappropriateness of apologies by 'Whites' for wrongs done to the Native Americans, since they did the same to these early 'Caucasians'.[27] Worse, instead of ending up in reservations like the Indians, these early 'Whites' were exterminated. Thus, the question of who got to America first sinks into 'a swamp of fossilised politics, racial myth and archaeological angst'.[28] The polemics heated up the issue of historical justice, who is to blame for what, and what reparation, if any,

[19] A. L. Slayman 'Reburial dispute', *Archaeology, Online News*, 10 October, 1996.

[20] With an allowance of plus or minus 60 years.

[21] Slayman, 'Reburial dispute', p. 1.

[22] A 1990 law that provides for the repatriation to tribes of Indian skeletons and artifacts.

[23] T. Allen-Mills, *The Sunday Times*, 15 June 1997, 22. According to Slayman, 'Reburial dispute', p. 2, some of the tribes in the coalition were disposed to allow scientific examination of the skeleton through non-destructive analysis.

[24] Compare the Washitaw Nation – blacks who claim to have moved from Africa to the Americas when the continents were joined, and to pre-date the Indians: J. Friedman, 'Indigenous struggles and the discreet charm of the bourgeoisie', *Australian Journal of Anthropology*, 10(1) (1999), 1–14.

[25] *C.* 8500 BP to present, Slayman, 'Reburial dispute', p. 1.

[26] See the comments in Allen-Mills n. 23 above on the Spirit Cave dispute, and the fate of 'the Buhl skeleton' in *The Sunday Times*, 15 June 1997, 22.

[27] Consider A. Roberts, 'First scalp for truth in the race debate', *The Sunday Times*, 15 June 1997, p. 5.

[28] Allen-Mills, *The Sunday Times*, 15 June 1997, 22.

should be made for historical wrongs. Kennewick waters appear calmer now. Detailed examination suggests that the Man is not a caucasoid,[29] nor apparently related to modern American Indians.[30] Mysteriously, scientists suggest that his features are like those of the Ainu (of Japan) or other South Asian group.[31] The polemics none the less encapsulate contemporary debates on indigenous peoples, including the question of indigenous rights in relation to the rights of others. They suggest readings of 'indigenous' which may carry moral and legal weight. The fact that the understandings and claims are locked into political struggle serves as a reminder that categories and definitions rarely function in a political vacuum, in the United States, in the international community, or anywhere.

The Kennewick debates suggest four interwoven strands in 'indigenous'. In the first, the term suggests *association with a particular place* (usually lengthy)[32] – a locality, a region, a country, a State. Place is important: a particular place, not an amorphous space. In this sense, we are all indigenous to somewhere, we have roots (except perhaps 'rootless cosmopolitans'?). Uprooting peoples from areas to which they are indigenous results in disorientation, disempowerment and loss. This link with ancestral territory, is caught by the texts of some international instruments.[33] The former Chairperson of the WGIP has suggested that indigenous peoples are 'groups which are native to their own specific ancestral territories . . . rather than persons that are native generally to the region'.[34] The coupling of space and peoples alerts us to the importance of territory, of land rights in the indigenous context, the safeguarding and promotion of which is a key reflex. Anti-Indian Kennewick polemics threaten the deep association of American Indians with ancestral territories, create anxiety and invite rebuttal. This sense of 'indigenous' is reflected in terms such as 'native'. Here, positive aspects recognised in 'native land' and 'native country' coexist with a negative sense of 'the inferior inhabitants of a place subjected to alien political power or conquest' – the latter 'was particularly common as a term for

[29] Studies carried out in February and March 1999 under the auspices of the UN Interior Department are published on internet site www.cr.nps.gov/aad/kennewick/kennewick.htm

[30] Information from Kennewick Man Virtual Interpretive Centre, Tri-City Herald, 15–16 October 1999.

[31] For further intriguing possibilities on 'ancient Europeans' in the Americas, see 'Stone Age sailors "beat" Columbus to America', *The Observer*, 28 November 1999, p. 7.

[32] Very lengthy in the case of the skeleton!

[33] On the indigenous texts, see below. On the subject of minority rights, see Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe, Article 1 of which defines 'national minority' in terms of a group of persons in a State who 'a. reside on the territory of that State and are citizens thereof; b. *maintain longstanding, firm and lasting ties* with that State' (present author's emphasis).

[34] Daes, *Working Paper*, para. 64.

non-Europeans in the period of colonialism and imperialism'.[35] For this, indigenous was both 'a euphemism and . . . a more neutral term'.[36]

A second, closely related idea is that 'indigenous' is synonymous with *prior inhabitation* – 'we were here before you, so we are indigenous'. This is a strong meaning in ordinary speech, and in some political contests it is proposed as the *unique* meaning of indigenous. This is about historical priority: where priority can be established, the prior group is indigenous; where it cannot, 'indigenous' is meaningless, applying to everyone and no one.[37] On the basis of historical priority, Asian States are inclined to assert that 'indigenous' is not an appropriate descriptor for Asia. They have described international concern on indigenous peoples as dominated by the 'Native American stereotype' – groups overrun by settlers from overseas, dispossessed and marginalised.[38] The rejection of 'indigenous' by some Asian States is difficult to square with their use of terms such as *Adivasi*, a Sanskrit-derived Bengali word which literally means 'original inhabitant',[39] and the general employment in the law and practice of Asian States of terms such as 'indigenous' and 'aboriginal'.[40] In Kennewick, the historical overlays of cultures produced arguments on priority as a kind of trump card. The use of indigenous in the sense of earlier inhabitants is reflected in international definitions (Martinez-Cobo) or statements of coverage of particular instruments (ILO Convention No. 169). In her analysis of linguistic usage in a number of languages (English,[41] French,[42] German,[43] Spanish[44]), the former Chairperson of the WGIP contends that 'the semantic roots of the terms historically used in modern international law share a single conceptual element: priority in time'.[45]

'Indigenous' also carries a sense of *original or first inhabitants*. Such peoples would not only be historically prior but the first human beings to inhabit a territory. As Kennewick shows, this may be even more difficult to establish

[35] R. Williams, *Keywords; A Vocabulary of Culture and Society* (London: Fontana Press, 1988), p. 215.

[36] *Ibid*.

[37] See various remarks in the present chapter on Alfonso Martinez, and Asian issues.

[38] UN Doc. E/CN.4/Sub.2/1996/21, para. 39 (observer for Bangladesh).

[39] See Timm, *Adivasis of Bangladesh*. See also J. Rehman, 'Indigenous peoples at risk: a survey of the indigenous peoples of South Asia', in Burman and Verghese, *Aspiring to Be*, pp. 72–121.

[40] Submission to the WGIP by the Asian Indigenous and Tribal Peoples Network, 26–30 July 1999, with legal examples from the Philippines, Malaysia, Japan, Nepal, India, Pakistan and Bangladesh.

[41] Indigenous.

[42] Autochtone.

[43] Ursprung.

[44] Indígena.

[45] *Working Paper on the Concept of 'Indigenous People'*, UN Doc. E/CN.4/Sub.2/AC.4/1996/2, para. 10.

than historical priority. 'Origin' refers to a point in time from which we trace subsequent developments. Questions about the moral and legal relevance of historical priority would apply with redoubled force to indigenous as 'original'. Only very few groups could claim such originality in this sense. The sense of firstcomers appears clearest in 'aboriginal' – *ab origine*, from the beginning – though even here, reputable English dictionaries can be tentative and apply the term additionally to groups 'found' by (European) colonists,[46] a usage reflected in the preamble to the Australian Aboriginal and Torres Strait Islander Commission Act 1989, which concerns itself with descendants of those who 'were the inhabitants of Australia before European Settlement'. The Grand Council of the Crees of Quebec asserts that 'We are the original inhabitants of our territory, and have occupied our land and governed ourselves for the past 9000 years'.[47] The term *Orang Asli* in Malaysia translates as 'original peoples' or 'first peoples'. The originality of groups appears is also intimated by evocative descriptions such as First Nations.[48]

A fourth strand accounts for indigenous peoples as *distinctive societies*.[49] This is not about history or place but about character and 'the diacritical marks of culture',[50] and refers to whole societies exhibiting cultural patterns which differ from those of the dominant society. Negative accounts of cultural distinctiveness rank such societies as 'primitive' or 'backward' – terminological legacies of the nineteenth century.[51] Right into the twentieth century, international law was replete with tracts on 'backward peoples'.[52] The first multilateral indigenous treaty of the UN era devoted to the indigenous – ILO Convention 107 of 1957 – ranked peoples according to their level of advancement. ILO Conventions distinguish 'tribal' from 'indigenous' – the former term takes much of the burden of the distinctive society, while the latter is expressed as historical priority. Burman notes that 'since the nineteenth century, the word "tribe" has been generally used synonymously with the "primitive" '.[53] To be accused of 'tribalism' is positively hostile: this is the scourge that African governments have striven to eliminate; this is the

[46] *Concise Oxford Dictionary* (4th edn, 1951), p. 4.

[47] 'A Message regarding the rights of the Crees and other aboriginal peoples in Canada', in *Sovereign Injustice; Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Quebec: Grand Council of the Crees, 1995).

[48] For use in Canada, see Minority Rights Group (ed.), *World Directory*, pp. 13–16.

[49] The term is used in preference to 'distinct society', associated with the claims of Quebec – see Grand Council of the Crees, *Sovereign Injustice*.

[50] Cf. 'shared or diacritical cultural traits': B. K. Roy Burman, *'Indigenous' and 'Tribal' Peoples and the UN International Agencies* (New Delhi: Rajiv Gandhi Institute for Contemporary Studies, 1995), p. 21.

[51] A. Kuper, *The Invention of Primitive Society; Transformations of an Illusion* (London and New York: Routledge, 1988).

[52] The classic work is M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (reprinted New York, Negro Universities Press, 1969).

[53] Burman, *'Indigenous' and 'Tribal'*, p. 1.

representation of the ethno-nationalist sickness of Bosnia, Rwanda and elsewhere.[54] The tribal category is implicated in condemnations of colonialism, of which it is claimed to be an invention, a means of imposing order on populations in colonial territories.[55]

Approaches to definition and description

'Indigenous' is a contemporary designator in many international instruments. ILO usage has the longest pedigree, using the term in the 1930s.[56] Terminology has wavered to include the Committee of Experts on *Native* Labour,[57] the Convention on Indigenous and other Tribal and Semi-Tribal *Populations*,[58] and the Convention on Indigenous and Tribal *Peoples*.[59] Outside the ambit of the ILO, Article 30 of the Convention on the Rights of the Child refers to the rights of children of 'persons of indigenous origin'. The approach in the UN draft Declaration on Indigenous Peoples is to make 'indigenous' take on all the Kennewick senses, and to drop 'tribal'. The representative of Bangladesh at the WGIP suggested that consideration should be given to replacing the term 'indigenous' with another term 'which could be defined more effectively'.[60] But what term would be appropriate? While regretted by self-describing indigenous peoples, the word 'populations' continues to appear in the title of the WGIP. In defence of this, it may be argued that, while its primary connotation is quantitative and statistical, the term does at least carry a collective imprint. On whether we should speak of indigenous *peoples* or *people*, the latter was promoted by Canada in the negotiations on the International Year (1993).[61] The UNCED[62] and the

[54] Hence T. Franck's terminology in 'Postmodern tribalism and the right to secession', in C. Brölmann *et al*., *Peoples and Minorities*, pp. 3–27.

[55] T. Ranger, 'The Invention of Tradition in Colonial Africa', in E. Hobsbawm and T. Ranger (eds.), *The Invention of Tradition* (Cambridge University Press, 1983), pp. 211–62, at p. 248.

[56] As in the Recruiting of Indigenous Workers Convention 1936; the Penal Sanctions (Indigenous Workers) Convention 1939, and the Labour Inspectorates (Indigenous Workers) Recommendation 1939: *Conventions and Recommendations Adopted by the International Labour Conference 1919–66* (Geneva, ILO, 1966).

[57] Established by the Governing Body of the ILO in 1926.

[58] Convention No. 107, 1957.

[59] Convention No. 169, adopted during the 76th session of the ILO in 1989, in force from 5 September 1991.

[60] Report of the WGIP on its 15th Session, UN Doc. E/CN.4/Sub.2/1997/CRP.1, para. 31.

[61] D. Marantz, 'Issues affecting the rights of indigenous people in international fora', in *People or Peoples; Equality, Autonomy and Self-Determination: The Issues at Stake of the International Decade of the World's Indigenous People* (Montreal, International Centre for Human Rights and Democratic Development, 1996), pp. 9–77, at pp. 30–1.

[62] UN Doc. A/CONF.151/26 (vol. III), ch. 26.

World Conference on Human Rights opted for indigenous 'people',[63] with the former regularly using the formula 'indigenous people and their communities'.[64] The Convention on Biological Diversity did not use people/s but opted for 'indigenous and local communities'.[65] The UN Conference on Population and Development[66] committed itself to 'people', as did the World Summit for Social Development.[67] The 4th World Conference on Women also opted for 'people'. The year 1994 marked the beginning of the Decade of the World's Indigenous *People* as 1993 was their International Year.[68] 'Peoples' suggests a group dimension to claims of right, and a possible question on self-determination, which many governments prefer to avoid. The issue remains sharp. Reports of the Commission Drafting Group habitually incorporate disclaimers on the use of 'peoples and 'people'.[69] Whether a government representative tempers an intervention by placing an 's' after 'people' may be regarded by the indigenous as a sign that the government is for ('s') or against (no 's') indigenous rights. The disagreement is linked with the claims made by indigenous groups on the basis of peoples' rights.[70] As an indigenous representative at the World Conference on Human Rights put it:

> They have called us populations, 'communities' 'groups', 'societies', 'persons', 'ethnic minorities'; now they have decided to call us 'people' in the singular. In short, they will use any name they can think of, as long as it is not peoples

[63] UN Doc. A/CONF.157/24 (Part I). The Working Paper, *Elements for Consideration for Possible Inclusion in a draft Final Document*, based on ideas and principles drawn form the preparatory process, consistently used the plural 'peoples', UN Doc. A/CONF.157/PC/82.

[64] Chapter 26 of Agenda 21 is entitled: 'Recognizing and strengthening the role of indigenous people and their communities'.

[65] *Convention on Biological Diversity, Text and Annexes* (Geneva, UNEP, 1994). The Convention entered into force on 29 December 1993.

[66] *Report of the International Conference on Population and Development* (Cairo, 5–13 September 1994), UN Doc. A/CONF.171/13 and Add. 1.

[67] *Report of the World Summit for Social Development* (Copenhagen, 6–12 March 1995), UN Doc. A/CONF.166/9. See for example the Copenhagen Declaration, para. 26, Commitments 4 and 6.

[68] Consult resolution 1994/26 – 'International Decade of the World's Indigenous People', and 1994/28 – 'A Permanent Forum in the United Nations for Indigenous People', of the UN Commission on Human Rights: UN Docs. E/1994/24 and E/CN.4/1994/132, pp. 98–101, pp. 103–4.

[69] The report of the First Session contained the following: 'This report is solely a record of the debate and does not imply acceptance of the usage of either the expression "indigenous peoples" or "indigenous people". In this report, both are used without prejudice to the positions of particular delegations, where divergences of approach remain': E/CN.4/1996/84, para. 3. The disclaimer approach is followed in later reports.

[70] R. L. Barsh, 'Indigenous peoples at Vienna: what's next after the battle of the "S"', in J. Patel (ed.), *Addressing Discrimination in the Vienna Declaration* (Tokyo), IMADR, 1995, pp. 23–30.

with an 's'. They are willing to turn universality on its head to avoid recognizing our right to self-determination.[71]

ILO statements of coverage[72]

In view of UN debates about the global reach of the draft Declaration, it is notable that ratifications of ILO 107 come from countries in Africa, Asia, the Americas and Europe; and ILO 169 has been ratified by States in the Americas, Europe and Oceania.[73] The path-breaking study *Indigenous Peoples; Living and Working Conditions of Aboriginal Populations in Independent Countries* devoted a chapter to the definition of 'indigenous',[74] which elicited an extraordinary collection of national attempts to define. Some were little more than stereotypical, patronising and racist accounts of 'exotic' peoples among the national community.[75] The authors of the study decided 'to lay aside the complex problem of *a priori* definition of "indigenous"', recording the complaint of the Director of the Inter-American Indian Institute about the 'confused and illogical classification, quantitative as well as qualitative, encountered in almost all American countries regarding the aboriginal population'.[76] Instead of definition, they offered the following description as a purely empirical guide:[77]

> Indigenous persons are descendants of the aboriginal population living in a given country at the time of settlement or conquest . . . by some of the ancestors of the non-indigenous groups in whose hands political and economic power presently lies. In general, these descendants tend to live more in conformity with the social, economic and cultural institutions which existed before colonisation or conquest . . . than with the culture of the nation to which they belong; they do not fully share in national economy and culture owing to barriers of language, customs, creed, prejudice . . . and other social and political factors.

[71] Statement on behalf of the North American Region by Chief Ted Moses (Grand Council of the Crees) on Agenda Item 8 (undated, on file with author).

[72] ILO 'definitions' are not drafted as canonical statements but, more modestly, as statements of the scope of the particular instrument. Nevertheless, they add to the stock of general understanding and function as valuable pointers to the leading issues.

[73] By December 2001, ILO Convention 169 had been ratified by fourteen States. A number of states – Austria, Brazil, Switzerland – are considering ratification.

[74] International Labour Office, Geneva, 1953.

[75] The study cited the work of the Indian Commissioner for Scheduled Castes and Scheduled Tribes in collating State attempts to distinguish the members of aboriginal groups from the rest of the population. They include the extraordinary statement from the Vindhya Pradesh government which described the characteristics of aboriginals as: 'dark skin and flat noses, preference for fruits, roots, and animal flesh, rather than food grains, the use of bark and leaves of trees as clothes on ceremonial occasions, nomadism, witch-doctoring, and the worship of ghosts and spirits' – *Ibid*., p. 14.

[76] *Ibid*., p. 8.

[77] *Ibid*., pp. 25–6.

> When their full participation in national life is not hindered by one of the obstacles mentioned above, it is restricted by historical influences producing in them an . . . overriding loyalty to their position as members of a given tribe.[78]

The approach recognises the significance of historical movement, characteristic cultural identification between the indigenous and earlier – pre-settlement or conquest – inhabitants of the territory, the relevance of discrimination or objectification by outsiders and the sense of group loyalty or solidarity, linked to a certain exclusivism among tribal membership. The lack of participation in national processes stems from a combination of external and internal factors. 'Indigenous' and 'tribal' appear in the description without the conceptual boundaries mapped out in ILO conventions. The study contrasts the indigenous with the power-holding descendants of the non-indigenous groups, a description which fits the Americas and Australasia better than Africa and Asia. The document also refers to marginalised individuals who did not participate either in the organised life of the indigenous society or the nation as a whole. From this perception develops the 'semi-tribal' category in 107: those 'groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community'.[79] Although, as Burman notes, the semi-tribal category gives some sense of cultures as dynamic, 'a teleological world-view',[80] there is also a strong push to integration in the 107 formulation, which is reflected in the text as a whole.[81] 'Semi-tribal' is a term that catches a sense of individuals living out an existence on the margins of conurbations great and small in a kind of cultural half-light – other instruments do not so clearly incorporate such populations. It is notable that Convention 107 accepts the tribal category as dominant – postulating that, while all indigenous populations are tribal, not all tribal populations are indigenous. Some 'tribal or semi-tribal populations in independent countries' are regarded as being at 'a less advanced stage than the stage reached by other sections of the national community' with status regulated by own customs or special laws;[82] others are regarded as indigenous 'on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation' and which 'irrespective of their legal status' live more in conformity with the institutions of that earlier time.[83] The rights in the Convention apply equally to those regarded as indigenous and those not so regarded. The Chairperson of the Working Group on Indigenous Populations comments that, in view

[78] *Ibid.*, p. 26.
[79] Article 1.2.
[80] Burman, *'Indigenous' and 'Tribal'*, p. 6.
[81] See below ch. 13.
[82] Article 1.1(a).
[83] Article 1.1(b).

of the subsumption of 'indigenous' by 'tribal', 'the source of rights [according to the Convention] is not . . . a people's history of being conquered or oppressed, but its history of being distinct as a society or nation'.[84] The association between conquest or colonisation and the populations is made for those who are 'indigenous'. 'Colonisation' is not perhaps the same as 'colonialism'; the latter describes settlements and settler societies, without the nuance of external exploitation by colonial powers.[85]

The *populations* in ILO Convention No. 107 became *peoples* in ILO Convention No. 169,[86] Article 1 of which provides that the Convention applies to:

> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Convention 169 is potentially much wider in scope than 107 in that the 'independent countries' now represent virtually all of the globe. The newer Convention widens the indigenous–tribal distinction while fundamentally modifying 107's descriptions. In 107, 'indigenous' was subsumed under 'tribal'; the two are split in 169. In the case of tribal peoples, the reference to being 'at a less advanced stage' than the rest of the population has been replaced by an account of their distinctiveness. The move from the vertical and hierarchical narratives of 1957 (advanced/less advanced) towards a horizontal, equality-with-difference approach is consonant with the move from 'populations' to 'peoples'. The tendency towards self-determination inherent in 'peoples' has diminished force in the case of 'tribals' through the understanding that while the latter status is regulated *internally*, it is also regulated *externally* by special laws or regulations.[87] The account of indigenous distinctiveness resides in their description as peoples who retain some of their own institutions, recalling Kymlicka's distinction between national minorities (in which he includes examples of indigenous peoples) which are cultures, 'more or less institutionally complete',[88] and ethnic groups which

[84] UN Doc. E/CN.4/Sub.2/AC.4/1996/2, para. 22.
[85] Burman, *'Indigenous' and 'Tribal'*, p. 6.
[86] The Convention was adopted by the International Labour Conference at its 76th Session, Geneva, 27 June 1989 and entered into force on 5 September 1991.
[87] A point picked up by Daes, *Working Paper*, para 29 – '[a] people may be tribal, either by its own choice . . . or without its consent . . . A people may be classified as "indigenous" only if it so chooses'.
[88] Kymlicka, *Multicultural Citizenship*, ch. 2.

are not.[89] The institutions which distinguish indigenous peoples contrast with the distinguishing 'conditions' and 'customs or traditions' of the tribal peoples. As with 107, 'indigenous' is linked with the factor of colonisation, though the association is loosened by the reference to 'the establishment of present state boundaries' as an alternative account of relevant ancestors of present peoples.[90] The 'descent' criterion is taken over from 107. The term, which has echoes of a 'biological' or 'race' approach to ethnic identity and continuity,[91] is rarely used in international human rights law.[92] In terms of Convention 169, ancestors of indigenous peoples may have existed in countries which did not experience conquest or colonisation.[93] On the other hand, the retention of 'populations' – those from whom descent is claimed – who give rise to indigenous 'peoples' – who claim on the basis of that descent, suggests a legal intervention of some kind to provoke the qualitative move from a 'population' to a 'people'. It is as if the peoples were *established* by colonisation or analogous processes. An ILO *Guide* to Convention 169 explains the continuing attachment to the use of both 'indigenous' and 'tribal' in terms of the global reach of the Convention and its applicability to diverse situations.[94] The proposed American Declaration on the Rights of Indigenous

[89] Hence the critique of the ILO 'definition' by S. Wiessner, who argues that it is 'over-inclusive' and would, *ex facie*, allow a group such as the Hungarians of Romania to claim indigenous status: Wiessner, 'Rights and status of indigenous peoples', *Harvard Human Rights Journal*, 12 (1999), 57–128, at 112. The argument is in the context of an attempt by the author to reach an essentially reductionist definition, which may not reflect sufficiently on the self-definition component of the ILO formula, nor on any processes of negotiation which may assist the resolution of an issue of definition in a particular case.

[90] Thus narrowing the distinction between indigenous and tribal: Daes, *Working Paper*, para. 28.

[91] See the extensive discussion of the criterion of 'ancestry' in Martinez-Cobo, E/CN.4/Sub.2/L.622, paras. 31 ff.

[92] See for example Article 1.1 of the International Convention on the Elimination of All Forms of Racial Discrimination.

[93] Canada proposed to replace the colonisation reference with a reference to 'contact' – between original inhabitants and incomers: International Labour Conference 76th Session 1989, report IV (2A), Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), 13.

[94] Thus, '"indigenous" refers to those "who occupied a particular area before other population groups arrived . . . a description . . . valid for North and South America, and in some areas of the Pacific'. In most of the world, however, 'there is very little distinction between the time at which tribal and other traditional peoples arrived in the region and the time at which other populations arrived. In Africa . . . there is no evidence to indicate that the Maasai, the Pygmies or the San . . . , namely peoples who have distinct social, economic and cultural features, arrived in the region . . . before other African populations. The same is true in some parts of Asia'. Hence the ILO decision to include both categories – 'to cover a social situation, rather than to establish a priority based on whose ancestors had arrived in a particular area first' – M. Tomei and L. Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169* (Geneva, 1996), p. 5.

Peoples dispenses with 'tribal', while adopting the substance of the ILO description of tribal peoples, and does not define 'indigenous'.[95]

The descriptions in 107 and 169 appeal to characteristics of various kinds in a broadly objectivist approach to group recognition. The inclusion of 'self-identification as indigenous or tribal'[96] in 169 is not reflected in 107. It is not the only criterion of indigenous or tribal, but it is 'a fundamental criterion'.[97] In part, such self-identification serves to distinguish tribal groups from minorities – if one points only to distinctive characteristics, it may be hard to distinguish such characteristics from those possessed by minorities or by other peoples. The paragraph does not indicate if it is concerned with individual acts of self-identification, or a collective process. If self-identification is to establish the *groups* to which the Convention applies, this suggests a collective act of self-identification. On the other hand, the question is not entirely free from doubt, and the affirmation of the value of self-identification could carry over into regarding self-describing exercises by individuals as appropriate modes of constituting an indigenous group. However, international law does not fully accept individual declarations of group membership as paramount.[98] The former Chairperson/Rapporteur of the WGIP comments on the subjective criterion in Convention 169 as involving 'the *choice of the group* to be and to remain distinct, which is an exercise in self-determination'.[99] Her point on group choice follows from the text of 169, but it is more difficult to extract a notion of self-determination from Convention 169 in view of Article 1.3, according to which the use of 'peoples' is not to spill over into general conclusions of international law – self-determination is the obvious candidate for exclusion.

Many governments would contest the Chairperson's view, while conceding that the Convention's use of 'peoples' stretches the discourse of international law. Those governments supporting introduction of 'peoples' into Convention 169 did so for a variety of reasons. For Colombia, it referred to 'the sense of identity of [the] peoples'.[100] For Gabon, the term referred to 'a social and cultural community which is distinct in its identity' and 'would go with that of "territory" referring to the space in which they live'.[101] For

[95] Article 1 of the text approved by the Inter-American Commission on Human Rights, 26 February 1997. The draft is discussed in ch. 16 of this volume.

[96] Article 1.2.

[97] 'Self-identification would not appear to be the sole criterion applied to coverage of the Convention' – International Labour Office Commentary, replying to the Government of Sweden, *Partial Revision*, Report IV (2A), p. 13.

[98] See especially chs 6 and 8 in this volume. Compare *SIK v Denmark* (ILO), GB. 277/18/3; GB. 280/18/5, para. 33.

[99] E/CN.4/Sub.2/AC.4/1996/2, para. 30 (present author's emphasis).

[100] International Labour Conference 76th Session 1989, Report IV (2A), *Partial Revision of the Indigenous and Tribal Populations Convention 1957 (No. 107)*, p. 9.

[101] *Ibid.*, p. 10.

Switzerland, the use of peoples was 'an essential part of changing the overall orientation' of Convention 107.[102] Canada understood it in relation to the 'attainment of greater levels of autonomy' at the domestic level.[103] Swepston claims that the effect of using 'peoples' 'will be a positive one for increasing the recognition in international law of the right of these peoples to a separate and continued existence'.[104] He also refers to *indigenous* peoples as 'a limiting designation',[105] which suggests that the recognition of rights implied in indigenous peoples will be something less than for 'peoples' *simpliciter*. This appears to have been the understanding of the drafters of the Convention. Supporters of 'peoples' were cautious and a number of governments resolutely opposed the term. However, some *travaux* have diminished value in view of many changes in the international profile of governments on the self-determination issue. For example, current supporters of self-determination language in the UN draft Declaration such as Finland and Norway counselled caution in the drafting of 169,[106] the latter explicitly proposing that '"peoples" does not imply rights beyond the scope of the Convention'. This may be so, but the rhetorical force of 'peoples' suggests the inception of a rolling programme of claims. Governments are well aware of this and were so aware when Convention 169 was drafted.[107]

Special Rapporteur Martinez-Cobo

Beyond the ILO, the most notable contribution to the elucidation of the concept of indigenous peoples is found in the massive *Study of the Problem of Discrimination against Indigenous Populations*[108] by UN Special Rapporteur J. Martinez-Cobo. A preliminary working definition was constructed in 1972:

> Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national,

[102] *Ibid*., pp. 10–11.
[103] *Ibid*., p. 9.
[104] L. Swepston, 'A new step in the international law on indigenous and tribal peoples': ILO Convention No. 169 of 1989', *Oklahoma City University Law Review*, 15(3) (1990), 677–714, at 694.
[105] *Ibid*., 695.
[106] ILC 76th session, Report IV (2A), *Partial Revision*, p. 10.
[107] See remarks of Bolivia, Chile, Ecuador, India and the United States, *Ibid*., pp. 8–11.
[108] UN Doc. E/CN.4/Sub.2/1986/7 and Add 1–4; UN Sales No. E.86.XIV.3.

> social and cultural characteristics of other segments of the population which are predominant.[109]

The paragraph vividly recalls colonial systems – saltwater colonialism – and not simply a process of colonisation, and describes a brutal collision of cultures, with winners and losers. This appears from the explanation offered by the author of the study: in the light of the phrase 'from other parts of the world', he explained that this was necessary because if that were not the case, 'the question would have been one involving a problem between indigenous populations'.[110] This leaves open the application of the definition, to, say, Africa. In that continent, are there only problems 'between indigenous populations'? Colonialism is intimated because conquest, settlement, etc., led to a situation of dependence on a metropolitan power which exploited land, goods and peoples to its own advantage.[111] The political processes recorded in the definition describe the historical move in the international legal status of many groups from peoples ('nations' in the sense of treaty-making nations with all the attendant vocabulary of pre-imperialist international law) to populations (their diminished condition in the twentieth century);[112] whereas ILO 169 appears to postulate a move from populations to peoples by the grace of colonialism.[113] This is not the whole definition. In a separate paragraph, the author reflected on isolated or marginal populations who were introduced thus:

> Although they have not suffered conquest or colonisation, isolated or marginal population groups existing in the country should also be regarded as . . . 'indigenous' . . . for the following reasons: (a) they are descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there; (b) . . . they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterized as indigenous; they are . . . placed under a State structure which incorporates . . . characteristics alien to theirs.[114]

This represents a notable extension of the original concept. The colonial context is not, after all, necessary to the recognition of all indigenous groups. However, the explanation of the indigenousness of these groups exhibits a certain fragility – they 'should be' regarded as indigenous, and have customs and traditions 'similar to' those of the indigenous. The paragraph is therefore more prescriptive of indigenousness than we find elsewhere. The recognition of marginal populations exhibits an affinity with the semi-tribal groups in Convention 107. As a result of further years of study, Martinez-Cobo

[109] UN Doc. E/CN.4/Sub.2/L.566, para. 34.
[110] UN Doc. E/CN.4/Sub.2/L.566, para. 39.
[111] *Ibid.*, para. 41.
[112] See the next chapter, and the Treaty Study of Special Rapporteur Alfonso Martinez, for incidents in these developments.
[113] Discussed above.
[114] *Ibid.*, para. 45.

advanced a definition of indigenous peoples 'from the international point of view' (*the international definition*) which differs in significant respects from the earlier attempt:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[115]

This 'historical continuity' consists in the continuation for an extended period reaching into the present of one or more factors: '(a) occupation of ancestral lands, or at least of part of them; (b) Common ancestry with the original occupants of those lands; (c) Culture in general, or in specific manifestations . . . (d) Language . . . (e) Residence in certain parts of the country, or in certain regions of the world; (f) Other relevant factors'.[116] The most obvious difference between the international and the working definitions is the move from 'populations' to 'communities, peoples and nations'. The working definition was restricted to existing descendants of the original peoples, linking indigenousness with the task of tracing ancestry. This may be appropriate on a short span but less so through a succession of historical changes. Neither does 'descent' necessarily cohere with the notion of self-identification. In the Australian case of *Attorney General (Commonwealth) v State of Queensland*,[117] the Federal Court considered the application of 'aboriginality' to those only dubiously of aboriginal descent, observing that 'The closer to the boundary the person's genetic history . . . places him, the greater the influence of his conduct[118] and of the conduct of the aboriginal community'.[119] In the later case of *Gibbs v Capewell*, Drummond J. observed that the 'less degree of aboriginal descent, the more important cultural circumstances become in determining whether a person is "Aboriginal" '; he also rejected the argument that 'the only relevant consideration is the genetic one'.[120] The international definition subsumes descent, etc., under historical continuity – described in terms of lands, ancestry, culture, language, residence, and other, unnamed 'relevant factors'. 'Historical continuity' is plausibly a more appropriate overarching concept than descent for a definition recognising cultural formations, though it has also been regarded as 'potentially limited, and

[115] UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para. 379.
[116] *Ibid*., para. 380.
[117] See S. Pritchard, *The United Nations Draft Declaration on the Rights of Indigenous Peoples: An Analysis* (ATSIC, 1996), pp. 42–3.
[118] Including self-identification.
[119] (1990) 94 ALR 515, 517–18.
[120] (1995) 128 ALR 577, 584–5.

controversial',[121] in that assertions of the 'romanticized continuity demanded by Western history',[122] risk the same objections as the constructed narratives of other nations, and invite 'sceptical reconsideration' in due course.[123]

The term is also open to the objection of UN Sub-Commission member Bengoa, who pointed out its inherent danger in that 'many indigenous peoples had been forcibly removed from their lands or were now living in urban areas but had kept their indigenous identity'.[124] Are they part of the historical continuity? The tone of *the international definition* is assertive and dynamic compared to other definitions – the intergenerational element is rendered more conspicuous by its absence elsewhere. The effect is to portray the indigenous as actors in their own destiny and not as relics of the past. Colonising processes are adverted to, but there is no indication that invaders or colonists must come from other parts of the world.[125] The reach of the definition is thus broader than the earlier version – a point spotted (and criticised) by treaty rapporteur Alfonso Martinez.[126]

In the Martinez-Cobo formulation, the role of the group in responding to individual acts of self-identification is stressed. He insists that: 'On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group)'.[127] In discussions of minority rights, the argument often reduces to an assessment of the respective roles of State and individual: i.e., if individuals make a claim to belong to a minority, should the State accept the claim without further investigation? The stronger collective imprint of indigenous societies is implicit in Martinez-Cobo approach – membership is about group acceptance and not simply individual declarations. The question of group membership has often exercised human rights treaty-bodies and is discussed later in the present work.

[121] Kingsbury, 'A constructivist approach', 420.

[122] Kingsbury, *East Asian Challenge*, p. 349.

[123] *Ibid*. The writer refers to the critique of nationalism developed by scholars such as E. Kedourie – *Nationalism* (Oxford, Blackwell, 4th edn, 1993), and B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, Verso, rev. edn, 1991).

[124] E/CN.4/Sub.2/1996/2, para. 41 (Daes Working Paper on definition). See also Wiessner, for a similar objection: Rights and status, 111; the formula would exclude groups such as 'the Wayuu, now living a desolate life in the outskirts of Maracaibo, Venezuela, distant from their traditional forest dwellings'.

[125] Contra, Wiessner, who discerns in the Martinez-Cobo formulation 'a mandatory link to the phenomena of European colonization' (Rights and status, 111).

[126] Who comments on Martinez-Cobo that 'he tended to lump together situations that this Special Rapporteur [Alfonso Martinez] believes should be differentiated because of their intrinsic dissimilarities' (E/CN.4/Sub.2/1999/20, para. 72).

[127] UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para. 381. He added that: 'This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference' (para. 382).

Other criteria/characteristics

For the most part, international law is not geared to precise calibrations. Typically, it sets out a framework of discourse within which there is further work to be done in bringing concepts home, in pinning them down to get answers to questions about indigenousness and other issues in specific cases. All the Kennewick senses of indigenous are contained somewhere or other in the corpus of international law. Others could be added – perhaps that of vulnerability. The World Bank deploys 'vulnerability' as a criterion in its functional approach to working with indigenous peoples: Operational Directive 4.20 states: 'The terms "indigenous peoples", "indigenous ethnic minorities", "tribal groups" and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process'.[128] Further suggestions can be gleaned from the major specific texts on indigenous rights. In the body of Convention 169, the peoples have a specific social and cultural identity,[129] customs, traditions and institutions,[130] religious and spiritual values and practices,[131] own institutions,[132] methods for dealing with offences,[133] a distinctive relationship with lands and territories and procedures for the transmission of land rights,[134] subsistence economy and traditional activities,[135] own knowledge and technologies[136] and languages.[137] The draft Declaration – a text which is imprinted to a greater extent than 169 with the self-understanding of indigenous groups – adds extra dimensions, recalling detailed lists of cultural attributes such as 'archaeological and historical sites, artifacts, designs, ceremonies',[138] etc., and 'cultural, intellectual, religious and spiritual property',[139] oral traditions,[140] own names for communities, places and persons,[141] indigenous sacred places,[142] traditional medicines and health practices,[143] citizenship,[144] land-tenure systems,[145] and

[128] IWGIA Newsletter, November/December 1991, p. 19.
[129] Article 2.2(b).
[130] *Ibid*.
[131] Article 5(a).
[132] Article 5(b).
[133] Article 9.
[134] Articles 13–19; Article 17.
[135] Article 23.1.
[136] Article 23.2; Article 27.1.
[137] Article 28.
[138] Article 12.
[139] *Ibid*.
[140] Article 14.
[141] *Ibid*.
[142] Article 13.
[143] Article 24.
[144] Article 32.
[145] Article 26.

'treaties, agreements and other constructive arrangements concluded with States or their successors'.[146] Instead of defining beneficiaries and then allocating rights, international law has often proceeded the other way round. Rights have been set out and continue to be developed in such a way that the contours of the communities appropriating them become clearer.

Indigenous and minorities[147]

International law deals with national, ethnic, religious and linguistic minorities. Despite the extensive elaboration of documents on minority rights by international organisations, there is still no definition of 'minority' which commands general assent. Formal approaches have been tried.[148] An influential analytic definition was presented by UN Special Rapporteur Capotorti for the purposes of Article 27 of the ICCPR. For Capotorti, a minority could be defined as:

> A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[149]

Capotorti's definition is capable of application to many indigenous peoples and as been applied in the context of Article 27.[150] While it does violence to their self-perception as peoples, the stress on cultural difference, non-dominance and the desire to transmit culture, etc., to their successors rings true for the indigenous also. On the other hand, it is often claimed that some States – Guatemala, Bolivia – and home-rule territories such as Greenland, have an indigenous majority so that 'numerical inferiority' does not always fit.[151] The problem with 'minority' is that it strongly suggests numerical inferiority, though it need not be contrasted with a monolithic majority bloc. Many States incorporate a variety of groups with no clear majority, except, in each case, a majority of all others who are not members of that group. International organisations have not generally counted heads to assess the size

[146] Article 36.

[147] See the illuminating *Working Paper on the Relationship and Distinction between the Rights of Persons belonging to Minorities and those of Indigenous Peoples* prepared by Sub-Commissioners Eide and Daes, UN Doc. E/CN.4/Sub.2/2000/10, 19 July 2000.

[148] For a general review of such attempts, see G. Pentassuglia, *Defining 'Minority' in International Law: A Critical Appraisal* (Rovaniemi, Juridica Lapponica 21, 2000).

[149] *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York, UN, 1991), UN Sales No. E.91.XIV.2, para. 568.

[150] See ch. 6 of this volume.

[151] J. Burger, *Report from the Frontier; The State of the World's Indigenous Peoples* (London and Cambridge, MA, Zed Books and Cultural Survival Inc., 1987), p. 11.

of groups. The HRC appears to be an exception through disallowing minority status to the (non-dominant) anglophones of Quebec in the case of *Ballantyne et al. v Canada*[152] – because the anglophones constituted a majority in Canada as a whole. It is not clear if such a view will be followed by a future Committee, not least in view of strong objections advanced by dissenting members. On non-dominance, Daes makes the acute point that 'applying non-dominance as a key characteristic of minorities or indigenous peoples results in the paradox that a group ceases to be a minority or an indigenous people when it realises its human rights'.[153] She reminds those enthusing to discover defining characteristics that 'no minority or indigenous people has admitted that its legal status exists only at certain times, and in certain situations'.[154]

Capotorti's efforts were followed by those of Jules Deschênes, again at the prompting of the UN Sub-Commission.[155] The definitions are broadly similar. Deschênes replaces 'numerical inferiority' with 'in a numerical minority', and adds a reference to the aims of the minority 'to achieve equality with the majority in fact and in law'. Alfonso Martinez interprets the latter phrase as implying that the equality must be on the basis of the dominant society's legal institutions and 'not as a derivative of the legal culture of the "minorities"'.[156] He therefore suggests that the Deschênes criterion could be used to distinguish minorities from indigenous peoples, whereas Capotorti's cannot. In terms of understanding, the Deschênes formula incorporating a normative aspiration appears to be open to the Daes objection: what happens when equality is achieved?

The Capotorti and Deschênes formulae may be compared with that offered in Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe, a formula fairly typical of European attempts, even if they have not been embodied in multilateral treaties on minority rights:

> the expression 'national minority' refers to a group of persons in a State who:
> a. reside on the territory of that State and are citizens thereof;
> b. maintain longstanding, firm and lasting ties with that State;
> c. display distinctive ethnic, cultural, religious or linguistic characteristics;
> d. are sufficiently representative, although smaller in number than the rest of the population of that State or of a region of that State;
> e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.[157]

[152] Communication Nos. 359/1989, 385/1989, UN Doc. A/48/40 (1993), discussed in chs. 5 and 6 of this volume.

[153] UN Doc. E/CN.4/Sub.2/2000/10, para. 30.

[154] *Ibid*.

[155] *Proposal Concerning a Definition of the Term 'Minority'*, UN Doc. E/CN.4/Sub.2/1985/31.

[156] UN Doc. E/CN.4/Sub.2/1995/27, para. 73.

[157] Text adopted by the Assembly on 1 February 1993.

Certain aspects of this definition relate easily to indigenous peoples. The reference to 'longstanding, firm and lasting ties' expresses the first Kennewick sense, though indigenous ties would more naturally be expressed as applying to a territory rather than 'the State' – hence Daes's point that indigenous peoples are 'groups which are native to their own specific ancestral territories'.[158] It is also questionable whether 1201 'ties' apply to minorities in a situation where groups have a historical presence while States around them come and go.[159] The reference to ties with the State therefore appears to incorporate a prescriptive standard of loyalty.[160] The contents of these efforts overlap to a significant extent with indigenous descriptors. In both, there is a combination of 'objective' and 'subjective' characteristics, of sharing a culture and engaging in a responsibility to protect it.

In his attempt to draw a bright line between 'minority' and 'indigenous',[161] Alfonso Martinez finds that indigenous exploration of the possibilities of using minority rights through the Human Rights Committee creates definitional confusion.[162] The paradox is that indigenous peoples have been largely responsible for taking forward the international law on minority rights through the UN Human Rights Committee – a development explored at some length in a later chapter.[163] On the basis of the above descriptions, the relationship between minorities and the indigenous is one of fuzzy edges rather than bright lines. International law does not insist that 'minority' is essentially a European concept – an argument which is part of the classic repertoire of South American States, and that of some African States.[164] Nothing in Capotorti or elsewhere lends credence to this proposition. On the contrary, the human rights treaty bodies have insisted on the potential universality of the minority concept, and are increasingly sceptical about denials of the presence of minorities in particular States.[165] On the other hand, principle does not demand that the groups be described as minorities in national legislation. Nor should it be insisted that a minority of ethnicity/nationality X in State A always implies the existence of a kin-State B – where X ethnicity/nationality is dominant. The situation is allegedly the case

[158] Eide and Daes, *Working Paper*, para. 64.

[159] This is the situation in, for example, parts of Central and Eastern Europe, an account of a succession of Empires, puppet States, etc. See for example, the present author's *International Law and the Rights of Minorities*, Part I.

[160] The 'loyalty' factor has been a major issue in drafting minority rights – see remarks in Capotorti, *Study*, ch. II.

[161] See the ILO opinion concerning 'travellers' of Roma etc. origin, Report of the Director-General GB-280/18, March 2001.

[162] UN Doc. E/CN.4/Sub.2/1995/27, paras. 118–20. This is also the implication in his *Final Report*, esp. paras. 67–92.

[163] See ch. 6 of this volume.

[164] Thornberry, *International Law*.

[165] See ch. 6 of this volume.

for so-called 'national' minorities,[166] but such international definitions as exist do not build in such a factor.[167] Further, many minority groups have no such kin-State and are more or less whole within particular political boundaries.[168]

Concept, definition, process

Multiple factors

The previous chapter posed a question on the coherence and point of the category of indigenous peoples. In terms of the former (in as far as it can be detached from the issue of justification), legal instruments and specialist commentators discern a spectrum of factors, the ensemble of which is taken to portray the subject of their concern. In the light of all the above, elements in the indigenous descriptors (not commonly found in descriptions of 'minority') relate to:[169]

> precedent habitation;
> historical continuity;
> attachment to land;
> the communal sense and the community right (including those societies which do not have a strong conception of individual rights);
> a cultural gap between the dominant groups in a State and the indigenous, and the colonial context.

To these may be added the specific of *self-identification as indigenous peoples*. The selection of descriptors includes all the Kennewick senses.[170] No one descriptor appears as absolutely dominant; the factors asserted to

[166] Alfonso Martinez, UN Doc. E/CN.4/Sub.2/1995/27, para. 108.

[167] See the brief discussion in F. Benoit-Rohmer, *The Minority Question in Europe* (Strasbourg: Council of Europe Publishing, 1996), pp. 12–15.

[168] Consider for example, the Basques and Galicians in Spain, the Friulani, Ladini and Sards in Italy, the Kurds in various States; see, in general, the Minority Rights Group's *World Directory*.

[169] Daes notes that despite the plethora of 'characteristics' asserted as definitive, cases 'will continue to arise that defy any simple, clear-cut attempt at classification': UN Doc. E/CN.4/Sub.2/2000/10, para. 41.

[170] Compare the 'factors' relevant to 'the understanding of the concept "indigenous"' proposed by former WGIP Chairperson Daes: '(a) Priority in time, with respect to the occupation and use of a specific territory; (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist'. Daes emphasises that the factors 'do not, and cannot, constitute an inclusive or comprehensive definition', but 'may provide some general guidance to reasonable decision-making in practice': E/CN.4/Sub.2/1996/2, paras. 69 and 70.

contribute to our understanding of indigenous peoples appear to be multiple. In further refinement of the arguments, and with possible definition in mind, one commentator suggests a flexible ranking among 'requirements' of indigenousness (self-identification, vulnerability, long regional connection, wish to retain identity) and 'indicia' of indigenousness ('strong indicia' – non-dominance, affinity with land, historic continuity; and 'other relevant indicia' – so-called objective characteristics and different treatment in law or administration).[171] The ILO employed another approach based on multiple criteria in its study of 1953 (see above, pp. 42–3). The principle consisted of 'taking two or more criteria,[172] each of which is regarded as individually significant, and applying them jointly to a given demographic group'.[173] The study then offered a 'geometrical illustration':[174] 'it might be said that the relation between the results obtained by applying each of . . . various criteria is similar to the relation between several intersecting circles where, the greater the number of circles, the smaller the area on which all are superimposed'.[175] No one condition may be necessary or sufficient for the wholly appropriate employment of 'indigenous'. Only a few indigenous peoples would satisfy all criteria; some would satisfy most – but even those further down the scale could still count as indigenous, until the sense of indigenousness peters out. Both methodologies are set against single-factor analysis, which insists that 'indigenous' means only one thing, failing which it can have no application in State X or State Y – an approach espoused by Asian governments in particular. Hence the statements of the government of India that 'indigenous' implies only a precedent group,[176] and of Bangladesh that the concept is uniquely characterised as 'historic dispossession at the hands of exogenous groups'.[177]

Definition

Despite the suggestions of those who may claim to have the golden key to definition, it is unlikely that any single factor is adequate to capture all the

[171] Kingsbury, *East Asian Challenge*, p. 374.

[172] Including the criteria of language, culture and group consciousness – ILO, *Indigenous Peoples*, ch. 1.

[173] *Ibid.*, p. 19.

[174] *Ibid.*, p. 20.

[175] *Ibid.*, pp. 20–1.

[176] Hence, the application of the term 'indigenous people to the situation in India 'would be inaccurate because the entire population has been living on its lands for the past several millennia. All of these people are indigenous to the country and any attempt to make a distinction between indigenous and non-indigenous would be artificial and spurious': a précis of the statement (on file with author) appears in *Report of the WGIP on its Eleventh Session*, E/CN.4/Sub.2/1993/29, para. 81.

[177] Statement of the Observer Delegation of Bangladesh to the 13th Session of the WGIP (on file with author).

nuances of 'indigenous', all the Kennewick senses. However, the degree of commonality in the various analyses is significant, even if the choice of indicators is not uniform, and particular descriptions represent the situation in one region better than in another.[178] Attempts to move from this limited degree of coherence in the broad conceptualisation of groups towards a compact definition is difficult – though, despite reservations expressed concerning ILO endeavours (by the ILO and others), Convention 169 makes a reasonable job of conveying the sense of the matter in its statement of coverage. To search further for a 'universal' formula – as some governments demand in the context of the draft Declaration – is perhaps misguided.[179] In the area of group rights – peoples, minorities, etc., – international law has generally avoided definitions – it has not been regarded as necessary for the international system to define canonically all its components. The principles which animate the need for definitions in municipal law and at the level of the community do not necessarily carry over into international law.[180] The level of abstraction required for international legal principles, the dynamic nature of the system, the need to be receptive to inputs from the variety of national practice and the openness of its prescriptions, make parts of the human rights system in particular unsuitable for the imposition of definitions as a kind of *deus ex machina*. There are advantages as well as disadvantages for indigenous peoples in writing a definition (it will be a complex one if offered as appropriate for all regions) into the draft Declaration or other indigenous texts in the future. It could help to clear out ersatz claimants, improve the goodwill of governments, give greater confidence to those defined as indigenous and improve precision in targeting programmes. Neither governments nor indigenous peoples favour the exponential growth of 'indigenism' as a vehicle to carry all kinds of claims by sundry collectivities. In this, the shaping aspect of international law should be borne in mind – depending on the degree of positive development of international standards, more and more groups may be tempted to reclassify themselves as indigenous

[178] 'Therefore, when we ask who indigenous peoples are, we may not have a formal definition but we do have a concept . . . We do not need a formal definition in order to articulate the interests that should be protected . . . it is in our interest . . . to avoid the pitfalls of creating a label. Otherwise, in our attempt at being all encompassing, we may hurt those whom we most aim to protect': A. K. Dias, 'International standard-setting on the rights of indigenous peoples: implications for mineral development in Africa' – http://www.dundee.ac.uk/cepmlp/journl/html/article7-3.html, p. 3.

[179] While Wiessner, 'Rights and status', appears to attempt just that in the interests of 'delimiting the scope *ratione personae* of an international document conferring rights', he also sees virtue on the approach espoused by Kingsbury, which 'would seem to provide a more flexible basis for negotiations between States and communities whose recognition as indigenous may have been initially denied' (115–16, n. 398).

[180] Contra, J. J. Corntassel and T. H. Primeau, 'The paradox of indigenous identity: a levels-of-analysis approach', *Global Governance*, 4(2) (1998), 139–56.

peoples. The further refinement of rights may call for sharper descriptions of beneficiaries than are presently available. If the time comes, reductionist, formulaic approaches are unlikely to prove helpful.

Process

In any assessment of who or what is indigenous, the nature of self-organisation should be borne in mind, and group aspirations to a certain set of rights. In the face of challenges to such identification and appropriation of rights, issues of decision, of process, logically arise. In an interesting intervention at the WGIP, Sub-Commissioner Bengoa argued that what was required was a set of procedures to exercise the 'inalienable' right of self-identification. Procedures should be '*operational* in order to serve international objectives and in particular allow an understanding of the many different cultures'; they should be *functional* 'to allow participation of the indigenous peoples', and *flexible* in order to respond to new situations.[181] What international law should promote is principles for the fair-minded adjudication of claims. For example, Article 34 of ILO 169 provides that 'The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristics of each country'. The flexibility should ideally involve all interested actors in a State, and the international organisation, in making a good-faith reading of the ground rules for recognition of the indigenous. The processes by which understandings are arrived at are as important as the analyses. The former Chairperson/Rapporteur of the Working Group has called for a solution to the definition issue based on 'a fair-minded and open process, so that there is room for the evolution and regional specificity of the concept of "indigenous" in practice'.[182] In the case of Article 27 of the Covenant on Civil and Political Rights, which begins 'In those States in which . . . minorities exist', the General Comment issued by the Human Rights Committee (HRC) states that: 'The existence of an ethnic, religious or linguistic minority in a given State party . . . requires to be established by objective criteria'.[183] Further, existence 'does not depend upon a decision by [a] State party'.[184] The Comment does not offer a definition, and the objective criteria are not further explicated: the HRC has not been minded to supply them. When the HRC asserts that there are existence criteria for minorities, this can also be read as pointing out a limitation on State authority and as suggesting that the State should employ good faith in

[181] Reproduced in E/CN.4/Sub.2/196/2, para. 41.
[182] 'Supplementary working paper on the concept of "indigenous peoples"', UN Doc. E/CN.4/Sub.2/AC.4/1997/2, para. 10.
[183] General Comment, para. 5.2.
[184] *Ibid.*

assessing status claims.[185] It also indicates that the State does not have the last word in deciding who or what is indigenous.[186] 'Process' possibilities have been enhanced by the growth of the international indigenous movement. This will be true also of the indigenous input expected from the Permanent Forum – constituted, it may be noted, without the benefit of definition.

Comment: characteristics, subjectivity and self-determination

In their descriptions of 'indigenous peoples', the above instruments factor in self-definition but go beyond it in insisting on a range of characteristics to identify 'true' and 'false' claimants to indigenous status – history, culture, territory, ancestry, continuity, and so on. The stances on self-definition and characteristics roughly correlate with theoretical writing on identity and ethnicity, which has assumed formidable proportions since the 1980s, and is sometimes claimed to have been ahead of events.[187] There are debates between 'primordialists' and 'constructivists',[188] and between those who posit notions of peoples with 'characteristics' and those who propose that groups self-agglomerate on the basis of free association,[189] or self-identify on the perception of boundaries between themselves and 'others'.[190] The problem with positing a range of 'characteristics' is that it may lead to the perception that indigenous peoples constitute a static universe of immutable group hierarchies – that the characteristics must endure over time if the group is to be indigenous. Accordingly, the debates interface in complex ways with

[185] In the drafting of General Comment 23, HRC member Chanet observed that the 'objective criteria' must be acceptable to members of minorities themselves – CCPR/C/SR.1295, para. 30.

[186] Cf. remarks of HRC member Higgins to the effect that 'objective criteria 'meant' differences in language or religion between minority groups and the majority . . . the situation to be avoided was that of a State determining the existence of a minority' – CCRP/C/SR.1295, para. 31.

[187] See the introduction (by E. Mortimer) to E. Mortimer (ed.) with R. Fine, *People, Nation and State: The Meaning of Ethnicity and Nationalism* (London and New York, I. B. Tauris Publishers, 1999), vii–xvii.

[188] E. Shils, 'Primordial, personal, sacred and civil ties', *British Journal of Sociology* 8(2): 130–45; C. Geertz, *The Interpretation of Cultures* (New York, Basic Books, 1973, reissued London, Fontana Press, 1993). See also the extracts from Geertz and his critics J. D. Eller and R. M. Coughlan, in J. Hutchinson and A. D. Smith (eds.), *Ethnicity* (Oxford and New York, Oxford University Press, 1996), pp. 40–51.

[189] For a legal/theoretical defence of free association as applied to minorities, see J. Packer, 'Problems in defining minorities', in D. Fottrell and B. Bowring (eds.), *Minority and Group Rights in the New Millennium* (Dordrecht, Kluwer, 1999), pp. 223–73.

[190] F. Barth, *Ethnic Groups and Boundaries* (Boston, Little, Brown and Co., 1969).

arguments on individual and group rights. Insistence on 'characteristics' may lead to questions of human rights – the strength of primordial ties may act to overpower or render irrelevant the desires of (some) individuals. On the other hand, the idea that groups are constituted simply on the basis of freedom of association can lead to a completely freewheeling approach to group formation, to group claims to indigenous status at odds with basic intuitions, and individual claims to group membership shot through with unreality.

It seems intuitively possible to recognise and accept a range of claimants to indigenous status, though hard cases inevitably emerge – the Boers and the Rehoboth Basters are examples in point. However, the conceptualisation of indigenous peoples cannot be a simple exercise in description. The question of who is indigenous is mired in politics, suffused with ethical considerations and questions centring around the justifications for a new focus in human rights instruments and a specifically addressed body of rights.[191] It is a complex amalgam of power, logic and right, in which international law itself plays a constructive (or deconstructive) role through recognition processes and incentives for groups to access international norms through configuration or re-configuration as indigenous. Against the State-inspired stratagems which would restrict the scope of 'indigenous peoples', self-defining indigenous groups correlate self-definition with self-determination: as a Cree representative put it 'efforts to define who or what are indigenous peoples are seen as further attempts to dispossess and take away our inherent right to be. Indeed to assume a right to define indigenous peoples is to further deny our right of self-determination'.[192] Logically, this is like pulling yourself up by your bootstraps, since it presupposes an answer to the prior question of who is entitled to self-determination. It also proposes that indigenous status is to be achieved through hermetically sealed processes, with no role for perceived outsiders – an implausible scenario in the international context. On the contrary, the answer to specific issues of recognition will result from complex dialogic exercises, in which States advance both delegitimating and supportive responses to the increasingly assertive international indigenous movement. The influence of this movement in advancing the category of 'indigenous peoples' cannot be gainsaid; it is one powerful reason for pervasive international interest in indigenous questions.

[191] For remarks on the ethics of definition as applied to indigenous peoples, see the chapter on definition and description by the present author in Burman and Verghese, *Aspiring to Be*, pp. 53–71.

[192] The representative spoke in the name of IWGIA, cited by I. Sjorslev, 'Indigenous peoples and the United Nations', *The Indigenous World 1995–96* (IWGIA, Copenhagen, 1996), p. 273.

3

Ambiguous discourses: indigenous peoples and the development of international law

Introduction

Discussion of concept and practice on indigenous peoples facilitates responses to the question of whose history is to be recalled from among the infinity available. The retrospective element in the definitions suggests that we should find relevant histories in and beyond the discourses of colonialism; our presumptive universalism suggests that the frame for a search is global.[1] The draft Declaration is replete with historical recollection. The preamble expresses the concern that the peoples have been deprived of their human rights 'resulting, *inter alia*, in . . . colonization and dispossession of their lands, territories and resources'. References in the body of the draft to traditional practices culminate in the full blown demand in Article 26 that historical agreements, etc., between peoples and States must be respected. A degree of schematisation and elision is required in order to tell the story, while some attempt is made to avoid assuming 'simple linear continuity' between past and present societies, 'romanticized' or otherwise.[2] The ancestors of present indigenous peoples share with ancestors of élites in African and Asian States elements of common experience and common discourses of 'otherness'.[3] In the colonial timeframe, for every society that disappeared – 'flaking into the earth that nourished it'[4] – another survived, reassembled,

[1] The researches of UN Rapporteur Alfonso Martinez (see chapter 2 in this volume) implicated all continents but found no criterion to distinguish a specific indigenous category in Africa and Asia – 'the term "indigenous" – exclusive by definition – is particularly inappropriate in the context of the Afro-Asian *problematique* and within the framework of United Nations in this field': E/CN.4/Sub.2/1999/20, para. 91. He does not defend 'the absurd position' of denying the existence of autochthonous groups on those continents: *ibid.*

[2] Kingsbury, *East Asian Challenge*, p. 349.

[3] B. McGrane, *Beyond Anthropology: Society and the Other* (New York, Columbia University Press, 1989).

[4] D. Mahon, 'A disused shed in Co. Wexford', in P. Muldoon (ed.), *The Faber Book of Contemporary Irish Poetry* (London, 1986), pp. 296–8.

reformed or was shaped by the actions of colonising powers to form the core of a new sovereignty. Still others remain without recognition and respect – a 'Fourth World' of contemporary peoples.[5] Indigenous claims to international status are sometimes evoked with reference to a past practice of recognition by the law of nations – although historical claims characterise the agenda of only some groups, not all. The chapter traces a series of discourses to which the peoples were subjected, including the development of notions of trust or guardianship and looks at the early work of the ILO. The conclusion reflects briefly on the beginnings of the engagement of indigenous groups with contemporary instruments and concepts, with their promise of renewal and empowerment.

An indigenous perspective

Through indigenous lenses, international law can look like a system for the vindication of Eurocentric State practice – the 'apologist' pole of the Koskenniemi characterisation.[6] On such a view, it has done little to salvage indigenous societies and much to damage them – though recalling the stances of Vitoria, Las Casas and others reminds us that,[7] in moments of epiphany, system actors managed to grasp the humanity and essential dignity of the non-European peoples. A sense of dispossession and loss still weighs heavily with many peoples. An indigenous speaker from South America presented the following narrative:

> In the past, indigenous peoples were living peacefully in their homelands, in harmony with nature. Then came 'civilization' which wanted to conquer, with a hunger for richness for only a few, the ambition of capital and power. They conquered the land, we lost our homes, our sacred sites, our agricultural areas, our hunting fields, our fishing waters. They called it development, we called it destruction. They said it would raise living standards, we said it brings humiliation. They earned money, we got poor. They founded big companies, we became cheap labour. They ruined the biodiversity, we lost our sources of traditional medicines. They spoke of equality, we saw discrimination. They said infrastructure, we saw invasion. They thought civilization, we lost our cultures, our language, our religion. They subjected us to their laws, we saw them claiming our land. They brought illnesses, weapons, drugs and alcohol, but not equal education and health care. It has been going on for more than 500 years. And it still goes on.[8]

[5] For an explanation of the term, see Centre for World Indigenous Studies, 'Background on the term "Fourth World"': http://www.cwis.org/fourthw.html

[6] M. Koskenniemi, *From Apology to Utopia* (Helsinki, Finnish Lawyers' Publishing Company, 1989).

[7] See p. 178 in this volume.

[8] Statement of Max Ooft, Organization of Indigenous Peoples in Suriname, UN Doc. E/CN.4/Sub.2/1995/24, para. 54.

While it may be objected that such poignant evocations of oppression simplify events through a romantic mist, the passage presents societies where interface with others is experienced through a specific cycle of oppression. Consider the claims, and their ramifications. The speaker links past and present; oppression continues to be lived. Civilisation is the enemy, and the development and so-called progress which accompanies it. Tradition is valuable. Laws are part of the process of destruction: they provide its infrastructure of argument and rationalisation. They are made by others. The speaker's place is the land; the privations are viewed largely from a territory, from a home, a homeland. The land is threatened, and its fields, its sacred sites and the fishing grounds. Outsiders bring death and destruction. Their proclamations of equality are a mask for destructive designs. They look down on the peoples of the land and make false promises. Consider also the vocabulary in which the story is told. It is clear that this is no traditionalist untouched by our contemporary cosmopolitanisms. The language of civilisation, capital and labour, power and conquest, companies, equality and discrimination, and 'biodiversity' is the contemporary vernacular of the State and international law – including its dialects of human rights and environment. This suggests that the speaker knows and hopes that at least one of the languages in which the complaints could be addressed is that of international law. This illustrates a fundamental ambiguity that flows through historical discourses and principles – the universalising discourse of law and right is a form of imperialism; the law that oppresses promises liberation.[9]

The discourses

Fideist international law[10]

In the formative period of international law the peoples of the New World were caught up in debates which had origins outside their experience. The

[9] Ambiguities are explored in P. Keal, '"Just backward children": international law and the conquest of non-European peoples', *Australian Journal of International Affairs*, 49(2): 191–206.

[10] Fideism 'is the conviction that the faith, whether religious creed or secular ideology, is the beginning of truth; and accordingly . . . that the faith supplants existing moral and political rules; and that all rights, notably the right to have a separate state and to exercise government, are dependent on possession of the faith' – M. Donelan, 'Spain and the Indies', in H. Bull and A. Watson (eds.), *The Expansion of International Society* (Oxford, Clarendon Press, 1984), pp. 75–85, p. 75. Placing international law in parentheses is a caution against identification of the early system with modern conceptions – principles of *ius civilis, ius naturale* and *ius gentium* all informed the sixteenth-century discourse, a mélange of concepts far removed from concepts prevailing in the twentieth and twenty-first centuries. See the discussion, below, and *inter alios*, A. Nussbaum, *A Concise History of the Law of Nations* (New York, the Macmillan Company, rev. edn 1961).

debates did not arise in consequence of indigenous assertions of right, but centred on the nature, scope and justification of rights which others claimed over them. The Spanish adventures in the Americas raised profound issues of law, morals and theology. The Conquest – and the behaviour it engendered – was justified and attacked in almost equal measure. The Dominican priest, missionary and apostle/defender/Father of the Indians, Bartolomé de las Casas (1474–1566)[11] was apparently prepared to counsel the abandonment[12] or reshaping of the enterprise.[13] The colonising enterprise was stoutly defended against las Casas by Juan Ginés de Sepúlveda, Chaplain to the Emperor[14] and court historian. Before the 'Great Debate' between Las Casas and Sepulveda,[15] the Dominican Prime Professor of Theology at the University of Salamanca, Francisco de Vitoria (1480–1546), had advanced a set of critical arguments from his distant university (only las Casas had been to the New World). The names figure in standard histories of international law, though the discourses they deployed are at some remove from twentieth-century legal languages. Their critical essays embody the vocabularies of medieval theology, Christocentric and philosophical natural law, the Ius Gentium, Canon Law, Roman Law; they implicate discourses of Crusade, contemporary polemics on rights of infidels, the Aristotelian theory of natural slavery, and Papal claims in the temporal realm. While the complex nexus of references refined the essence of a sixteenth-century political and intellectual system (which can be anachronistically styled 'international law' only for ease of reference), the law thereby distilled was at once Eurocentric, Christian, provincial and aggressive in its incorporation of those who played no part in its making.

Many of the contentions of Vitoria and others circulated around the effects to be attributed to Papal Bulls, particularly the Bull *Inter Caetera*,

[11] See L. Hanke, *Bartolemé de las Casas, Bookman, Scholar and Propagandist* (Philadelphia, University of Pennsylvania Press, 1952); G. Sanderlin (ed.), *Bartolemé de las Casas: A Selection of his Writings* (New York, Knopf, 1971); F. A. McNutt, *Bartholomew de las Casas: His Life, His Apostolate, and his Writings* (New York, G. B. Putnam's Sons, 1909).

[12] A. Pagden, 'Dispossessing the barbarian: the language of Spanish Thomism and the debate over the property rights of the American Indians', in A. Pagden (ed.), *The Languages of Political Theory in Early–Modern Europe* (Cambridge University Press, 1990), pp. 79–98, at p. 96.

[13] 'to . . . restore the Indians to their human and temporal good way of life, not a single Spaniard would have to remain in the Indies . . . I affirm before Jesus Christ that it would be necessary . . . to cast them all out, except for a few chosen ones, so that the Indians could receive the faith': las Casas in Sanderlin, *Bartolemé de las Casas*, pp. 195–6.

[14] King Charles I of Spain, elevated to the title of Holy Roman Emperor Charles V in 1519.

[15] Vividly recounted in L. Hanke, *Aristotle and the American Indians: A Study of Race Prejudice in the Modern World* (London, Hollis and Carter, 1959).

issued by the Spanish (Borgia) Pope Alexander VI in 1493.[16] Papal authority purported to grant to Ferdinand and Isabella sovereignty over all lands which they might discover 100 leagues west of the Azores – a demarcation adjusted to a point 370 leagues west of the Cape Verde Islands by the Treaty of Tordesillas in 1494. The authority entrusted the inhabitants to the care of a Christian monarch when the discovering nation reported that the people were well-disposed to embrace the Christian faith. The grant of title was reinforced by the sanction of excommunication against any rivals to the Spanish possession. Alexander's Bull of Donation was perfected in specific cases by the device of the *Requerimiento* which had to be read to Indians before hostilities could be commenced against them. The choice was either to accept its terms – to reflect on its Christocentric historical narrative and its demand that the Indians accept the authority of the Pope and the Spanish Crown – or be attacked and subjugated.[17] Indigenous peoples recalled the historical events in 1992, during the 500th anniversary of the 'discovery' of the Americas, and in 1993, the International Year of the World's Indigenous People. In a letter addressed to Pope John Paul II, the Indigenous Law Institute called for recognition, change and reparation for this 'unresolved historical grief':

> Five hundred years ago, your predecessor, Pope Alexander VI, issued the now famous *Inter Cetera* Bull.[18] That papal decree expressed the Pope's desire that 'barbarous nations', those 'discovered' and yet to be 'discovered', be 'subjugated' and reduced to the Catholic faith and Christian religion. Now in 1993 . . . it is time for the Age of Subjugation to end . . . We therefore call on you . . . to formally revoke – in a bilateral ceremony with our spiritual elders and representatives – the *Inter Cetera* Bull.[19]

A 'Declaration of Vision' drafted by indigenous delegates at a Parliament of World Religions in 1994 again called upon Pope John Paul for a revocation, asserting that the Bull 'has been and continues to be, devastating to our religions, our cultures, and the survival of our populations'.[20] The declaration suggests that the assignment of authority, with its determination that Spain 'bring to the worship of our redeemer and the profession of the Catholic

[16] R. A. Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York, Oxford University Press, 1990) observes, pp. 80–1, that there were two bulls – *inter caetera divinai*, and the later *inter caetera*; the latter was drawn up in consequence of the geographical if not moral ambiguities in the first. For references, see Nussbaum, *A Concise History*, p. 320, n. 7.

[17] Text in J. Falkowski, *Indian Law/Race Law: A Five Hundred Year History* (New York, Praeger, 1992), pp. 11–12.

[18] Falkowski, *Indian Law/Race Law*, pp. 8–10.

[19] Indigenous Law Institute, 22 May, 1993, statement presented to the UN WGIP, July 1993.

[20] Communication from Hawaii of 8 October 1997 concerning a call for non-violent action – burning copies of the Bulls of 1493 (on file with author).

faith' their residents and inhabitants – those 'many peoples living in peace, and, as reported, going unclothed, and not eating flesh' – is still experienced as a living affront to the autonomy of indigenous societies.[21] While many considered Papal grant to be an adequate ground for conquest, its underlying basis was regarded with unease by Vitoria who delivered a famous set of lectures on Indian rights,[22] which were published posthumously.[23] The lectures bring to the fore Scholastic, Thomistic perspectives to examine the deep structure of Spanish claims. Vitoria rejected the universalist claims of Papacy and Empire.[24] In similar vein, he rejected first discovery as a legal basis of claim in cases of inhabited lands – 'it gives no support to a seizure of the aborigines any more than if it had been they who had discovered us'.[25] His arguments focused largely on the precepts of natural law. The Indians, he reasoned, were in full pacific possession of their public and private goods before the arrival of the Spaniards. He denied in the first place that the Indians forfeited their natural rights because of sin. To argue otherwise would be to join the modern heretics who asserted that no one can have *dominium* who is in a state of mortal sin.[26] In this, Vitoria was addressing the challenge of Lutheran and Calvinist 'heretics' as much as the particular features of the American adventure.[27] Similarly, in rejection of a thesis which had animated medieval canonists and hierocrats such as Hostiensis (1200–71),[28] Vitoria claimed that the fact that the Indian were infidels did not deprive them of *dominium* – unbelief did not destroy natural or human law which were the basis of ownership and dominion; infidels

[21] In 1537, Pope Paul III issued the Bull *Sublimis Deus* which 'had the effect of revoking *Inter Caetera* insofar as it purported to give the Spanish monarchy title to the Indians' land, although Spain continued to have the duty to convert the Indians to the Christian faith' – Falkowski, *Indian Law/Race Law*, p. 25.

[22] E. Nys (ed.), F. Victoria, *De Indis et de Jure Belli Relectiones*, J. Bate transl. (New York, Oceana, 1917).

[23] Nussbaum, *A Concise History*, p. 79.

[24] The rejection of papal authority was essentially related to temporal affairs rather than matters of faith. He combined the temporal and the spiritual in agreeing that the Pope could regulate temporal matters if that was essential for spiritual purposes. Hence it was lawful for the Pope to grant Spain an exclusive right to trade with the Indians, in order to prevent an inrush of Christians from elsewhere which might disturb the process of bringing the natives to the faith: J. Merrills, 'Francisco de Vitoria and the Spanish conquest of the new world', *Irish Jurist* 1968, 187–94, 192.

[25] Williams, *The American Indian in Western Legal Thought*, p. 99.

[26] For distinctions between *dominium* and *imperium*, see K. McNeil, *Common Law Aboriginal Title* (Oxford, Oxford University Press, 1989).

[27] Pagden, *The Languages of Political Theory*, p. 83.

[28] Hostiensis held that pagan communities could not, since the inception of Christianity exist as sovereign within the family of nations, and war against them was always lawful. Contra Aquinas, who held that the political and legal characterisation of a community is (merely) a matter of *ius humanum*.

could have legitimate Princes.[29] As the matter was later put by Balthasar Ayala (1548–84),

> War may not be declared against infidels merely because they are infidels, not even on the authority of Emperor or Pope, for their infidel character does not divest them of those rights of ownership which they have under the law universal, and which are not given to the faithful alone, but to every reasonable creature. For the earth is the Lord's and the fullness thereof, the world and all who dwell therein, and 'the Lord makes his sun to rise on the just and the unjust'.[30]

While the Indians were not Aristotle's natural slaves, they were 'some kind of natural children and, like all children, heirs to a state of true reason'.[31] The *motif* thus introduced – Indians as children – was destined to exert a powerful influence on ways of thinking and on the development of international and national legislation and administrative practice concerning the indigenous. Vitoria tentatively broached – neither affirmed not condemned – what later became known as the Doctrine of Guardianship,[32] which included the notion that 'Spain's governance of the Indians must be based on the principle of acting for their welfare and not merely that of Spain'.[33] The children and guardianship metaphors appear in for example, Brazil's Act No. 6001 of 1973, according to which Indians not 'integrated into national life' are legally minors under the guardianship of the State.[34] Turning to the *ius gentium*, Spaniards had *ius gentium* rights to trade and travel (the *ius peregrinandi*):

> Christians have a right to preach and declare the Gospel in barbarian lands . . . if the Spaniards have a right to travel and trade among the Indians, they can teach the truth to those willing to hear them, especially as regards matters pertaining to salvation and happiness, much more than as regards matters pertaining to any human subject of instruction.[35]

[29] Vitoria's sermons on Indian rights had 'internal' and 'external' aspects. The internal aspect of his teaching was to respect the property and sovereignty rights of the Indians; the external aspect of the Indians' true ownership of their property operated against other States besides Spain: Merrills, 'Francisco de Vitoria', 193.

[30] B. Ayala, *On the Laws and Duties Connected with War and Military Discipline* (Classics of International Law Series), cited by G. Hasselbrink, 'Native rights to territorial sovereignty under international law', paper for the International NGO Conference on Discrimination against Indigenous Peoples in the Americas, Geneva, 20–23 September 1977, fn. 60 (on file with author). The internal quotation is from St Matthew's Gospel, 5:43.

[31] Pagden, *The Languages of Political Theory*, p. 86.

[32] Consult G. Bennett, *Aboriginal Rights in International Law* (London, Royal Anthropological Institute, 1978).

[33] Cited by J. B. Scott, *The Spanish Origin of International Law* (Oxford, Clarendon Press, 1934), 78.

[34] L. Swepston, 'The Indian in Latin America: approaches to administration, integration, and protection', *Buffalo Law Review*, 27(4) (1978), 715–56, at 22.

[35] Vitoria, *De Indis et de Jure Belli Relectiones* (E. Nys ed., transl. J. Bate, 1917), 160.

Violations of natural rights constituted injuries, vindication of which could necessitate a just war – though causes should be real, not imagined.[36] Spain could intervene to protect converts and prevent blasphemy and public sacrifice by the Indians. Placing together *ius gentium* and more abstract principled approaches, Williams concludes that 'reason as well as Rome were granted the right to initiate enforcement of Christian Europe's universally binding norms and values in lands possessed by heathens and infidels'.[37] Todorov is critical of Vitoria's enterprise:

> We are accustomed to seeing Vitoria as a defender of the Indians; but if we question, not the subject's intentions, but the impact of his discourse, it is clear that his role is quite different: under cover of an international law based on reciprocity, he in reality supplies a legal basis to the wars of colonization which had hitherto had none (none which, in any case, might withstand serious consideration).[38]

A different analysis of Indian rights was offered by Juan de Sepúlveda[39] in his short dialogue[40] entitled *Democrates Secundus*,[41] where he denied that the Indians enjoyed *dominium* before the arrival of the Spaniards. He was committed to a stark reading of Aristotle's theory of natural slavery[42] Indians in America were, without exception, 'persons of natural rudeness and inferiority' with limited understanding, and thus fit to be classified as *servi a natura*. The 'superior' Spaniards have a natural right to rule over these barbarians.[43] The tenor of Sepulveda's reading of Aristotle's theory implicated communal and not merely individual practices:

> Compare then [the] blessings enjoyed by Spaniards of prudence, genius, magnanimity, temperance, humanity, and religion with those of the *homunculi* in whom you will scarcely find even vestiges of humanity, who not only possess

[36] Compare las Casas: 'The one and only method of teaching men the true religion . . . is, by persuading the understanding through reason, and by gently attracting or exhorting the will': Sanderlin, *Bartolemé de las Casas*, p. 158.

[37] Williams, *The American Indian*, pp. 105–6.

[38] T. Todorov, *The Conquest of America: The Question of the Other* (New York, Harper & Row, 1992), p. 150.

[39] Who, like Vitoria, had never visited the Indies.

[40] 'the most virulent and uncompromising argument for the inferiority of the American Indian ever written': A. Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge University Press, 1982), p. 109.

[41] In Spanish, *Democrates segundo, o de las justas causas de la guerra contra los indios* (A. Losada, ed., Madrid, 1951).

[42] Hanke, *Aristotle and the American Indians*, ch. V. The theory is elaborated by Aristotle in *Nicomachean Ethics* and other works. See the short account of Aristotle's thought by H. V. Jaffa in L. Strauss and J. Cropsey (eds.), *History of Political Philosophy* (Chicago, Rand McNally and Company, 1972).

[43] The Indians are as inferior 'as children are to adults, as women are to men': Hanke, *Aristotle and the American Indians*, p. 47.

> no science but who also lack letters and preserve no monument of their history except certain vague and obscure reminiscences of some things in certain paintings.[44] Neither do they have written laws, but barbaric institutions and customs. They do not even have private property.[45]

The suggestion was that if the whole community supported impious practices – and not merely aberrant individuals – the rationality of the collective was doubtful. The Indian world was no better organised than colonies of bees or ants. The strictures on indigenous society reached down to deny their rights to – in contemporary language – land and resources.[46] The key to his argument was the absence of civil society among the Indians, so that the civilising mission of the Spaniards was sufficient ground for spiritual and temporal domination. In the attempt to refute Sepulveda's reading of the theory of natural slavery, Juan de la Pena suggested that this threatened the divinely revealed doctrine of the perfectibility of man and the unity of the species,[47] an observation that resonates across centuries.

The mutation of natural law

While the natural law ruminations on the rights of the indigenous continued through writers from Gentilis and Grotius onwards,[48] they were gradually overlaid by the development of the discourses of the Enlightenment, *laissez-faire* and positivism. Natural law approaches themselves underwent considerable modification in the direction of a slow liberation from the strictures of the religious framework and religious derivation of principles. The impact of the Reformation worked its way through the discourses. The Italian Protestant Gentilis (1552–1608) developed a less-than-Catholic doctrine of the just war which indicated that the idolatry of a pagan peoples alone was not a just cause of war, but had to be conjoined with gross violations of natural law. Neither could a refusal to hear the Gospel count as a cause of war.[49]

[44] Compare the disparaging tone on indigenous art with that of Albrecht Dürer, who 'marvelled over the subtle ingenuity of the men in these distant lands': Hanke, *Aristotle*, p. 49.

[45] *Ibid.*, p. 47.

[46] Consider, however, the consequences of even Vitoria's synthesis of law and right – 'Spaniards might moor their ships in Indian rivers and harbours; likewise, the Spaniards might not be prevented from digging for gold in Indian lands and fishing for pearls in the sea or Indian rivers . . . The Pope, for reasons of faith, might grant the Spaniards the monopoly of Indian trade . . . Never has practice or doctrine of international law claimed self-sustained rights of that kind for foreigners': Nussbaum, *A Concise History*, 81–2.

[47] *De Bello Contra Insulanos*, cited in Pagden, *The Languages of Political Theory*, p. 93.

[48] Reaching a kind of apogee in the writings of Pufendorf (1632–94) for whom international jural relations were entirely a matter of natural law: Nussbaum, *A Concise History*, pp. 147–50.

[49] See the section on Alberico Gentili in Nussbaum, *A Concise History*, pp. 94–101.

Nevertheless, he made distinctions for these purposes between those who believed in perverse religions and those who did not acknowledge any deity, reserving a specially harsh approach to the latter.[50] And victors in war would not tolerate religious difference, whatever the nature of their dissent – a reflection of 'tactics of convenience that viewed a Christianized savage as a safe savage'.[51] The Dutch Protestant Grotius (1583–1645) postulated that natural law would retain a certain measure of validity even if it could be conceded that God did not exist.[52] His approach to the power of treaty-making had to concede that rights under natural law included those who were strangers to true religion. He endorsed the doctrine of the just war in a somewhat secularised version, going beyond contemporaries in extending justice to the *temperamenta* of warfare, urging moderation on victors, including some respect for the liberty and autonomy of vanquished peoples, especially in matters of religion.[53] Stripped of some Catholic inflections, the Spanish natural law discourses furnished an influential repository of source material to justify other conquering enterprises, including the English. Chief Justice Coke was moved to state in *Calvin*'s case that when infidel nations were conquered by Christians, '*ipso facto* the laws of the infidel are abrogated, for . . . they be against . . . the law of God and of nature'. He was thus infected with 'the madness of the crusades'.[54] The subjugation of the Irish, 'whom reason and duty cannot bridle'[55] provided something of a trial run for the larger colonial venture in the Americas.

Early positivists

In the broader discourse of international law, while processes of secularisation continued, movements towards the aggrandisement of sovereignty, the further and narrower 'Europeanisation' of international law, and the diminishing of polities not modelled on European patterns, continued apace. The observations of consociational thinkers such as Althusius,[56] complex diplomatic

[50] Those who live 'rather like beasts than men, being the common foes of all mankind . . . ought to be assailed in war' – cited in Williams, *The American Indian*, p. 197.

[51] Williams, *The American Indian*, p. 199.

[52] The hypothesis *etiamsi daremus*, discussed in J. Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980), pp. 42–8.

[53] Nussbaum, *A Concise History*, p. 111.

[54] Williams, *The American Indian*, p. 200.

[55] Walter Devereux, Earl of Essex, cited by N. P. Canny, *The Elizabethan Conquest of Ireland: A Pattern Established 1565–76* (Hassocks, Sussex, Harvester Press, 1976), p. 121.

[56] *Politica Methodice Digesta, Atque Exemplis Sacris at Profanis*, 1st edn, 1603, translated with an introduction by F. S. Carney, *The Politics of Johannes Althusius* (London, Eyre and Spottiswoode, 1964). The work of Althusius is introduced briefly by V. van Dyke, *Human Rights, Ethnicity and Discrimination* (Westport/London, Greenwood Press, 1985), p. 201.

practice in the field of protection of minorities as communities,[57] and a fairly relaxed approach to the making of treaties with non-European Powers obscured the trend,[58] but did not cause major deviations. It is perhaps supererogatory to call up the full gallery of luminaries who made their contribution to these developments. Clearly, the turn given to natural law by Hobbes (1588–1679) which views it as an instrument of self-preservation, together with his bifurcation of law into 'real' law under the sovereign within the State, and the law of nations (*ius gentium*) still in a state of nature without, is a major influence. Machiavelli (1469–1527) in his distillation of *raison d'état* was another. Hobbes's clarity and system, and the cold pragmatism of Machiavelli, worked slowly but osmotically into readings of sovereignty and law. The related aspect of Hobbes's thinking – the brutish state of nature from which sovereignty was an escape – continues even now to furnish unattractive metaphors for those who wish to caricature indigenous societies: hence, according to the learning of Chief Justice McEachern of British Columbia

> it would not be accurate to assume that . . . [the] pre-contact existence of [of the Gitksan and Wet'suwet'en peoples] in the territory was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbes, that aboriginal life in the territory was, at best, 'nasty, brutish and short'.[59]

Vattel (1714–67) had much to say on the 'Indians' and like nations confronting the Europeans. A feature of his system pointed to by Akehurst[60] and Crawford,[61] is a relative neglect of duties of States in favour of their rights. There is also a noticeable emphasis on sovereignty and many textual identifications of 'nations' with 'States'. Anaya points to the bifurcation of rights for States/nations and rights of individuals in Vattel's synthesis, with a consequent tendency to squeeze out 'intermediate' communities.[62] Vattel digressed on the differences between the civilised empires of Aztecs and Inca, criticising their usurpation by Spain, while lauding the colonisation of

[57] Thornberry, *International Law and the Rights of Minorities*, ch. 2.

[58] See the report of the UN Special Rapporteur M. A. Martinez in his *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, authorised by ECOSOC resolution 1989/77; discussed at pp. 77–82 in this volume.

[59] *Delgamuukw v British Columbia*, [1991] 3 WWR 97.

[60] M. B. Akehurst, *A Modern Introduction to International Law* (London, George Allen & Unwin), various editions to the 6th in 1987, ch. 2.

[61] J. Crawford, *The Creation of States in International Law* (Oxford, Clarendon Press, 1979), pp. 7–9.

[62] S. J. Anaya, *Indigenous Peoples in International Law* (New York and Oxford, Oxford University Press, 1996), pp. 13–16.

North America: on which 'celebrated question' he wrote that those Indian nations

> cannot appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home . . . were lawfully entitled to take possession of it, and settle it with colonies. The earth . . . belongs to mankind in general, and was destined to furnish them with subsistence: If each nation had . . . resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants.[63]

The hierarchy of civilisations

As international law gradually decoupled itself from the religious framework,[64] the position of the indigenous was increasingly embedded in legal reflections on the status and hierarchy of civilisations, supported by the philosophical conceits of such as Hegel who asserted grandly that: 'The civilized nation is conscious that the rights of barbarians are unequal to its own and treats their autonomy only as a formality'.[65] Notions of a hierarchy of civilisations were spurred on by reflections of anthropologists[66] and sociologists, cultural historians and legal scholars. Influenced by Enlightenment theories of progress, anthropology was greatly marked by unilinear evolutionist[67] schemes, drawing in time upon Darwinian and social Darwinian thought. The sharp sense of cultural difference suggested by scholastics and natural lawyers had been supplemented in the less vitriolic writers by a sense of common humanity which translated into perceptions of a diversity of actors in international legal processes, or even a rough equality between Europeans and others. Romanticisation of savage society (and Vitoria's concern for nature's children) carried with it the implication that the savages were like Europeans used to be, so that they were in a state which would evolve towards another. A dimension of temporality, a normativisation of

[63] E. de Vattel, *The Law of Nations* (J. Chitty ed. 1867), p. 100. This echoes the property theory of John Locke (1632–1704), for whom things produced by the spontaneous hand of nature but removed from this worthless state by human labour became the property of individuals.

[64] See, generally, Nussbaum, *A Concise History*.

[65] G. W. F. Hegel, *Philosophy of Right* (T. M. Knox translation, Oxford, 1942), p. 219.

[66] Anthropology – 'is a Western European science and its subject matter has, until very recently, been overwhelmingly the "primitive" ': A. Pagden, *European Encounters with the New World* (New Haven and London, Yale University Press, 1993), p. 184.

[67] Montesquieu's *De L'Esprit des Lois* (1748) is considered a precursor.

progress,[68] and the impulse of evolutionism, added themselves to the basic perception of difference between Europeans and others, so that 'it is not unwarranted to insist that classical evolutionism accounts for sociocultural differences by negating them, for it concerns itself mainly with explaining the backwardness of non-Western societies and cultures'.[69] In the sphere of international law, natural law declined and legal positivism burgeoned, placing its emphasis on State practice, typically the practice of a narrow club of European States or States with dominant European populations,[70] a development summarised in the context of Africa by C. H. Alexandrowicz:

> The Europeans arriving in Africa at first brought with them a law of nations based on natural law ideology which started fading out in the nineteenth century, giving way to positivism. Positivism discarded some of the fundamental qualities of the law of nations, particularly the principle of universality of the Family of nations irrespective of creed, race, colour and continent . . . international law shrank into an Eurocentric system.[71]

In positivist perspective, international law enjoyed only a precarious existence and sovereignty was almost everything. For theorists such as Austin, international law was only 'improperly so called', only a law or rule 'by an analogical extension of the term'.[72] In this aggrandised State system, against the backdrop of a scramble for fresh colonial possessions in Africa and Asia, the texts of international law usually discoursed on 'the uncivilized tribes'. Westlake is not untypical of nineteenth-century international lawyers in reserving international law to the civilised:

> The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied . . . International law has to treat . . . natives as uncivilized. It regulates, for the mutual benefit of civilized States, the claims which they make to

[68] 'the assertion that the past is different from the present and future, and that the future is intrinsically better than the past and present': M. A. Martinez, UN Doc. E/CN.4/Sub.2/1992/32, para. 84.

[69] M. A. Martinez, Special Rapporteur, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations, First Progress Report*, UN Doc. E/CN.4/Sub.2/1992/32, para. 46.

[70] Among textbook writers, it was merely a commonplace, uncontroversial observation that: 'The parties to international law are sovereign States. In the fullest acceptation of the term it prevails only among the Christian States of Europe and those originally colonized by them in America and elsewhere. This is due to the fact that these States have had a common historical development, and recognize the same, or nearly the same, standards of law and morals' – G. B. Davis, *Elements of International Law* (New York and London, Harper and Brothers Publishers, 1908), p. 29.

[71] C. H. Alexandrowicz, *The European–African Confrontation* (Leiden, Sijthoff, 1973), p. 6.

[72] W. Jethro Brown, *The Austinian Theory of Law* (London: John Murray, 1920), pp. 49–52.

> sovereignty . . . and leaves the treatment of the natives to the conscience of the State to which sovereignty is awarded.[73]

The uncivilised outside the international society have moral rights only, although these remain intact: 'Becoming subjects of the Power which possesses the international title to the country in which they live, natives have on their governors more than the common claim of the governed, they have the claim of the ignorant and helpless on the enlightened and strong'.[74] For Westlake, the existence of 'government' was the test of 'civilisation'. He distinguished 'Asiatic' from other modes, arguing that the Asian States may have 'government' even in autochthonous form. There is also some attempt to link various differences of 'understanding' and economic modes among the 'uncivilised' to particular legal and moral effects.

Terra nullius

To many European lawyers of the eighteenth and nineteenth centuries, some indigenous peoples were so low in the scale of civilisation and their forms of social organization and concepts of property so incomprehensible, so incommensurate with 'advanced' models, that their lands were regarded as *terra nullius*.[75] The configuration of *terra nullius* as it appeared particularly in the nineteenth century was extensively discussed by the jurist M. F. Lindley.[76] Noting that the Roman law of occupation,[77] applied essentially to ownerless things and was simply unequal to the conditions of international law, it was nevertheless being discussed in the context of 'the acquisition of sovereignty over the territories of backward peoples'.[78] He divided jurists into three classes:[79] (I) those who regard backward peoples as possessing a title to the sovereignty which they inhabit which is good against more highly civilised peoples; (II) those who admit title but with qualifications; and (III) those who do not consider that the natives possess rights of such a nature as to be a bar to the assumption of sovereignty over them by more highly civilised peoples. Among the class (I) jurists 'who recognize sovereignty in

[73] J. Westlake, *Chapters on the Principles of International Law* (Cambridge, The University Press, 1894), pp. 142–3.

[74] *Ibid.*, p. 140.

[75] Land belonging to no one.

[76] *The Acquisition and Government of Backward Territory in International Law* (New York, Negro Universities Press, 1969, reprinted from 1926).

[77] Influential in the formulation of many doctrines of international law including those connected with the acquisition of territory: see particularly Sir Henry Maine (criticised by Lindley for overstating the influence of Roman Law), *International Law*, The Whewell Lectures of 1887 (London, John Murray, 1888).

[78] Lindley, *Acquisition of Territory*, p. 11.

[79] Ch. III.

backward peoples', and thus do not regard 'occupation' as appropriate to backward territory (although other grounds for appropriation of territory such as conquest may apply), he placed Vitoria and followers, as well as Grotius and Gentilis among the historic jurists as assenting to his proposition, and among his contemporaries or almost contemporaries, he included such as Fiore, Woolsey and Pradier-Fodéré. In class (II), he placed Vattel (occupation if the primitive peoples have too much land and the civilised State needs it), Phillimore (stated to approve Vattel) and De Martens (the land of nomadic peoples can be thus appropriated). In class (III), he includes Westlake, Hall (whom he asserted to be inconsistent),[80] Oppenheim and Martens Ferrao (quoted with approval by Westlake).[81]

Nineteenth-century doctrine presents a mixed picture on the question of indigenous status. There was a tendency, particularly marked among English and American Writers, to write off the sovereignty of native tribes. This went beyond a denial of their statehood, which is one thing, to a claim that their lands were assimilable to uninhabited territory. The tendency was never complete, and such views were strenuously challenged. This 'new' way of looking at international law, was not, however, widely supported by State practice, and, to a degree, remained something of an academic conceit. The practice of States in acquiring territories displayed a mixture of modes. *Terra nullius* was in fact a rare exercise of acquisition for inhabited lands: Australia was an example, but not New Zealand.[82] The American commentator Story claimed that in North America, the doctrine of discovery operated to confer sovereignty on the European powers with the natives having the legal status of 'brute animals'.[83] This unappealing description is also legally inaccurate. Lindley comments that whatever the effects of 'discovery' between the European powers themselves, it did not operate as between the native inhabitants and the invaders to deprive, without more, the former of their sovereignty.[84] A similar pattern is evident from Africa, with 'treaty races' between European powers to obtain rights in West Africa, coastal East Africa and the Niger River Valley.[85] As Hedley Bull comments:

> It is clear . . . that the Europeans did not put forward any general claim that African land was *territorium nullius* . . . but chose to recognise the existence of local communities with rights both of political independence and ownership of land, at least until the time came when they were strong enough to overthrow these communities . . . title to territory was generally based upon claims that it

[80] Lindley, *Acquisition of Territory*, p. 18.
[81] Westlake, *Chapters*, p. 146.
[82] See ch. 8 in this volume, on the modern reverberations of the Australian case.
[83] 'Story's commentaries' in J. Story, *A Familiar Exposition of the United States* (New York, Harper and Bros., 1864).
[84] Lindley, *Acquisition of Territory*, pp. 29–30.
[85] Generally, Alexandrowicz, *The European–African Confrontation*; Lindley, *Acquisition of Territory*, pp. 32 ff.

> had been ceded by consent of African rulers, or, much less frequently, that it had been acquired by right of conquest.[86]

Bull also points to the operation of the doctrine of constitutive recognition under which entities do not come within the compass of international law until recognised by the family of nations.[87] In Africa, the imperial powers generally preferred the thesis that the native communities voluntarily extinguished themselves, opting for the 'security' of the colonial system.[88]

The doctrine of guardianship

Along with the radical negation of indigenous existence presupposed by *terra nullius* doctrine, the powers developed further the doctrine of trust or guardianship. The seeds of the idea in the work of Vitoria and others were noted above, but the developments of the nineteenth century erected this sentiment into a system. Lindley expressed it thus:

> Governments and peoples at home have been more and more concerned with the general welfare of the natives under their control. Their professed aim has been to raise them in the scale of civilisation, and furnish them with the mental and manual training and the material equipment necessary to enable them to improve their conditions; and the duty of the advanced towards the backward races has come to be expressed as that of a trustee towards his *cestui que trust*, or of a guardian towards his ward.[89]

Lindley was equivocal on whether the trust was a moral or a legal obligation placed upon States. The doctrine was expressed in a broad ethical sense to denote duties which 'the advanced peoples collectively owe to backward races in general'; in a more definite sense, it meant the duties which a particular Power owes to the backward races under its immediate control – in which sense the concept sums up 'the actual legal duties of a legal or quasi-legal character'.[90] The concretisation of the guardianship doctrine accompanied the parcelling of Africa under the aegis of the concert of Europe. Article VI of the General Act of the Berlin African Conference 1884–85 gives the trust doctrine concrete expression in providing that:[91] 'All the Powers . . . bind themselves to watch over the preservation of the native

[86] H. Bull, 'European States and African political communities', in H. Bull and A. Watson (eds.), *The Expansion of International Society* (Oxford, Clarendon Press, 1984), p. 111.

[87] Bull, 'European States', 113–14. See also L. Oppenheim, *International Law* (3rd edn, 1920), pp. 134–5.

[88] Bull, 'European States', pp. 112–13.

[89] Lindley, *The Acquisition of Territory*, p. 329.

[90] *Ibid*., pp. 329–30.

[91] Under the title 'Provisions relative to Protection of the Natives, of Missionaries and Travellers, as well as relative to Religious Liberty'.

tribes, and to care for the improvement of the conditions of their moral and material well-being'.[92] They also bound themselves to 'protect and favour all religions, scientific, or charitable institutions, and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilisation'.[93] Christian missionaries, scientists and explorers were likewise given special protection. The natives were guaranteed freedom of conscience and religious toleration as were foreigners. Freedom to organise religious missions was also one of the guaranteed rights. Alexandrowicz cites a Committee of the Conference for its statement that 'the Conference has thought proper to assume the role of the Official Guardian', to aid the natives 'to attain higher political and social status . . . to instruct and initiate them into the advantages of civilisation . . . No dissent manifested itself, nor could manifest itself in this respect'.[94] The doctrine of guardianship makes another appearance in the Treaty of St Germain-en-Laye 1919. Article 11 extends the provisions of the Berlin Act to all the African territories of the powers, who will continue 'to watch over the preservation of the native populations and to supervise the improvement of the conditions of their moral and material well-being'.[95] It is also essentially the doctrine that finds its way into the Covenant of the League of Nations. Article 22 of the Covenant under which the care of those peoples unable to stand by themselves under the strenuous conditions of the modern world was to be undertaken by advanced nations as a 'sacred trust of civilisation'. Guardianship also motivated the international trusteeship system set out in Chapter XII of the UN Charter.

The treaty nexus

The history of treaties runs through the history of indigenous engagement with international law. As indicated in earlier chapters, the question of 'treaties, agreements and other constructive arrangements between States and indigenous populations' is the subject of recent work at the UN – the Alfonso Martinez Study.[96] While State–indigenous agreements are not of interest to all indigenous groups (where there are no relevant historical examples), the constellation of rights in the draft Declaration includes, as previously noted,

> the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors,

[92] M. Hurst (ed.), *Key Treaties for the Great Powers 1814–1914* (Newton Abbot, David and Charles, 1972), vol. 2, pp. 885–6.
[93] *Ibid.*, p. 886.
[94] Alexandrowicz, *The European–African Confrontation*, p. 115.
[95] CMND 477 (1919). This was signed and ratified by Belgium, France, Italy, Japan, the United Kingdom and the United States of America.
[96] *Final Report* in E/CN.4/Sub.2/1999/20, 22 June 1999.

> according to their original spirit and intent, and to have States honour and respect such treaties . . . (etc.) Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.[97]

The article does not explicitly describe the agreements as governed by international law, though it does call for scrutiny by international bodies.[98] There is a long history of such agreements, many of which clearly belong – or belonged – to the canon of international law. Agreements supply a missing link in the history of European expansion, for which the other doctrines – papal donation, discovery, conquest, *terra nullius*, etc. – do not fully account.[99] As Chief Justice Marshall observed in *Mitchell v United States* (1835),[100] the British Crown, by 'thus holding treaties with these Indians, accepting of cessions from them . . . and establishing boundaries with them . . . waived all rights accruing by conquest or cession'. Examples of treaty arrangements can be found in the histories of the various 'colonialisms' and continents. In the case of Spanish expansion, there are few examples of 'direct' treaties as opposed to cases where indigenous groups are affected third parties.[101] Examples include agreements made between Spain and the Mapuche of modern Chile and Argentina (the peoples known as Renqueles in the latter context), with Parlamentos or peace conferences between colonial authorities and Mapuche playing a key role.[102] Agreements recognised the Mapuche as having direct relations with the colony of Chile as an independent nation.[103] In North America, Spain made treaties with Chicasaws and Choctaws in 1784 to draw them into conflicts on the side of Spain.[104] In the case of the Dutch, treaties were made with the Maroons of Suriname in the 1760s, renewed in the 1830s and 1860. Maroon treaties also exist in Colombia, Cuba, Ecuador, Jamaica, Brazil, Mexico and elsewhere: the treaties 'all exchanged a cessation of hostilities for a recognition of the Maroons' collective control over their territories in which they could exist as autonomous

[97] Article 36.

[98] Compare the formula in the (1997) draft American Declaration of Indigenous Rights, which prefers the formula (Article XXII) that disputes 'should be submitted to competent bodies' – omitting the international dimension: see ch. 16 of this volume.

[99] The work of C. H. Alexandrowicz vividly brings home this point: *The European–African Confrontation,* and *An Introduction to the History of the Law of Nations in the East Indies* (Oxford, Clarendon Press, 1967).

[100] 34 US 711.

[101] The Tratado de Permuta (Treaty of Permutation) of 1750 between Spain and Portugal provided for an exchange of Jesuit missions in Eastern Parana for the town of Colonia do Sacramento – cited by Alfonso Martinez, E/CN.4/Sub.2/1996/23, para. 148.

[102] J. Bengoa, *Historia del pueblo Mapuche* (Santiago, Edicion sur, 1985).

[103] Alfonso Martinez, E/CN.4/Sub.2/1996/23, paras. 145–70.

[104] Alfonso Martinez, *Treaty Study*, E/CN.4/Sub.2/1992/32, para. 254.

political and cultural entities'.[105] One indigenous view of the treaties is summarised as:

> Saramakas, like their Maroon counterparts in Jamaica . . . have continued to see the treaty as a sacred charter and have refused to believe that it could be fundamentally altered. The whitefolks' various ultimatums, sometimes couched in legalistic language, have never been understood by Saramakas as more than arbitrary and transitory words.[106]

On the East Indies, Alexandrowicz wrote that

> a great number of treaties originating from the pre-nineteenth century were either equal treaties or, if they were unequal and imposed transitory or permanent burdens on the contracting (indigenous) Rulers, they did not necessarily result in the suppression of their sovereignty or remove them from the orbit of the natural family of nations.[107]

It is estimated that the British Crown signed some forty treaties with the first nations of North America between 1693 and 1862.[108] In the case of the United States, some 400 treaties were entered into with first nations,[109] the first in 1778 with the Delawares (Treaty of Fort Pitt).[110] The United States produced an early body of Supreme Court jurisprudence in Indian matters which exemplifies the process of aggrandisement of settler sovereignty, commensurately downgrading indigenous treaties and indigenous sovereignty. The five 'Marshall cases' offer lessons in the deconstruction process. In *Fletcher v Peck* (1810),[111] the court held that States claiming lands west of a line of demarcation defined in the Royal proclamation of 1863 'owned' them, even if the indigenous nations had not consented to cede them. Thus the state of Georgia, in a case involving title to land, had the right to sell Indian land. Vattel was cited by the respondent Peck – 'what is the Indian title? It is mere occupancy for the purpose of hunting. It is not like our

[105] E.-R. Kambel and F. MacKay, *The Rights of Indigenous Peoples and Maroons in Suriname* (Copenhagen, IWGIA Document No. 96, 1999), p. 56. The authors discuss (pp. 58–61) the Ndyuka Treaty 1760, the Saramaka and Matawai Treaty 1762, the Matawai Treaty 1769, various renewals of treaties, and the Boni/Aluko Maroon Treaty 1860; comments on the status of the instruments at p. 62. The Saramaka Treaty was pleaded before the Inter-American Court of Human Rights in the *Aloeboetoe* case – see ch. 11 of this volume.

[106] Kambel and MacKay, *Rights of Maroons*, p. 65, citing R. Price, *Alabi's World* (Baltimore, Johns Hopkins University Press, 1990), p. 343. See also, *ibid.*, the citation from W. Hoogbergen, *The Boni Maroon Wars in Suriname* (Leiden, E. J. Brill, 1990), p. 28.

[107] Alexandrowicz, *Law of Nations in the East Indies*, p. 154.

[108] P. Havemann (ed.) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Auckland, Oxford University Press, 1999), p. 25.

[109] Alfonso Martinez, *Treaty Study*, E/CN.4/Sub.2/1992/32, para. 259.

[110] E/CN.4/Sub.2/1992/32, para. 240.

[111] 10 US 87.

tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited'.[112] In *Johnson v McIntosh* (1823), Chief Justice Marshall observed that the doctrine of discovery operated to give title to one European sovereign against another. This meant that for the original inhabitants, 'their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will' According to Alfonso Martinez, the Cherokee Nation Cases – *Cherokee Nation v Georgia* (1831) and *Worcester v Georgia* (1832),

> elaborate the notion of the quasi-sovereignty of Indian nations: they are sovereign enough to enter into treaties with the purpose of ceding title to their territory, but they are not sovereign enough to function as independent political entities or . . . to protect the remnants of their sovereignty.[113]

In *Cherokee Nation*, the Cherokee sought original jurisdiction before the Supreme Court under Article III of the US Constitution, which gives the court jurisdiction to hear disputes between Union States and foreign States. The Supreme Court distinguished between and Indian nation and a foreign nation. Indian nations were not comprehended in the latter term, 'not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States'. The Cherokee – and other Indian nations – were 'domestic dependent nations', in 'a state of pupillage; their relation to the United States resembles that of a ward to his guardian' – a sentiment which clearly echoes the ideas of Vitoria. *Worcester v Georgia* was a test case challenging the constitutionality of Georgia's legislation on the grounds of repugnance to Cherokee–Federal treaties: the laws were declared void. Chief Justice Marshall stated that:

> By various treaties, the Cherokees have placed themselves under the protection of the United States: they have agreed to trade with no other people, nor invoke the protection of any other sovereignty. But such engagements do not divest them of the right of self-government, nor destroy their capacity to enter into treaties or compacts.[114]

Further,

> the Constitution, by declaring treaties already made, as well as those to be made, the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.

This was a high point in recognition of a power of treaty-making by indigenous tribes – 'Marshall's attempt to right the wrongs that he had

[112] *Ibid.*, p. 121.
[113] E/CN.4/Sub.2/1996/23, para. 54.
[114] *Worcester v Georgia.*

perpetrated on Indian peoples in his prior decisions'.[115] At the same time, Martinez notes, 'the decision implied the precarious status of the Indian nations, considered as States but not foreign, considered as sovereign but also as wards of the federal government'.[116] Independent treaty-making capacity was gradually dismantled by decisions of US courts.[117]

In line with developments in general international law, early treaty relationships were characterised by a rough idea of agreement between (more or less) equals, followed by the absorption of the treaties into domestic law: a process of retrogression and domestication.[118] As Brownlie observes in relation to the Maori–Pakeha Treaty of Waitangi 1840:

> The can be no doubt . . . that the Treaty of Waitangi presupposed the legal and political capacity of the chiefs of New Zealand to make an agreement which was valid on the international plane. Moreover, there is evidence that, in the decade prior . . . the British Government conducted itself on the basis that relations with the Maori tribes were governed by the rules of international law.[119]

The detailed reason for this process may be something in the instrument itself. In the case of Waitangi for example, Brownlie adds that the treaty 'does not fit into the normal pattern . . . it is not binding upon the Crown as a valid international treaty: for New Zealand it is not a treaty in force. Its result was the disappearance of one of the international persons involved in the transaction'.[120] In another example, Britain signed a convention on military cooperation with the 'King of the Mosquito Indians' in 1720, though in the later Treaty of Managua between Great Britain and Nicaragua, Britain recognised Nicaragua's sovereignty over all the Miskito lands without indigenous consent.[121] In many cases, the treaty was simply ignored by the colonial power. In other cases, non-indigenous versions which may more clearly set out a language of cession, have tended to prevail. In yet other cases, there

[115] Falkowski, *Indian Law*, p. 104.

[116] E/CN.4/Sub.2/1996/23, para. 57.

[117] In *Lone Wolf v Hitchcock*, 187 US 553 (1903), the Supreme Court upheld the power of the federal government unilaterally to abrogate Indian treaties. See also *ex parte Crow Dog*, 109 US 556; *United States v Kagama*, 118 US 375. The Supreme Court upheld the extinguishment of Indian title in *Tee-Hit-Ton Indians v United States*, 348 US 272, observing that: 'Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land' (89–90).

[118] The terms are used through the various stages of the UN report on treaties, etc., by Special Rapporteur Alfonso Martinez.

[119] I. Brownlie (F. M. Brookfield, ed.), *Treaties and Indigenous Peoples* (Oxford, Clarendon Press, 1992), p. 8.

[120] *Ibid.*, p. 26.

[121] Alfonso Martinez, *Third Progress Report*, E/CN.4.Sub.2/1996/23, paras. 119–21.

is no indigenous version. Misunderstandings abound and appear always to have done so in such a fruitful area for mutual incomprehension. While it is not always a case of duplicity on one side and a sacralised approach on the other, the following remarks are instructive:

> the six [Iroquois] Nations having conquered such and such nations, their territories belong to them, and the Six nations being the King's subjects which by treaty they have acknowledged themselves to be, those lands belong to the King. I believe it is for our interest to lay down such principles . . . [But if] we are to search for truth . . . I don't imagine we shall find any conquered Nation ever formally ceded their country to their conquerors . . . as for the Six nations having acknowledged themselves to be Subjects of the English, that I conclude must be a very gross Mistake and am well satisfied that were they told so, they would not be well pleased.[122]

Twentieth century

The period of the League of Nations witnessed the stirrings of indigenous organisation at the international level.[123] At the level of Empire, direct appeals to the monarch in London were made by Canadian Indians and New Zealand Maori from the middle of the nineteenth century.[124] A delegation of the Six Nations of Canada led by Iroquois Cayuga Chief Deskaheh travelled to Geneva to plead their case for treaty rights of self-government. The matter was taken up by the General Secretary of the League of Nations in 1923, and Deskaheh's case was supported by such as Ireland, Estonia, Panama and Persia. However, Britain removed the question from the League agenda, insisting that it was an internal affair of the British Empire.[125] Attempts by the Maori T. W. Rotana and a later Iroquois Confederation delegation to engage the League organs were even less successful.

[122] The eighteenth-century soldier and administrator General Sir Thomas Gage, cited in H. Foster, 'Indian administration', in Havemann, *Indigenous Peoples' Rights*, pp. 351–77, at p. 356. The author adds at p. 357: 'Nor are they today'. 'The Mohawks of Kanesatake (Oka), Kahnawake, and Akwesnasne, and the Iroquois of the Six Nations at Brantford, are among the most vocal and determined on the subject of title and sovereignty'. Among other 'determined' groups we may note the claims of indigenous Hawaiian organisations (Ka Pakaukau) for the recovery of Hawaiian sovereignty: Alfonso Martinez, E/CN.4/Sub.2/1995/27, paras. 238–49.

[123] D. Sanders, 'The legacy of Deskaheh; indgenous peoples as international actors', in C. P. Cohen, *Human Rights of Indigenous Peoples* (Ardsley, NY, Transnational Publishers, 1998), pp. 73–88.

[124] D. O. Sanders, *The Formation of the World Council of Indigenous Peoples*, IWGIA Document No. 29, Copenhagen 1977.

[125] H. Minde, 'The making of an international movement of indigenous peoples', in Frank Horn (ed.), *Minorities and their Right of Political Participation* (Rovaniemi, Lapland University Press, 1996), pp. 90–128, at pp. 102–4.

In terms of formal doctrine, a trio of international cases in the early twentieth century appeared to confirm the invisibility of indigenous groups to international law. In the *Cayuga Indians* case,[126] a US–Great Britain Arbitral Tribunal dealt with a claim to compensation for violation of the rights of Cayuga Indians who had settled in Canada, having sided with the British in the American War of Independence. In a treaty of 1789 between the Cayuga nation and the state of New York, Cayuga land was ceded to the state in return for an annuity. No money was paid to Canadian Cayugas after 1810.[127] Claiming through Great Britain, the Canadian Cayugas claimed to be the 'Cayuga nation' of 1795. The Tribunal stated that the tribe had never constituted a unit under international law: 'the American Indians have never been so regarded . . . From the time of the discovery of America the Indian tribes have been treated as under the exclusive possession of the power which by discovery or conquest or cession held the land which they occupied'. Thus, the Cayuga Nation was a legal unit under New York law – so far as New York law chose to make it one. For such a 'contract' there was no direct legal liability of the United States. Liability existed under the Treaty of Ghent,[128] not to the Cayugas – who, being in a state of pupilage,[129] 'could do nothing except under the guardianship of some sovereign'[130] – but to their sovereign, the United Kingdom. In the *Island of Palmas* case,[131] a dispute between The Netherlands and the United States, a similar view to the above was advanced by Arbitrator Huber when he declared that:

> As regards contracts between a State or a company such as the Dutch East India Company and native princes or chiefs of peoples not recognised as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights or obligations such as may, in international law, arise out of treaties. but, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; they are none the less facts of which the law must in certain circumstances take account.[132]

[126] 6 UNRIAA (1926), 173; H. W. Briggs, *The Law of Nations. Cases, Documents and Notes* (London, Toronto, etc., George G. Harrap & Co. Ltd.,1938), esp. pp. 58–62. See also in the Canadian context, *R v Syliboy* (1929), 1 DLR, 307.

[127] Canadian Cayugas sided with Great Britain in the war of 1812; those in New York sided with the United States.

[128] Treaty of Ghent 1814, Article IX of which obligated the United States to restore to the Indians with whom they had been at war 'all the possessions, rights, and privileges which they might have enjoyed or been entitled to' in 1811; text in M. Hurst, *Key Treaties of the Great Powers 1814–1914*, vol. 1, pp. 21–30, at p. 29.

[129] Citing *Cherokee Nation v Georgia*, per Marshall CJ.

[130] Briggs, *The Law of Nations*, p. 62.

[131] *2 UNRIAA* (1928), 831.

[132] *Ibid.*, 858. In relation to 'indirect effects', treaties of cession could be evidence of title against third parties.

In the *Eastern Greenland* case,[133] the Permanent Court of International Justice was called to decide between the claims of Denmark and Norway to Eastern Greenland. In the face of declarations of support by some countries in favour of Denmark, Norway claimed sovereignty over Eastern Greenland which it regarded as *terra nullius*. In its assessment of historical incidents pertinent to the claim, the Permanent Court of International Justice observed that early Norwegian settlements perished because their 'inhabitants were massacred by the aboriginal population'.[134] In this great sovereignty debate, the Greenlandic Inuit were not considered as possessing *locus standi* in the case, still less was there any consideration of their views.[135]

International law did not clearly distance itself from the *terra nullius* doctrine until the twentieth century. The Advisory Opinion of the International Court of Justice in the *Western Sahara* case was crucial. In the words of Judge Ammoun

> the concept of *res nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned. It is well known that in the sixteenth century Francisco de Vitoria protested against the application to the American Indians, in order to deprive them of their lands, of the concept of *res nullius*. This approach by the eminent Spanish jurist and canonist, which was adopted by Vattel . . . was hardly echoed at all at the Berlin Conference of 1885. It is however the concept which should be adopted today.[136]

The doctrine was regarded as inapplicable in cases of 'territories inhabited by tribes or peoples having a social and political organization'. Following this example, the High Court of Australia in the case *of Eddie Mabo and Others v The State of Queensland*[137] made further inroads into the doctrine and discourse of *terra nullius*. According to Brennan J.:

> If the international law notion that inhabited land may be classified as *Terra Nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be 'so low in the scale

[133] *Legal Status of Eastern Greenland*, PCIJ, Ser. A/B No. 53 (1933), extracts in L. C. Green, *International Law Through the Cases* (London, Stevens and Sons, 2nd edn, 1959).

[134] Green, *International Law*, p. 129.

[135] See comment in Alfonso Martinez, *Treaty Study*, E/CN.4/Sub.2/1996/23, paras. 181–2.

[136] ICJ Rep. 1975, 86–7.

[137] 13 Leg. Rep., No. 11, 11 June 1992, pp. 1–29 and footnotes 1–2. Commentaries include those in M. A. Stephenson, and S. Ratnapala, *Mabo: A Judicial Revolution* (St Lucia, Queensland, Queensland University Press, 1993); D. Hyndman, 'Mabo and the demise of *terra nullius*: regaining ancestral domain in Australia', *Fourth World Bulletin*, 2(3) (1993), 4–5; M. Falck Borch, 'Australia: indigenous entitlement to land reconsidered', *IWGIA Newsletter*, 4/92, 41–4; G. Nettheim, 'As against the whole world', *Australian Law News*, July 1992, 9–14.

> of social organization' that it is 'idle to impute to such people some shadow of the rights known to our law'[138] can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.[139]

He added that it was only by fastening on the notion that a settled colony was *terra nullius* that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants:

> If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too. Though the rejection of the notion of *Terra Nullius* clears away the fictional impediment to the recognition of indigenous rights and interests in colonial land, it would be impossible for the common law to recognize such rights and interests if the basic doctrines of the common law are inconsistent with their recognition.[140]

In terms of the twentieth-century development of indigenous rights, the ILO has been a prime mover. Elements of a somewhat paternalistic concern for 'native populations' in the colonies animated elements of the League of Nations generally, while the major ethnic/racial thrust of League activity was directed more Eurocentrically to minority rights protection. The work of the ILO is considered in a later chapter: its history merges into a history of the present.

Comment

The engagement of international law with indigenous, non-European 'others' throws into relief contemporary indigenous claims, both against and on the basis of that system. International law has persistently struggled to position indigenous, non-European 'others' in relation to a set of European-derived assumptions, principles and practices. The approach to the personality of indigenous peoples moved from basic forms of recognition through a series of benevolent or disparaging notions, to the negation of indigenous societies and loss of international personality. In the hands of authorities such as Vitoria, sovereignty was recognised, even if not quite equal to that of incoming

[138] *In Re Southern Rhodesia* [1919] AC, 233–4.

[139] (1992) 11 Leg. Rep., 10.

[140] For an examination of historiographical and other implications of *Mabo*, see H. Reynolds, 'New frontiers: Australia', in Havemann, *Indigenous Peoples' Rights*, pp. 129–40, and the bibliography therein. The author notes at pp. 138–39 that in *Mabo*, the Court 'overthrew the doctrine of *terra nullius* in relation to property but reaffirmed it in relation to sovereignty'; see the 1979 case of *Coe v Commonwealth*, 53 AJLR, 403. See also H. Reynolds, *Aboriginal Sovereignty* (Sydney, Allen & Unwin, 1996).

Europeans. With Sepúlveda, the negation of indigenous authority was radical, and linked to an assault on the rationality of indigenous societies. In the case of the doctrine of *terra nullius*, the mismatch between European conceptions of governance and non-European social, cultural and political organisation was extreme. Metaphors to describe the indigenous – children, natural slaves – continue to have effects. In ILO Convention 107, others have the primary responsibility for nurturing these childish societies,[141] whose childish cultures are replaceable.[142] Indigenous languages are the languages of childhood, to be replaced by fully adult, standardised national languages,[143] preserved only in museums of childhood.[144] The motif of natural slavery is also profoundly disabling, without the softening features of guardianship. To suggest that the indigenous inhabitants of the New World were somewhat less than human is to institute a language of dehumanisation, a perfect instrument of genocide.[145] The knowledge systems of these *homunculi* could not be equated with European knowledge – of the human and the divine. While indigenous knowledge had its uses through introducing new plants and animals to European taxonomies, it was too closely integrated with superstition, too low in conception, to stand the tests of European theology or later science. The indigenous were also deemed to lack the virtues of labour – hence the colonisers' justification of appropriation of empty lands, or the acquisition of lands superfluous to the needs of the Indians.

But the past, as they say, is unpredictable. Read deconstructively, this melancholy history at least shows that international law is not fixed and that, even at its narrowest, it paraded a conscience of sorts.[146] Rough equivalences between the European and the non-European really existed before they were swallowed up by positivist dogma. And, apart from the rudimentary attention to indigenous concerns, the protection of aliens, protection of minorities through specific treaties and other arrangements,[147] the

[141] Article 2.1.
[142] Article 4(b).
[143] Article 23.2.
[144] Article 23.3.
[145] For a contemporary reflection, see H. Fein, *Genocide: A Sociological Perspective*, (London, Sage Publications, 1993), pp. 77–8; pp. 81–2.
[146] Much of the development in the present chapter can be summed up as follows: 'On the one side, there is a long Western tradition of doctrines and ideas that rested on principles of exclusiveness based on being Christian, being European or being "civilised"; on the other side, there is the powerful counter-current in Western thought that has maintained the existence of a universal community of mankind and that has drawn its primary inspiration from the long tradition of natural law' (A. Hurrell, 'Power, principles and prudence: protecting human rights in a deeply divided world', in T. Dunne and N. J. Wheeler (eds.), *Human Rights in Global Politics* (Cambridge University Press, 1999), pp. 277–302, at p. 290).
[147] Thornberry, *International Law*, Part I.

abolition of the slave trade,[148] the development of the laws of war,[149] the early twentieth-century League of Nations mandates system,[150] and the general work of the ILO, were only some expressions of a humanitarian burden. The spots of light should not be blinked away. Heroic State positivism and a sovereignty-obsessed legal system – which create a kind of psychological prison in the minds of contemporary policy makers – appear as fleeting images in international relations, even if they linger. Government appeals to abiding systemic arrangements which rule out indigenous challenges cannot therefore succeed: international law is no monolith, but is more like a network of interlinked, evolving and eminently challengeable assumptions.

For some contemporary indigenous peoples, the loss of sovereignty still rankles and history continues to hurt, to say nothing of deprivations and the attitudes and practices of the non-indigenous. The doctrine of inter-temporal law[151] and the approach to treaties of Special Rapporteur Martinez[152] may encourage the retrospective re-examination of historical losses, though a system which works on ergonomic energy-conserving principles is not especially good at retrieving the past.[153] Most groups will look rather to the utilisation of present legal structures, claiming through human rights, minority rights, indigenous rights and/or a meta-doctrine such as the right of peoples to self-determination.[154] These discourses have potential to reimagine notions of society and political community – even if they emerge from the history

[148] See the brief summary with citations in A. H. Robertson and J. Merrills, *Human Rights in the World* (Manchester and New York, Manchester University Press, 4th edn, 1996), pp. 15–17.

[149] Among many contributions, see G. Best, *War and Law Since 1945* (Oxford, Clarendon Press, 1994) which, despite its title, elaborates an account of the historical development of laws of war.

[150] Thornberry, *International Law*, pp. 51–2.

[151] The doctrine – essentially a variant on the principle that laws should not be applied retroactively – asserts that the legality of a situation must be judged according to the legal system in force at the time. The notion has salience in the interpretation of treaties or territorial disputes, but has been undermined by doctrinal developments. One author observing that, whereas under modern international law, conquest cannot confer title, in the past it could, asks if 'old titles based on conquest now become void? If so, the results could be very startling; carried to its logical conclusion, this suggestion would mean that North American would have to be handed back to the Indian nations': P. Malanczuk, *Akehurst's Modern Introduction to International Law* (London and New York, Routledge, 7th rev. edn, 1997), p. 156; the author dismisses the suggestion as groundless.

[152] His references to the legal retrogression of indigenous peoples and the re-examination of attendant legal processes.

[153] See the remarks on historical sovereignty claims in B. Kingsbury, 'Claims by non-State groups in international law', *Cornell International Law Journal* 25(3) (1992), 481–513, at 496.

[154] P. Thornberry: 'The democratic or internal aspect of self-determination with some remarks on federalism', in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, Martinus Nijhoff, 1993), pp. 101–38.

which darkened the indigenous world and their presence in the international legal canon owes itself largely to the exercise of State authority. If we read contemporary rights as merely the working through of Enlightenment narratives of progress and homogeneous citizenship,[155] or as representing the liberal tradition writ large, indigenous peoples may not expect redemption through engagement with them. The burden of succeeding chapters is to trace the contemporary parameters of human rights law, to see if human rights contain the transformative energy to sustain and empower the peoples, subvert them, or both.

[155] For revealing accounts of Enlightenment attitudes to races, savages, etc., see I. Kramnick (ed.), *The Portable Enlightenment Reader* (New York, Penguin Books, 1995), pp. 629–70. Even Kant was not immune for the habit of disparagement – cf. his 'The difference between the races' (1764), in Kranmick, *Portable Enlightenment Reader*, pp. 637–9.

4

The age of rights[1]

If the iron cage of sovereignty-based international law continued to imprison the legal imagination, its power loosened significantly in the twentieth century. In terms of State actors, the opening out of the system to all 'peace-loving' States[2] under the impetus of self-determination implied that the Eurocentric mould was broken or badly damaged.[3] On possible types of international actor/participant,[4] the phrases of the ICJ in the *Reparations case* continue to resound:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective action of States has already given rise to instances of action upon the international plane by certain entities which are not States.[5]

Leaving aside the arcane language of subjects and objects, a range of entities – States, international organisations, peoples, individuals, transnational corporations, etc., presently participate in international law, as do indigenous peoples and minority groups. This flexibility is reflected only to a limited extent in current articulations of sources of international law.[6] The entities do not all participate in the same way: State rights are not the same as for

[1] After N. Bobbio, *The Age of Rights* (Cambridge, Polity Press, 1996).

[2] Article 4.1 of the UN Charter.

[3] In a vast literature, one of the best general accounts remains that by A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995). See also C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, Martinus Nijhoff, 1993).

[4] For a lucid explanation of 'participant' language, see R. Higgins, *Problems and Process: International Law and How we Use It* (Oxford, Clarendon Press, 1994), ch. 3.

[5] ICJ Reports 1949, 174, at 178–9.

[6] Article 38 of the Statute of the ICJ, taken as a contemporary account of the sources of international law, values the contributions of courts and jurists, and unspecified

individuals; rights and duties of organisations are linked to the specifics of their mandates;[7] rights of peoples are not the same as rights of minorities.[8] Flexibility extends to principles as well as actors: the 'actors' carry with them customised portfolios of rights, which share some features in common. It may be said that while States are still the primary actors in the international system, sovereignty has tended to leak outwards to supranational organisations and sub-State communities.[9] The leakage has not yet become a flow, but sovereignty appears more amorphous, less impressive than before.

Human rights and self-determination: the UN Charter

The Charter, incorporating Statist and Enlightenment elements, is at the root of modern developments,[10] though its principles do not necessarily exhaust the whole of modern international law.[11] On the first element, Charter principles command respect for sovereign equality, territorial integrity and non-intervention in domestic affairs.[12] Voting in the General Assembly (GA) and other major UN structures is limited to member States. Access to the ICJ is limited to States and UN organs and agencies. Echoes of old hierarchies throng the élite-member Security Council.[13] Statism is pragmatically

'general principles' to the development of international law alongside the various emanations of the State through custom and treaty: see Higgins, *Problems and Process*, ch. 2.

[7] See for example, the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* 35 ILM (1996), 809 ff.

[8] While one may agree with Kingsbury that 'simple assignment of labels' does not determine the outcome of any disputed case as to whether a group is a people or a minority, applying the labels is rarely a legally innocent act, and labels once assigned have considerable psychological/normative power: B. Kingsbury, 'Claims by non-State groups in international law', *Cornell International Law Journal* 15(3) (1992), 481–513, at 500.

[9] For reflections, see K. Mills, 'Reconstructing sovereignty: a human rights perspective', *Netherlands Quarterly of Human Rights*, 15(3) (1997), 267–90; G. J. Simpson, 'The diffusion of sovereignty: self-determination in the post-colonial age', *Stanford Journal of International Law*, 32(2) (1996), 255–86.

[10] This is not to underplay the role of the Nuremberg War Crimes Tribunal in disseminating a human rights message, particularly through its condemnation of crimes against humanity: J. Donnelly, 'The social construction of international human rights', in Dunne and Wheeler (eds.), *Human Rights in Global Politics*, pp. 71–102; also Thornberry, *International Law*, ch. 7.

[11] The relationship between the principles of the Charter and a vaguer customary law of humanitarian intervention is only one issue in the NATO intervention in Kosovo. For an appraisal of the Charter and alleged customary principles, see K. Drezov *et al.*, *Kosovo: Myths, Conflict and War* (Keele European Research Centre, 1999), revised as M. Waller, K. Drezov and B. Gokay, *Kosovo: The Politics of Delusion* (London, Frank Cass, 2001).

[12] Article 2, paras. 1, 4 and 7.

[13] Article 23 of the Charter.

moderated by procedures for the affiliation of non-governmental organisations with the UN Economic and Social Council – including indigenous organisations.[14] 'Independent Experts' fulfil many roles in the system,[15] including that of norm-development: succeeding chapters of the present work focus on the work of experts of the 'treaty-bodies', and 'Charter-based bodies'.

On the second element, the language of the rational, the secular, the democratic and the universal disseminated in key texts such as the French Declaration on the Rights of Man and the Citizen and the American Declaration of Independence eventually found its way into the Charter of the United Nations and the Universal Declaration of Human Rights.[16] Whereas the Dumbarton Oaks 'Proposals for the Establishment of a General International Organization' prepared by the Four Great Powers made only brief reference to 'respect for human rights and fundamental freedoms' in connection with 'Arrangements for International Economic and Social Co-Operation',[17] the rights were a broader concern at San Francisco. In the Charter, human rights figure in the preamble, among the Purposes of the United Nations, and elsewhere – there are seven distinct references to human rights in all, scattered throughout the text.[18] The formulaic provision demanding that the rights be respected and promoted 'without distinction as to race, sex, language, or religion' appears in four cases.[19] The promotion and encouragement of respect for human rights and fundamental freedoms is listed among the Purposes of the UN, complementing the concern with international peace and security. Article 68 of the Charter provided that ECOSOC shall set up functional commissions in various fields including human rights – a major outcome was the setting up of the Commission on Human Rights,[20] and latterly the Permanent Forum for Indigenous Issues.

[14] See the discussion of the role of NGOs in H. Steiner and P. Alston (eds.), *International Human Rights in Context: Law, Politics, Morals* (Oxford, Clarendon Press, 2nd edn, 2000), ch. 11; also A. Clapham, 'UN human rights reporting procedures: an NGO perspective', in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000), pp. 175–98.

[15] Thoughtful appreciations of this and other issues are presented in Alston and Crawford, *UN Human Rights Treaty Monitoring*.

[16] There were of course other influences: J. Morsink, 'The philosophy of the universal declaration', *Human Rights Quarterly* 6(3) (1984), 309–34.

[17] R. B. Russell and J. S. Muther, *A History of the United Nations Charter: The Role of the United States 1940–45* (Washington: Brookings Institution, 1958), appendix 1.

[18] The preamble, Article 1.3, Article 13(c), Article 55(c), Article 62.2, Article 68 and Article 76(c). In the last connection – the international trusteeship system, specific trusteeship agreements also carried a human rights component – *United Nations Action in the Field of Human Rights* (New York and Geneva, 1994), p. 3.

[19] Article 1.3, 13(c), 55(c) and 76(c); discussion in P. G. Lauren, 'First principles of racial equality: history and the politics and diplomacy of human rights provisions in the United Nations Charter', *Human Rights Quarterly*, 5(1) (1983), 1–26.

[20] Created in nuclear form in ECOSOC resolution 5(I), 16 February 1946, and in full form by resolution 9(II), 21 June 1946.

The Charter does not include explicit derivation of its notions of human dignity, rights and freedoms from natural law or other philosophical system, or from religion. Faith in rights is nonetheless 'reaffirmed',[21] suggesting that they have a pre-existence, a history.

General aspects of self-determination

The Charter also underpins the Enlightenment legacy of peoples' rights from its opening phrase: 'We the Peoples of the United Nations'. Some read the Charter to mean that governments and States derive authority from the peoples, and not the peoples from the States.[22] Articles 1(2) and 55 refer to self-determination, Chapters XI (declaration regarding non-self-governing territories) and XII (international trusteeship system) imply it. The Charter carries a broad mandate to promote self-determination as a contribution to international peace. International law continues to explore the nature of this mandate and no age can properly claim to have exhausted the full potential and promise of Charter principles. The initial thrust of the Charter was not the simple dismantling of colonialism, but the requirement that States administering non-self-governing territories report to the UN on progress towards self-government and related objectives;[23] only later did the elimination of colonialism become obsessive.

The Charter does not define its terms – there is no canonical definition of the peoples entitled to self-determination.[24] Despite extensive documentation of the principle, there are still legitimate debates about its meaning: as a League of Nations Commission of Rapporteurs observed, self-determination is a 'principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion'.[25] Little has changed. The immediate post-Charter assessment of the content of self-determination was unfortunate for indigenous groups. Chapter XI, which, according to Bennett, 'gives detailed expression to Vitoria's doctrine of guardianship',[26] was utilised by the GA in promoting self-determination. Belgium claimed that a number of States were administering

[21] Preamble.

[22] R. Falk,'The rights of peoples (in particular indigenous peoples)', in J. Crawford (ed.), *The Rights of Peoples* (Oxford, Clarendon Press, 1988), pp. 17–37.

[23] The point is made strongly by Higgins in *Problems and Process*, ch. 7.

[24] For efforts to define, see M. C. van Walt van Praag, 'Report and analysis', in M. C. van Walt van Praag and O. Seroo (eds.), *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Barcelona, UNESCO, 1999), pp. 21–37.

[25] The Aaland Islands Question, *Report Presented to the Council of the League by the Commission of Rapporteurs*, League of Nations Doc. B.7.21/68/106 (1921), 27.

[26] G. Bennett, *Aboriginal Rights in International Law* (London, Royal Anthropological Institute, 1978) p. 12.

within their own frontiers territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogeneous peoples differing from the rest of the population in race, language and culture. These populations were disenfranchised, took no part in national life, and did not enjoy self-government.[27] It was not clear how such groups were to be excluded from the provisions on non-self-governing territories in Chapter XI. The groups included the Indian tribes of Venezuela, the Nagas of India, indigenous African groups in Liberia, tribals of the Philippines, Dyaks of Borneo, and so on. The generality of the Belgian concerns was indicated by the representative's remark that 'similar problems [to colonialism] existed wherever there were underdeveloped groups'.[28] The effect of the thesis was to implicate indigenous peoples in the attempt by colonial powers (similar views had been expressed by Britain and France) to stem the flow of decolonisation: an early attempt at damage-limitation by established members of the international community. The intellectual merits of the Belgian thesis – the potential *universality* of the self-determination principle – were largely overlooked. A writer comments:

> It was the putative threat to the sovereignty of newly independent States that secured the final rejection of the Belgian thesis and the purported restriction of Chapter XI to colonial territories . . . the vagaries of international politics thereby imposed upon the United Nations a hypocritical stance towards the problems of indigenous peoples which was to frustrate organized efforts on their behalf for more than a decade.[29]

The thesis was rejected by the UN General Assembly, which moved in the direction of accepting whole colonial territories as the subjects of self-determination – the 'people' – and not ethnic, etc., groups within them. The claims of indigenous peoples were sidelined in the practice of the GA; resolution 1541 (XV) established a *prima facie* criterion of geographical separation for the transmission of information on non-self-governing territories, effectively excluding examination of the condition of groups outside the salt-water paradigm. The anti-colonial paradigm reaches a high point in resolution 1514 (XV), the Colonial Declaration. The Declaration,[30] hypercritically assessed as 'a serious blow to the aboriginal cause',[31] presents itself

[27] The thesis is set out systematically in *Replies of Governments Indicating their Views on the Factors to be Taken into Account in Deciding Whether a Territory is or is not a Territory Whose People have not yet Attained a Full Measure of Self-Government to the Ad Hoc Committee on Factors (Non-Self-Governing Territories)*, UN Doc. A/AC.67/2, 8 May 1953, pp. 3–31.

[28] UN Doc. A/C.4/SR.419, paras. 14 *et seq*.

[29] Bennett, *Aboriginal Rights*, p. 13.

[30] GAOR, 15th session, Supp.16, 66 (1960); text in I. Brownlie (1992) *Basic Documents on Human Rights* (Oxford, Clarendon Press), p. 28. The Colonial Declaration was passed by 89 votes to 0, with 9 abstentions: Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, UK and USA.

[31] Bennett, *Aboriginal Rights*, p. 12.

as an interpretation of the Charter, stressing independence as the principal means through which self-determination is implemented, demanding that: 'Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations'.[32] The target was colonialism and the Charter principle became a right: 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[33] Paragraph 6 combines self-determination with territorial integrity: 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'. The reference to territorial integrity was essentially directed at manoeuvres by colonial powers to divide territories before independence and also at interference by outside States in the decolonisation process.[34] Post-decolonisation, 'territorial integrity' has also been interpreted as a warning to dissident groups *within* States not to attempt to secede. The UN strongly favoured the premise that self-determination should be exercised on the basis of the integrity of colonial demarcations despite their often arbitrary nature. The Declaration is not hermetically sealed from possible elaboration: there are other nuances. Self-determination is associated with human rights in preambular paragraphs 1 and 2, and operative paragraphs 1 and 7,[35] an association developed further in Article 1 of the UN Covenants.[36] And if the text is heavily conditioned by repeated and narrowing references to colonialism, the basic assertion is of a universal nature: the right is for 'all peoples', a phrase which underlines the constant potential of self-determination to function as a normative constant.

The Declaration on Principles of International Law[37] describes self-determination in a manner capable of transcending the colonial context and the obsession with independence. In virtue of self-determination, 'all peoples

[32] Para. 5 of Resolution 1541 (XV) proposed that self-determination could be achieved through independence, integration with an independent State, or free association with an independent State: GAOR, in Brownlie, *Basic Documents*, p. 29.

[33] Para. 2.

[34] Whelan, A. 'Self-determination and decolonisation: foundations for the future, *Irish Studies in International Affairs* 3(4) (1992), 25–51, at 32–3.

[35] The preamble recalls the Charter's reaffirmation of faith in human rights and links self-determination, human rights and friendly relations. Operative paragraph 1 states baldly that the 'subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights'; paragraph 7 demands that all States 'shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration'.

[36] See chs. 5 and 7 in this volume.

[37] General Assembly resolution 2625 (XXV) (1970).

have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development'. Open-ended modes of exercise are attached to the right: 'The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing self-determination by that people'. The section includes a free-standing paragraph on human rights: 'Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter'. A final paragraph protects the national unity and territorial integrity of a State or country from the actions of other States – the integrity principle also appears in a penultimate paragraph on peoples in existing States:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The text of this much discussed paragraph[38] adds further instability to the controlled self-determination of the Colonial Declaration. Elsewhere, the present author has tried to show that, while the Declaration on Principles intimates a possible theorem on the relationship between misgovernment and self-determination, the relationship is by no means clear.[39] Suggestions that the Declaration legitimates secession as a response to oppressive practices such as systematic racial discrimination can be countered by the argument that the text simply motivates the State to make itself more representative of the various elements in the population as a whole. The virtues of the Declaration consist in its flexibility on modes of exercise, which could include autonomy, and the move towards internal self-determination in association with human rights. On the other hand, governments may read it as encapsulating a principle of conservation.[40] In a speech before an international

[38] Citations in P. Thornberry, 'The democratic or internal aspect of self-determination with some remarks on federalism', in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, Martinus Nijhoff, 1993), pp. 101–38.

[39] *Ibid.*

[40] This is not surprising. Hurrell notes that 'States have sought to welcome the idea of self-determination in theory but to restrict its application in practice, giving priority to the stability of frontiers and responding to secession crises in the light of shifting political interests': A. Hurrell, Power, principles and prudence: protecting human rights in a deeply divided world', in Dunne and Wheeler, *Human Rights in Global Politics*, p. 288. See also the intriguing suggestion by Tesón that 'traditional international law is highly anthropomorphic: because the preservation of *bodily*

conference on indigenous self-determination, the Foreign minister of Belgium stated that:

> The 1970 Declaration on Principles . . . is often used as a guideline for explaining . . . ['people' and 'self-determination'] . . . However, it would appear from this Declaration that, in principle, the normal exercise of this right may not affect . . . the territorial integrity or the political unity of an existing sovereign State, albeit under the condition that this State shows respect for equal rights and the principle of self-determination and that it has a government which is representative for the entire population. . . . Thus, when applied to indigenous peoples and according to its generally accepted interpretation, it would appear that this right does not automatically open the way to secession and independence. It is only when . . . the State in question is inherently discriminating and anti-democratic, that this form of self-determination becomes acceptable. The process, of course, also has to adhere to the other fundamental principles of the UN Charter.[41]

The principled connections between self-determination and human rights should be underlined – it can easily be assumed that self-determination as group right essentially goes against the grain of human rights,[42] despite the multiple repetitions of the formula that universal realisation of the right is a fundamental condition for the effective guarantee and observance of human rights.[43] Throughout its political and legal career, self-determination has exhibited both democratic and nationalist or collectivist aspects, with one or other tending to prevail in a particular era.[44] The peculiarity of the incorporation of self-determination into international law is that space is found for both conceptions – not necessarily in easy alliance.[45] International law is still concerned with various impediments to the full realisation of a

integrity is morally important, lawyers assume that preservation of the "body" of the state, the territory, is equally important' (emphasis in the original): F. R. Tesón, *A Philosophy of International Law* (Boulder, Colorado and Oxford, Westview Press, 1998), p. 151.

[41] International Conference on the Right to Self-Determination of Indigenous Peoples, Antwerp, 14–15 January 1994 (on file with author). The statement is not connected with the above discussion of the 'Belgian thesis'.

[42] C. Chinkin, 'International law and human rights', in T. Evans (ed.), *Human Rights Fifty Years On: A Reappraisal* (Manchester University Press, 1998), pp. 105–29.

[43] A formula which could be taken to mean that self-determination as liberation from alien rule guarantees human rights – not always the case. See also Hurrell, 'Power, principles and prudence', pp. 287–8.

[44] The 'classic' exposition of the political history is A. Cobban, *The Nation State and National Self-Determination* (London, Collins, 1969).

[45] The incorporation of human rights and peoples rights into one instrument in the African Charter on Human and Peoples' Rights is the most outstanding modern attempt to bring the 'rival' conceptions into a normative synthesis. The peoples' rights of the Charter include but go beyond self-determination – see ch. 10 in this volume.

self-determination of all peoples stemming from 'foreign military intervention, aggression and occupation'[46] – threats affecting the enjoyment of independence by post-colonial peoples. It is equally concerned with self-determination as an expression of human rights. These background considerations should be borne in mind when examining the Covenants on Human Rights and specific indigenous claim to self-determination: the concept brings with it a considerable intellectual baggage and influential forms of expression from general international law.

General aspects of human rights

The Universal Declaration of Human Rights[47]

The Universal Declaration of Human Rights proclaimed by the GA in 1948 exhibits a content and structure which has conditioned thinking on human rights to a significant degree: as Morsink observes, 'there is not a single nation, culture, or people that is not in one way or another enmeshed in human rights regimes'.[48] The Declaration was conceived by its authors as a new fact in the world, adopted by an assembly of the world community. In the process of drafting, its title was changed from an 'international' to a 'universal' Declaration, drawing attention away from the authors of the document to its addressees.[49] It is possible to read the Declaration as incorporating categories or generations of rights, with civil and political rights granted at least lexical priority.[50] They include basic freedoms such as freedom of thought, conscience and religion,[51] of opinion and expression,[52] of peaceful assembly,[53] freedom from arbitrary arrest,[54] torture[55] and slavery,[56] and rights to equality,[57] nationality,[58] to marry and found a family,[59] and so

[46] General Assembly resolution 53/134, 9 December 1998, para. 2. The resolution incorporates earlier resolutions (to 1980) on the same theme.

[47] See, generally, J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, Pennsylvania University Press, 1999).

[48] Morsink, *Universal Declaration*, p. x.

[49] Morsink, *Universal Declaration*, p. 33.

[50] But no more than this – 'the organic unity of the document reflects on the part of the drafters a belief in the fundamental unity of all human rights': Morsink, *Universal Declaration*, p. 238.

[51] Article 18.

[52] Article 19.

[53] Article 20.

[54] Article 9.

[55] Article 5.

[56] Article 4.

[57] Articles 7 and 10.

[58] Article 15.

[59] Article 16.

on. The provisions on economic, social and cultural rights including social security,[60] work,[61] rest and leisure,[62] an adequate standard of living,[63] education[64] and participation in the cultural life of the community[65] more clearly require the provision of resources by the State. However, all human rights consume resources, since even the successful prohibition of torture[66] requires information campaigns, administration, training of officials, and monitoring of their conduct in case bad habits of physical and mental abuse have become ingrained in routines and practices.[67] Solidarity rights of a universalistic kind are intimated in Article 28 which provides that everyone 'is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. Further, everyone is entitled to the rights in the Declaration 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

In a reading which affects human rights as a whole, the Universal Declaration is sometimes portrayed as a hymn to individualism.[68] The rights are for 'all human beings', not for particular groups; they are for 'everyone', 'all'; prohibitions of torture, slavery, etc., require that 'no one' will be subjected to such.[69] Apart from the trite fact that the rights are addressed to a class of persons,[70] there seems to be little space for communitarian notions. Closer examination suggests more nuanced readings. The preamble refers to 'peoples' and 'nations'; Article 21 provides that 'The will of the people shall be the basis of the authority of government'; Article 1 states that all human beings should 'act towards one another in a spirit of brotherhood' – a gendered expression of human solidarity. The non-discrimination principle[71] – and its more truncated expression in the UN Charter – carries the implication that violations of human rights direct themselves, *inter alia*, against

[60] Article 22.
[61] Article 23.
[62] Article 24.
[63] Article 25.
[64] Article 26.
[65] Article 27.
[66] Article 5.
[67] See Article 10 of the much later Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984. See also General Comment 20 (44) of the HRC concerning Article 7 of the ICCPR – in HRI/GEN/1/Rev.4, 7 February 2000.
[68] For a thoroughgoing 'Kantian' reading of human rights as serving the interests of the individual, see Tesón, *A Philosophy of International Law*.
[69] Morsink observes that most of the early versions of Article 1 started out with the phrase 'all men': *Universal Declaration*, p. 118.
[70] Thus, 'all rights are group rights, because they all hold for a class of persons': W. Barbieri, 'Group rights and the Muslim diaspora', *Human Rights Quarterly* 21 (1999), 907–26, at 918.
[71] Article 2.

those who exhibit 'racial' characteristics, speak (their own?) languages, profess religions and have a particular 'national or social origin'. In other words, like indigenous peoples, many others are likely to be discriminated against on account of the communities they *stand for*, and not simply as desocialised or detribalised 'individuals'. There are other community notes: the family is 'the natural and fundamental *group unit of society*';[72] property can be owned 'alone as well as *in association with others*';[73] the Declaration recognises freedom to manifest religion or belief 'alone or *in community with others*'. Everyone, 'as a member of *society*' has social security rights;[74] education shall promote 'understanding, tolerance and friendship among all nations, racial or religious *groups*'; and according to Article 27, everyone also has the right 'freely to participate in the cultural life of *the community*. And then there is Article 29, the first two paragraphs of which state:

> 1 Everyone has duties to the community in which alone the free and full development of . . . personality is possible.
> 2 In the exercise of . . . rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The first paragraph expresses notions of community and duty, to set alongside the framework of rights, softening their apparent egotism. Notions of duty are set out more fully by other instruments in the international canon, notably the American Declaration of the Rights and Duties of Man,[75] and the African Charter on Human and Peoples' Rights,[76] but they are also part of the normative nucleus of the Universal Declaration. The second paragraph expresses the limitation that my rights stop where they touch yours, expressing this idea as including matters of the public realm – public order, general welfare, etc. The paragraphs impact on indigenous issues, even if the peoples were remote from the thoughts of most of those who drafted the Declaration. Aspects of 'group rights' in the drafting centred rather on the issue of minorities following the dismantling of the League of Nations regime.[77] 'Indigenous' references in the drafting processes included the reprimand by the representative of Byelorussia of governments of Australia for carrying out a policy of forceful elimination of its aboriginal peoples, and noted that the American Indian 'had almost ceased to exist in the

[72] Article 16.3.
[73] Article 17.1.
[74] Article 22.
[75] Text in Brownlie, *Basic Documents*, pp. 488–94.
[76] Brownlie, *Basic Documents*, pp. 551–66.
[77] J. Morsink, 'Cultural genocide, the universal declaration, and minority rights', *Human Rights Quarterly* 21 (1999), 1009–60.

United States'.[78] The core of ethnic issues in the Declaration is expressed in the provisions on non-discrimination: the absence of positive statements about the rights of minorities or indigenous groups is deliberate.[79] The anti-minority rights sentiment was articulated by (among others) the representative of the USA, Mrs Roosevelt who argued against inserting a right 'which was not of universal significance'[80] and that 'the best solution of the problem of minorities was to encourage respect for human rights'.[81] Countries with significant indigenous populations appeared wedded to their policies of assimilation.[82]

Article 29 has been the subject of a broad review by a UN rapporteur.[83] The word 'alone' in paragraph 1 is striking,[84] and in the drafting of the Declaration its inclusion was contested through an argument about Robinson Crusoe: was Crusoe the example of a man who could live outside society, proving that such a thing was possible; or did his story prove that one could not live without the products of human industry and culture? The latter interpretation appeared to prevail.[85] Whatever the literary merits, the episode at least shows that retaining 'alone' was intentional – Morsink contends that the word 'may well be the most important single word in the document, for it helps us to answer the charge that the rights set forth in the Declaration create egotistic individuals who are not closely tied to their respective communities'.[86] In a UN canvassing of the views of States on the meaning of 'community' in Article 29, many responses referred merely to the State as the community intended, but some asserted that this could be communities other than the State, including 'social groups'. However, the UN Special Rapporteur's summary of 'community', while it refers to groups,

[78] UN Doc. A/C.3/SR.162, 729–30.

[79] Thornberry, *International Law*, ch. 13; Morsink, *Universal Declaration*, ch. 7.

[80] UN Doc. A/C.3/SR. 161, 726.

[81] *Ibid.*

[82] Morsink, 'Cultural genocide', 1009–60. The author connects up the absence of group/minority rights provisions in the Universal Declaration with the absence of 'cultural genocide' from the Genocide Convention 1948.

[83] E.-I. A. Daes, *Freedom of the Individual Under Law: An Analysis of Article 29 of the Universal Declaration of Human Rights* (New York: United Nations, 1990). See also, Morsink, *Universal Declaration*, ch. 7.

[84] For its introduction in the Commission on Human Rights by the delegate of Australia, see Morsink, *Universal Declaration*, pp. 246–7.

[85] Daes, *Freedom of the Individual*, ch. 1., esp. paras. 44–7. Cf. the remarks of Glendon: 'The Declaration's "everyone" is not an isolated individual, but a person who is constituted in important ways, by and through relationships with others . . . Whatever else may be said of him or her, the Declaration's "everyone" is not a lone bearer of rights': M. A. Glendon, 'Rights from wrongs', cited in Steiner and Alston, *International Human Rights in Context*, p. 153.

[86] Morsink, *Universal Declaration*, p. 248, who concludes that the insertion 'of the term "alone" into Article 29 was meant to underscore . . . [the] . . . communitarian dimension of human rights possession'.

the family, the neighbourhood, cities, villages, social units, societies, regions, countries, states and nations, fails to include reference to indigenous peoples or minorities.[87] Nevertheless, communities of whatever stripe complement personal right-holders in the Universal Declaration and other general rights texts. In a perceptive critique based on general theory[88] and the texts of international human rights, Leary distinguishes between principles and doctrines based on 'persons and personalism' which place 'an emphasis on the intrinsic links between persons and community',[89] and those that deal in the currency of 'individuals and individualism'.[90] Leary claims that international human rights reflect the former concept rather than the latter. The standard-setting Universal Declaration of Human Rights as the paradigm of individual rights is implicated in her critique. Thus, while there is no explicit drawing out of a community right in the Declaration, communitarian inflections in the human rights field are no novelty. Beyond the Declaration, resolution 96(I) of the GA had already pointed to a group right to existence in the context of genocide.[91] Communities, it seems, dwell in the normative heartland of human rights.[92]

The expansion of rights

> The hugely increased normative ambitions of international society are nowhere more visible than in the field of human rights and democracy – in the idea that the relationship between ruler and ruled, state and citizen, should be a subject of legitimate international concern; that the ill-treatment of citizens and the absence of democratic governance should trigger international action; and that the external legitimacy of a State should depend increasingly on how domestic societies are ordered politically.[93]

The Universal Declaration of Human Rights was followed by the international covenants – on Civil and Political Rights and Economic, Social and Cultural Rights. While the Charter does not attempt to list or categorise potential holders of rights, the inclusion of the non-distinction/discrimination formula

[87] Daes, *Freedom of the Individual*, p. 39, para. 102.

[88] Particularly on the work of Mounier, Maritain and Unger.

[89] V. A. Leary, 'Postliberal strands in western human rights theory: personalist–communitarian perspectives', in A. A. An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia, University of Pennsylvania Press, 1992), pp. 105–32, at p. 106.

[90] Cf. T. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford University Press, 2000).

[91] See N. Robinson, *The Genocide Convention; A Commentary* (New York: Institute of Jewish Affairs, 1960).

[92] The phrase of Tore Lindholm, 'Prospects for research on the cultural legitimacy of human rights: the cases of Liberalism and Marxism', in An'Naim, *Human Rights in Cross-Cultural Perspectives*, pp. 400 ff.

[93] A. Hurrell, 'Power, principles and prudence', pp. 277–302, at p. 277.

rendered it not improbable that bodies of law could be developed for racial groups and ethnic minorities,[94] women,[95] speakers of languages[96] and adherents of religions.[97] International organisations have also carried through that programme with a vengeance, adding rights of children,[98] the disabled, migrant workers, refugees, women,[99] etc. Besides categories of persons, international law has developed rules and principles about particular 'practices' and 'conditions' including apartheid,[100] genocide,[101] torture, slavery[102] and statelessness.[103] The human rights production-line has also fabricated a raft of texts on specific rights, including the right to development.[104] If we add the multiple productions of regional intergovernmental bodies – the OAU, the OAS, Council of Europe, etc., to those of the UN, we may arrive at some conception

[94] See chapters in the present work on the Race Discrimination Convention, and the sundry texts of minority rights: chs. 6 and 8.

[95] Notably the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly in 1979.

[96] The Council of Europe's Charter on Regional or Minority Languages is the primary text in this field – some European instruments are discussed, see ch. 12 of this volume.

[97] There is no universal convention on religious freedom, but the UN Declaration of 1981 on the Elimination of All Forms of Religious Intolerance and of Discrimination based on Religion or belief, backed up by the work of various rapporteurs on freedom of religion, and interpretation of the guarantees of religious freedom set out in instruments of general human rights, supply the 'deficiency' to a significant extent. For a snapshot of international instruments of human rights in general, see Brownlie, *Basic Documents*. Other compilations include R. Wallace, *International Human Rights: Text and Materials* (London, Sweet & Maxwell, 1997). The UN and other intergovernmental organisations give ever-increasing publicity to their instruments and work in practice: see *Human Rights: A Compilation of International Instruments* (New York and Geneva, 1997), ST/HR/1/Rev. 5, vols. I and II. The expanding organisational websites on the Internet are a further source. On religious freedom, see K. Boyle and J. Sheen (eds.), *Freedom of Religion and Belief: A World Report* (London and New York, Routledge, 1997).

[98] See ch. 9 of this volume.

[99] See ch. 17 of this volume.

[100] Notably the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted in consequence of General Assembly resolution 3068 (XXVIII), 30 November 1973.

[101] The Convention on the Prevention and Punishment of the Crime of Genocide 1948 is discussed, see ch. 15 of this volume.

[102] The Slavery Convention 1926, as amended, and the Supplementary Convention, 1956: Brownlie, *Basic Documents*, pp. 52–63. For a contemporary assessment, see *Updated Review of the Implementation and Follow-up to the Conventions on Slavery*, E/CN.4/Sub.2/2000/3 and Add. 1, 26 May 2000. See also the report of the UN High Commissioner for Human Rights on *Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflicts*, E/CN.4/Sub.2/2000/20, 27 June 2000, for an appraisal of other aspects of the slavery issue.

[103] Conventions of 1964 and 1961: Brownlie, *Basic Documents*, pp. 82–105.

[104] Notably in the Declaration on the Right to Development, adopted by General Assembly resolution 41/128, 4 December 1986.

of the scale and scope of the human rights project.[105] The *corpus* of instruments includes treaties and declarations, politically binding agreements,[106] myriad varieties of 'soft' and 'hard' texts, customary law,[107] *jus cogens* or fundamental principles of non-derogable law. The texts inscribe, restate and supplement basic principles of State responsibility.[108] They have greater difficulty in reaching through the 'capillarities of power'[109] to engage the responsibility of private persons and groups,[110] though some branches of principle have considerable impact on the 'private/public divide' – notably in the development of women's rights, when the right to privacy is interpreted according to one critic as 'protecting from scrutiny major sites for the oppression of women: home and family'.[111] Chinkin summarises feminist arguments as alleging that

> human rights law is based upon the life experiences of men and that, despite its apparently neutral and objective language, it offers more to men than to women . . . In particular the doctrine of attributability asserts State responsibility only for the public acts of State officials, or acts instigated or acquiesced to by State

[105] The most useful compilation of regional instruments is provided by the UN: *Human Rights: A Compilation of International Instruments*, ST/HR/1/Rev. 5 (vol. II).

[106] A conventional terminology for most of the instruments produced within the Organisation for Security and Cooperation in Europe. For an account of the manner in which the terminology emerged, see Thornberry, *International Law*, pp. 248–54.

[107] See H. Hannum, 'Human rights', in C. Joyner (ed.), *The United Nations and International Law* (ASIL and Cambridge University Press, 1997), pp. 131–54; T. Meron, *Human Rights Lawmaking in the United Nations* (Oxford University Press, 1986). Commentators on customary law as applied to human rights have a tendency to rely on Restatements of the Foreign Relations Law of the United States, a limiting and particularistic view. Some commentators on indigenous rights identify large swathes of principle relating to indigenous peoples as customary law: Anaya, *Indigenous Peoples in International Law*.

[108] There is a considerable literature on the scope and limitations of public international law principles of State responsibility for international human rights: a useful summary of contentious issues is provided by R. Lawson, 'Out of control, State responsibility and human rights: will the ILC's definition of "Act of State" meet the challenges of the 21st century?', in M. Castermans-Holleman, F. van Hoof, and J. Smith (eds.), *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy, Essays in Honour of Peter Baehr* (The Hague, Kluwer Law International, 1998), pp. 91–116.

[109] A phrase associated with the work of Michel Foucault; see J. A. Lindgren Alves, 'The declaration of human rights in postmodernity', *Human Rights Quarterly* 22 (2000), 478–500.

[110] The leading work is A. Clapham, *Human Rights in the Private Sphere* (Oxford, Clarendon Press, 1993).

[111] H. Charlesworth, 'What are "women's" international human rights?' (1994), cited by V. S. Peterson and L. Parisi, 'Are women human? It's not an academic question', in Evans, *Human Rights Fifty Years On*, pp. 132–60, at p. 147.

> officials. State responsibility has not traditionally been extended to similar acts when committed by private individuals.[112]

On the international recognition of the rights of women,[113] and the need to address the evils of racial discrimination and apartheid, Falk observes that each of these undertakings 'represented the crystallization of particularly intense demands that took shape at a given time for an acknowledgement of rights, as a collective and formal expression of the urgency and seriousness of the claim and the grossness of the abuse'.[114] He also notes that in the case of the individuation of rights particular categories, 'the prohibited[115] behaviour could analytically have been subsumed under a broader group of pre-existing rights or demands'.[116] The search for fresh articulations of rights can be prompted by diverse considerations. Among them could be some widely shared perception of a need, of a pain which is not being addressed. This has spawned international concern about the condition of 'vulnerable groups'. Rights claimants may self-identify and impress the international constituency through determined articulation of their point of view. A crisis such as that in the former Yugoslavia may present the world with new horrors and/or contribute to the realisation that a particular practice such as terrorism/genocide through rape needs a specific remedy.[117] Groups of nations rather than individuals or communities may articulate the concern – an example would be the pressure for clear international recognition of the right of self-determination exercised by the former colonies from the 1940s to the 1970s. Political factors in the broadest sense, media interest, the sense of injustice, the passion for action, in combination with all or some of the foregoing, may prompt the move to codify rights: to inscribe them in a treaty, or to declare, recommend or demand them.

In the result, human rights are regarded as a matter of legitimate international concern, a principle affirmed by the Vienna Declaration of the World Conference on Human Rights,[118] which also avers that all human rights 'are universal, indivisible and interdependent and interrelated' and that the

[112] 'International law and human rights', in Evans, *Human Rights Fifty Years On*, p. 115.

[113] For another account of factors leading to the 'invisibility' of women to human rights and the partial escape from this, see G. Ashworth, 'The silencing of women' in Dunne and Wheeler, *Human Rights in Global Politics*, pp. 259–76.

[114] Dunne and Wheeler, *Human Rights in Global Politics*, p. 32.

[115] Or recommended.

[116] *Ibid.* The extent to which this is true for indigenous peoples is part of the argumentation of the present work.

[117] Report of the High Commissioner, see n. 102 in this chapter.

[118] Para. 4, which continues: 'The organs and specialized agencies related to human rights should . . . further enhance the coordination of their activities based on the consistent and objective application of international human rights instruments'.

international community 'must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis'.[119] Paragraph 5 of the Declaration famously concludes that, while

> the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[120]

International action

International concern with human rights does not justify forcible action against recalcitrant States: the strength of human rights is in its discourses, rather than the armed divisions which, like the Pope, it does not possess. Unilateral action against human rights violators is still outside the legal pale, as is forcible action in support of self-determination. Intervention in support of human rights was not sanctioned by the ICJ.[121] NATO action in Kosovo, ostensibly undertaken for reasons of human rights, does not set a precedent. However, the UN Security Council has increasingly incorporated elements of human rights into its official security concerns, in which respect Security Council resolution 688,[122] condemning 'the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas',[123] may have been a turning-point. The muted international reaction to the NATO adventure in Kosovo should also be borne in mind. Strident condemnations are avoided in Security Council resolution 1244, which smoothed over the extra-Charter NATO action like a wave washing

[119] Para. 5.

[120] Statist or legal traditionalist elements are not absent from the Vienna document, which frames the legitimate concern principle in paragraph 4 within the purposes and principles of the UN Charter; the territorial integrity of States is also a specific point of reference (for example in paragraph 2). Paragraph 7 bluntly states that 'processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the Charter of the United Nations, and international law'.

[121] 'as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect': *Nicaragua v United States of America*, ICJ Rep. 1986, para. 268.

[122] 5 April 1991.

[123] The resolution 'may . . . well be recorded as a first step in the long march towards developing more effective UN policies of linking human rights and peace and security concerns': N. Schrijver, 'Sovereignty versus human rights? A tale of UN Security Council resolution 688 (1991) on the protection of the Kurdish people', in Castermans-Holleman *et al.*, *The Role of the Nation-State*, pp. 347–57, at p. 356. See also F. Grunfeld, 'Human rights violations: a threat to international peace and security' *ibid.*, pp. 427–41.

the beach.[124] The UN Secretary-General discerned an 'emerging' principle, that is

> an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty. It is a principle that protects minorities – and majorities – from gross violations. And let me . . . be very clear: even though we are an organization of member States, the rights and ideals . . . the United Nations exists to protect are those of peoples . . . No government has the right to hide behind national sovereignty in order to violate the human rights or fundamental freedoms of its peoples . . . This developing international norm will pose fundamental challenges to the United Nations.[125]

International organisations have chosen to develop programmes of implementation of human rights by softer methods than the use of force.[126] International standards are backed up by varying qualities of implementing mechanisms: mandatory reports of States to international supervisory bodies,[127] systems for dealing with individual claims and accusations of rights violations, systems for inter-State claims, procedures for mass violations of rights,[128] courts,[129] and other types of tribunal, committees and commissions, working groups for monitoring States or practices and rapporteurs for the same,[130] assisted and complemented by complex rights bureaucracies of international organisations, programmes of technical assistance, programmes of conflict prevention through solidifying human rights within States, preventive diplomacy and just diplomacy in general, and so on.

In theory, these international mechanisms are secondary to the business of national implementation – the duty of States to secure the rights to those under their jurisdiction. In practice, individuals and groups seeking the

[124] The resolution does not condemn the NATO action, but reminds the Federal Republic of Yugoslavia that previous SC resolutions had not been complied with.

[125] Speech of 7 April 1999: cited in P. Thornberry, '"Come friendly bombs": international law in Kosovo', in Waller, Drezov *et al.*, *Kosovo: Myths, Conflict and War*, *Politics of Delusion*, pp. 43–58, p. 54; pp. 75–91, p. 89.

[126] A broad multifaceted review of UN systems is undertaken in Alston and Crawford, *UN Human Rights Treaty Monitoring*.

[127] See United Nations, *Manual on Human Rights Reporting Under Six Major International Human Rights Instruments* (Geneva, United Nations, 1997) for reporting procedures under six main treaties.

[128] Much of the literature on this relates to ECOSOC resolution 1503, 1970 (the 1503 procedure) – discussion in Robertson and Merrills, *Human Rights in the World*, pp. 78–83. See also the instructive article by H. Steiner, 'Individual claims in a world of massive violations: what role for the Human Rights Committee?', in Alston and Crawford, *UN Human Rights Treaty Monitoring*, pp. 15–53.

[129] For early ideas on an international court of human rights, see Morsink, *Universal Declaration*, pp. 15–16.

[130] Relevant bodies dealing specifically with indigenous rights are referred to throughout the present work.

vindication of their rights may be blocked at the level of domestic legal systems which do not take sufficient account of international standards. This is true of indigenous peoples as of others. A striking example of is provided by *Nulyarimma and others v Thompson*; *Buzzacott v Hill and others*,[131] where the Australian Federal Court dismissed applications for proceedings against government ministers and others in relation to the Native Title Amendment Act, and to the World Heritage Convention – the failure of which to apply was alleged to constitute genocide. Recognising genocide as a peremptory norm of general international law, the Court nonetheless decided that, in the absence of relevant legislation, the offence of genocide was not cognisable in the courts of Australia.[132] Political obstacles of various kinds may also inhibit the defence of rights.

Recognition and acceptance

The 'legitimate international concern' with human rights does not spill over into clear conditioning of statehood or recognition of governments by human rights assessments:[133] international law has not fully restored the nineteenth-century doctrine of conditional recognition.[134] Statehood is predicated somewhat tautologously on territory, population, government, and the capacity to enter into international relations –[135] supposedly neutral or value-free considerations. However, access to membership and continued membership of international organisations increasingly depends on positive evaluations of human rights and 'democratic' forms of government.[136] Specific minority

[131] 8 BHRC (2000), 135–200.

[132] In examining the third and fourth periodic reports of Australia under the ICCPR, critical remarks on the non-translation of rights into Australian domestic law were essayed by HRC members Kretzmer, Scheinin, Lallah, Henkin and Ando: CCPR/C/SR. 1856. For a general review of national enforcement, see B. Conforti, and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (The Hague, Martinus Nijhoff Publishers, 1997).

[133] Exceptions include the EC Guidelines making recognition of new States in the former Yugoslavia and USSR – extracts from relevant documents in Harris, *Cases and Materials on International Law*, pp. 147–54. A critical review of 'recognition' developments is offered in R. Mullerson, *International Law*, *Rights and Politics* (London and New York, Routledge, 1994), pp. 117–36.

[134] Thornberry, *International Law*, ch. 2.

[135] Montevideo Convention on the Rights and Duties of States 1933.

[136] The present author has completed a study for the Council of Europe which, *inter alia*, looks at membership conditionality from a human rights perspective: P. Thornberry and M. Amor Martín Estébanez, *The Council of Europe and Minorities* (Strasbourg, Council of Europe Press, 2002). Other organisations have relevant rules for suspension and expulsion of members: cf. M. Nowak, 'Human rights conditionality in relation to entry to, and full participation in, the EU', in P. Alston (ed.), with M. Bustelo and J. Heenan, *The EU and Human Rights* (Oxford University Press, 1999), pp. 687–98.

rights conditions – including accession to instruments such as the Framework Convention on National Minorities – have been required of candidates for membership of the Council of Europe;[137] the EC Guidelines affirm the need for rights guarantees to 'ethnic and national groups and minorities'.

State ambivalence

The State stands in an ambivalent position on human rights from an international law perspective. On the one hand, the State is the major guarantor of rights; on the other, it is a major violator. The point was made earlier that sovereignty is not what it was – or assumed to be – in previous centuries. To the diffusion or decentring of sovereignty attributed to the growth of supranational organisations and sub-national groups, including indigenous peoples, may be added the effects of globalisation. The term incorporates a range of contested meanings, at the core of which, according to a Sub-Commission study, 'is the extraordinary explosion of both technology and information, in ways that have considerably reduced the twin concepts of time and space'.[138] While human rights can be viewed as part of the globalising process, 'globalitarians' focus largely on the economic and social, favourably contrasting *global* 'capital, space, history and the power to transform' with the *local* values and sites of 'labour, tradition and, not infrequently, women, indigenous people, peasants and others who are still attached to "place"'.[139] The implication is, according to the authors of the study, 'that the latter are marginal to the discourses on globalization, and that their knowledge and practices are unhelpful in the construction of a truly global contemporary world'.[140]

On such a view, indigenous peoples might well look to the State and international organisations as a shield from these impersonal forces – as might workers, trades unionists, or just citizens who have benefited from the attempts at 'taming' of markets by welfare States and the distribution of benefits from market-led growth in the last fifty or so years.[141] Debate on the processes seeks to elucidate appropriate role for the various actors – States, people, NGOs, transnational corporations, etc. The UN treaty bodies have

[137] See A. Spiliopoulou-Åkermark, *Justifications of Minority Protection in International Law* (Uppsala, Iustus Forlag, 1997).

[138] J. Oloka-Onyango and D. Udagama, preliminary report on *Globalization and its Impact on the Full Enjoyment of Human Rights*, E/CN.4/Sub.2/2000/13, 15 June 2000, para. 6.

[139] *Globalization and its Impact*, para. 10, citing A. Dirlik, 'Globalism and the politics of place', *Development*, 41(2) (June 1998), 7 ff.

[140] Para. 10.

[141] Donnelly, *Social Construction*, pp. 91–6; and by the same author, 'Human rights, globalization, and the State', in Castermans-Holleman *et al.*, *Role of the Nation-State*, pp. 401–10.

been concerned with these processes, if less so than the Charter-based bodies. Among specialised agencies, the ILO has been the sharpest analyst of trends. The UN has announced a 'global compact'. The Sub-Commission is moving towards a code of conduct for transnational corporations, following the failure of UN and other efforts over several decades.[142] Consequences for States and their peoples are adverted to in interventions of indigenous organisations:

> in the logic of the absolute law of free trade in search of capital gains . . . the driving force behind globalization, the transnational movement of financial capital is the living expression of blind and anarchical market economy forces, which are absolutely free to indulge their unbridled passion to colonize the world, speed up the dismantling of mechanisms and rules of conduct, liberalize trade and privatize State enterprises at any cost.[143]

It is not proposed here to address the complex issues associated with globalisation but merely to flag up a tension between its processes and State control of key aspects of international law including human rights. Indigenous groups are among the most aware of globalisation's normativisation of markets with its potential effects on issues such as cultural property or heritage.[144] Economistic intergovernmental organisations and growth-orientated governments can intensify the threats against indigenous cultures but can also ameliorate them. In globalisation, as elsewhere, there is ambiguity, threat and promise for indigenous peoples.[145]

Calling the shots

In many ways, the State continues to call the shots in human rights. Participation in key instruments is limited – the Convention on the Rights of the Child is the closest to universal ratification. While the UN continues to urge universal ratification of key texts,[146] a negative process of withdrawing from treaties or additional protocols has been set in motion by some States.[147]

[142] Oloka-Onyango and Udagama, *Globalization and its Impact*.

[143] Statement of Indian Movement Tupaj Amaru to the 18th Session of the WGIP, E/CN.4/Sub.2/AC.4/2000/5, 6 July 2000, para. 19.

[144] See the excellent study by T. Simpson, *Indigenous Heritage and Self-Determination* (Copenhagen, IWGIA, 1997). Among relevant documents, see E.-I. A. *Daes, Protection of the Heritage of Indigenous People* UN Human Rights Study Series, No. 10, 1977; same author, *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People*, E/CN.4/Sub.2/1995/26, and annex; *Report of the Seminar on the Draft Principles and Guidelines, etc.*, E/CN.4.Sub.2/2000/26, 19 June 2000.

[145] Heritage issues are discussed at various points in the present work – see especially the concluding section.

[146] The problem is set out by Sub-Commission member V. Kartashkin in working papers E/CN.4/Sub.2/1999/29 and E/CN.4/Sub.2/2000/2.

[147] *Status of Withdrawals and Reservations with Respect to the International Covenants on Human Rights,* E/CN.4/2000/96, 14 December 1999 and E/CN.4/Sub.2/2000/7,

While in theory this still leaves the citizens protected by customary international law, and by political or diplomatic processes in the UN and other organisations, the state of human rights protection is much weaker in practice if situations persist. Perhaps surprisingly to optimistic-minded defenders and promoters of human rights, States can still formally 'denounce' human rights treaties – i.e., they can terminate their obligations. The Convention on the Elimination of All Forms of Racial Discrimination,[148] the Convention on the Rights of the Child, the American Convention on Human Rights,[149] the European Convention on Human Rights,[150] the Council of Europe Framework Convention for the Protection of National Minorities[151] are among those human rights treaties expressly subject to denunciation. Both ILO conventions on indigenous peoples are expressly subject to denunciation. ILO formulae, as expressed in Article 39 of Convention 169 on Indigenous and Tribal Peoples[152] are among the more complex attempts to express and limit this freedom of States:

> 1 A member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention comes into force . . . Such denunciation shall not take effect until one year after the date on which it is registered.
> 2 Each member which has ratified this convention and which does not, within the year following the expiration of the period of ten years . . . exercise the right of denunciation . . . will be bound for another period of ten years.

In the case of human rights conventions not expressly subject to denunciation, the legal constraints on State action are greater. The Vienna Convention on the Law of Treaties 1969, Article 56.1, makes denunciation depend on the intention of the parties or the nature of the treaty. Concerning the ICCPR, the HRC has clearly stated that the drafters of the Convention deliberately chose to exclude denunciation, and that the treaty is not of a nature that implies the possibility of denunciation;[153] thus 'international law does not permit a State which has ratified or acceded or succeeded to the

29 May 2000 – see discussions concerning the ICCPR, ch. 5 in present volume. For analogous difficulties within the OAS (Peru's purported withdrawal from the contentious jurisdiction of the Inter-American Court), see Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, 2 June 2000, ch. III.

[148] Article 21.

[149] Article 78.

[150] Article 64 – Article 58 of the amended Convention.

[151] Article 31.

[152] See also Article 32 of ILO 107.

[153] General Comment 26, *Continuity of Obligations*, A/53/40, annex VII.

Covenant to denounce it or withdraw from it'.[154] Besides denunciations, States still enjoy extensive liberty in making reservations to and derogations from human rights treaties. Sovereignty is protected by allowing restrictions to treaties in the name of the economic well-being of the country,[155] national security,[156] public order,[157] political independence,[158] public safety,[159] territorial integrity,[160] and so on.[161] The plethora of reservations to – particularly – the Convention on Discrimination against Women – has generated some international response.[162] Discussions of reservations have shown sharp divergences between those who adopt a sovereignty-orientated position and those who regard human rights treaties as governed by a modified regime compared with diplomatic and other treaties.[163]

In addition to shackling the letter of treaty law, later State practice could still eliminate or dilute earlier, painfully gained international human rights standards by the development of a regressive customary law, unless such a development is somehow bridled by fundamental principles such as *jus cogens*. Even here, the formulation of that principle in the Vienna Convention on the Law of Treaties is linked to notions of positive acceptance by the international community;[164] it is not free-floating, peremptory morality. The spectre of normative regression has not been extensively theorised, except in the area of cultural relativism; developments in relation to the UN Covenant and other instruments may serve to concentrate minds.

Interpretation

Steiner and Alston observe that there 'is no shortcut to a reliable sense of how a given treaty will be construed', which is also true for non-treaty texts.[165] Interpretative processes for human rights are not formally distinguished from principles of international law as expressed in the Vienna

[154] *Ibid.*, para. 5.
[155] Article 8 ECHR.
[156] Articles 12, 13, 14, 21, 22 ICCPR.
[157] Articles 12, 14, 18, 19, 21, 22 ICCPR.
[158] For example, Article 8.4 UN Declaration on Minorities.
[159] Articles 18, 21, 22 ICCPR.
[160] For example, Article 10 ECHR.
[161] E.-I. A. Daes, *Freedom of the Individual under Law.*
[162] Reservation issues are dealt with below in the contexts in which they arise – see the working paper by Sub-Commission member F. Hampson, *Reservations to Human Rights Treaties*, E/CN.4/Sub.2/1999/28, 28 June 1999, and the note by the Secretariat, E/CN.4/Sub.2/2000/32, 25 July 2000.
[163] Cf. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep. 1951, p. 15.
[164] See articles 53 and 64 of the Convention.
[165] *International Human Rights in Context* (2nd edn, 2000), p. 108.

Convention, which places emphasis on good faith interpretation of the text as a whole in the light of its object and purpose.[166] On the other hand, the object and purpose requirement for human rights treaties suggests a need for flexible and developmental interpretations guided by fundamental human values. Interpretative problems are not solved by abstracting particular lines and phrases of particular articles – if reading the text as a whole is to have any meaning, readings of individual articles will impinge on the reading of others. Clashes among rights are not confined to those between individual and collective rights, but also between individual rights, as momentary reflection on potential dissonances between privacy and freedom of expression will suggest.

The standard conservation principle is a potential safeguard against 'backsliding' through limiting interpretations: as expressed in ILO Convention 169, application of the Convention 'shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and recommendations, international instruments, treaties, or national laws, awards, custom or agreements'.[167] Such prescriptions are double-edged, suggesting that obligations under *other* instruments should not be 'dumbed down' in consequence of the emergence of the text in question; and that the text in question should add on to existing prescriptions. The ILO provision is cast in very wide terms, reaching out to instruments beyond treaties.[168] Despite these and other systemic principles,[169] the degree of connection between the various texts – the extent to which each refers to others *in pari materia* – is variable. There is a tendency for each text to be elaborated within its own four walls, in order to fulfil the mandate of the monitoring body in question. Obvious borrowings are there, but, in many cases, it is more a question of echoes and whispers of other texts. Beyond human rights interconnections, the texts are, as Brownlie observes, 'part of a much wider world of normative development', so that other balancing principles may come into play.[170]

[166] Article 31.1.

[167] Article 35.

[168] There appears to be no specific interpretative canon for declarations and other soft law instruments: readers adopt approaches which echo the principles of the Vienna Convention and treaty-body practice.

[169] For formal systemic provisions permitting/disallowing recourse to competing international treaties on human rights, see Robertson and Merrills, *Human Rights in the World*.

[170] Brownlie, *Treaties and Indigenous Peoples*, p. 63. Concern with political independence and the territorial integrity of States has been a regular feature of texts on minority rights: P. Thornberry, 'The UN declaration on the rights of persons belonging to . . . minorities', in A. Phillips and A. Rosas (eds.), *Universal Minority Rights* (Åbo/Turku and London, Åbo Akademi and Minority Rights Group, 1995), pp. 13–76.

Consistency

According to GA resolution 41/120,[171] new human rights standards should

(a) be consistent with the existing body of international human rights law;
(b) be of fundamental character and drive from the inherent dignity and worth of the human person;
(c) be sufficiently precise to give rise to identifiable and practicable rights and obligations;
(d) provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and
(e) attract broad international support.

The resolution incorporates a philosophy of what human rights are as well as how the international community should go about legislating them. The massive 'body of international human rights law' conditions the manner in which candidates for recognition present their claims. The resolution and its equivalents can be taken as the basis of a dialogue between indigenous peoples and the international community, perhaps resulting in a 'contract'. While the participants are not positioned on a basis of equality – making the dialogue less than 'Habermasian' – the terms are relatively open. 'Consistency' does not mean the endless repetition of the same – new rights adventures are not ruled out. Different views can be taken on what is 'fundamental', on what really matters to human beings. Culturally divergent readings of 'dignity and worth' are probable – no group can claim an inherent monopoly of wisdom or rectitude. Imagining that a Western, Asian or other world-view is of the essence of human rights reduces the rights to just another form of local knowledge, albeit one with universal pretensions.[172] While questions of what is 'realistic' or 'effective' refer to making the rights work in practice within States, this will involve questions of how the rights devolve to communities, how they relate to the mores of particular societies. 'Broad international support' reaches out beyond the sphere of governments to transnational communities, or a transnational conception of community, including indigenous groups.

Comment: universal rights?

This sketch of the international law framework suggests that it is not rigid. There is room for new actors – peoples as well as States: there is room for community and for duty. Hitherto unrecognised grievances stand a chance of being addressed. There is space for processes of interpretation of rights consonant with basic principle, and for drawing upon the commitments

[171] Similar frameworks are intimated or expressed by other intergovernmental organisations – Thornberry and Estébanez, *The Council of Europe and Minorities*.
[172] Echoing C. Geertz, *Local Knowledge* (London, Fontana Press, 1993).

made by States to their people and the world at large. There are safeguards against regression in the articulation of rights. There is also a certain fragility in the system, and some drawbacks to the discourse. The conceptual baggage of international law is still heavy with statist impulses – statism and rights are like tectonic plates: where they collide we live though turbulent legal–political times. As noted, States are still prime movers in the world of human rights, though the room for manoeuvre in an anti-human rights direction is narrowing. Further, rights have specific effects on political discourse, moving it in possessive, competitive and conflictual directions, which will not always be in the interests of indigenous groups. On the other hand, indigenous communities have sharp collective memories of the 'legacies of injustice and fear' which ground much of the current utilisation of rights.[173] The 'universal' in 'universal human rights' is beneficial to indigenous peoples if it is a complex and not a simple universalism. In Gunther's terms, the latter is 'abstract, epistemic and essentialist',[174] whereas the former 'makes the step from difference to dialogue', and is procedural and deliberative, implying 'a minimum of mutual recognition, of taking the voice of the other seriously'.[175] The 'universal' also implies going through dialogue and dissent, moving from recognition to understanding and response to indigenous perspectives, and their incorporation in our view of the whole.[176] In moving away from the fixities of previous centuries, the partnership of international law and human and peoples' rights, contains much promise for indigenous groups, and some threat. The legal recognition of indigenous concerns is the subject of the next chapters, commencing with the two UN treaties of fundamental rights for all human beings: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[173] K. Gunther, 'The legacies of injustice and fear: a European approach to human rights and their effects on political culture', in Alston *et al.*, *The EU and Human Rights*, pp. 117–44.

[174] 'It presupposes general common features of human beings which can be observed and recognized and which are considered as pre-given': *ibid.*, p. 119.

[175] *Ibid.*, pp. 119 and 121. While Gunther's arguments reflect on the role of individuals in complex dialogic processes, there is also reference to the experiences of minority communities.

[176] The point made in the Introduction (text prior to fn. 47 in this volume) will be recalled.

Part II

Global instruments on human rights

5

The International Covenant on Civil and Political Rights I

The International Covenant on Civil and Political Rights (ICCPR)[1] was adopted by the UN General Assembly and entered into force on 23 March 1976.[2] The Covenant has been ratified by 148 States,[3] including many with significant indigenous populations. On the other hand, the non-parties also include many States with indigenous populations, including Bangladesh, Indonesia,[4] Malaysia, Myanmar, Pakistan and Papua New Guinea. The Covenant is a complex statement of rights incorporating several domains of discourse: those of collective rights (self-determination), undifferentiated individual rights (most of the text), and minority rights (Article 27); it does not include a specific article on indigenous rights. The First Optional Protocol (the Optional Protocol) to the ICCPR, which allows for communications from individuals who claim to be victims of violations of Covenant rights, has 98 States' parties.[5] States declining to allow individuals this additional facility include indigenous-rich Belize, Brazil, Honduras, India, Japan, Mexico, Sudan, Thailand and the USA.[6] In the main text of the ICCPR and the Optional Protocol, procedures for implementation centre on the eighteen-member HRC, elected as independent experts[7] by secret

[1] United Nations Treaty Series, vol. 999, p. 171.

[2] The inter-State procedure came into force under the terms of Article 41.2 on 28 March 1979.

[3] As at 27 July 2001, *Report of the Human Rights Committee A/56/40*, vol. I, para. 1.

[4] At the UN Commission on Human Rights in April 1999, Indonesia announced an intention to ratify the UN Covenants (ICCPR and Covenant on Economic, Social and Cultural Rights) in the year 2000; this did not occur.

[5] Trinidad and Tobago withdrew from the Optional Protocol and re-acceded, subject to reservations, but again denounced the Protocol on 27 March 2000: A/56/40, vol. I, p. 158, with effect from 26 August 1998; Guyana and Jamaica have also denounced though Guyana has re-acceded.

[6] UN information supplied on 26 August 1999.

[7] The detailed provisions on the election, competences, functions and procedures

ballot[8] of the States' parties. The Committee formally takes decisions by simple majority, but working methods allow for attempts to reach a consensus[9] – an approach 'which has been the rule ever since the Committee's inception'.[10] The Covenant sets out a reporting procedure as the basic method of implementation[11] and an optional procedure for inter-State complaints[12] based on reciprocity – the complaining State must have accepted the procedure as well as the target State before it can operate. The complex inter-State system envisaged by the Covenant has not been used.[13] In general, meetings under the reporting procedure are public – in contrast to meetings under the Optional Protocol, which are held in closed session. The Committee is not a judicial or quasi-judicial body, but regards its function as that of assisting States in the implementation of commitments.[14] The public meeting with representatives of a State party in the reporting process is designed to establish a constructive dialogue between the Committee and the State. As a general rule, reports are submitted every five years.[15] The general part of the report is to be submitted in accordance with consolidated guidelines for the major UN human rights treaties, and should contain information on the main ethnic and demographic characteristics of the country and its population.[16] Guidelines for the submission of reports on the substantive

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of the HRC are set out in Part IV of the Covenant. The work of the HRC and key provisions of the Covenant are subject to extensive appraisal in D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford, Clarendon Press, 1991).

[8] Article 29.

[9] T. Opsahl, 'The Human Rights Committee', in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford, Clarendon Press, 1992), pp. 369–444, pp. 380–1. See also F. Pocar, 'The International Covenant on Civil and Political Rights', in *Manual on Human Rights Reporting* (Geneva, United Nations, 1997), pp. 171–266.

[10] *Manual on Human Rights Reporting*, p. 262. However, in the context of the Optional Protocol, individual opinions may be appended to the collective views of the Committee: rule 98 of the Committee's rules of procedure CCPR/C/3/Rev. 6 and CORR.1.

[11] States' parties 'undertake to submit reports on the measures they have adopted which give effect to the rights . . . [in the Covenant] . . . and on the progress made in the enjoyment of those rights': Article 41.1. States are also to indicate 'the factors and difficulties, if any, affecting the implementation of the Covenant': Article 40.2. The *Consolidated Guidelines for State Reports under the Covenant* referred to are contained in Doc. CCPR/C/66/GUI/Rev.2, A/56/40, vol. I, Annex III.

[12] Articles 41 and 42.

[13] For a succinct account of reasons for its lack of employment, see Robertson and Merrills, *Human Rights in the World*, pp. 51–4.

[14] *Manual on Human Rights Reporting*, p. 262.

[15] *Manual on Human Rights Reporting*, pp. 172–3.

[16] There are four sections: Land and People; General Political Structure; General Legal Framework in which Human Rights are Protected; and Information and Publicity. For the last of these, the report should indicate the manner in which the texts of the various human rights instruments have been disseminated, and whether such texts have been translated into the local language and languages.

provisions of the Covenant[17] do not, unlike guidelines for the Convention on the Rights of the Child, individuate ethnic issues to be addressed. However, the requirements that the measures to give effect to each right be set out, the possibility of court enforcement of rights, as well as the extent to which rights are enjoyed in law and practice, will necessitate a drawing out of specific provisions for indigenous groups where relevant. This will be particularly the case in the sections of reports explaining law and practice on Articles 1, 2, 18, 19, 20, 26 and 27. *Inter alia*, periodic reports should include information which takes into account general comments made by the Committee. Commencing in 1991, the Committee has resorted to the practice of requesting States' parties concerned to submit urgent reports on serious situations.[18] The Covenant does not contain a provision equivalent to Article 9 of the Convention on the Elimination of Racial Discrimination which would authorise Committee requests for further information from the State beyond the bare bones of the report. However, further information is typically requested. NGOs have often played a behind-the-scenes role in the Committee's proceedings, providing an alternative source of further information, including the preparation of parallel or shadow reports.[19] While their role in the reporting process has gradually been formalised and upgraded,[20]

[17] *Consolidated Guidelines for State Reports*, CCPR/C/GU1/Rev. 2.

[18] Urgent requests have been made to the governments of Iraq (11 April 1991); Federal Republic of Yugoslavia (4 November 1991); Peru (10 April 1992), Bosnia and Hercegovina, Croatia and the Federal Republic of Yugoslavia (6 October 1992); Angola and Burundi (29 October 1993); and Haiti and Rwanda (27 October 1994): A/50/40, para. 36. See also Nigeria (29 November 1995), A/51/40, paras. 42 and 43.

[19] The *Manual on Human Rights Reporting*, pp. 262–3, makes the point that since the Committee is not a court, the kind of 'evidential' restrictions which would apply to court proceedings are not appropriate; the Committee must be free to raise any issue falling within the scope of the Covenant itself. Accordingly, the Committee 'must . . . be free to use any information available to it, whether it comes from official documents of reporting State authorities, from intergovernmental organizations, or from unofficial sources such as the press or non-governmental organizations'.

[20] At is 49th session in 1993, the Committee decided that information from NGOs received by the Secretariat of the Committee would be officially distributed to all members of the Committee in the original language: *Human Rights Monitor* 23 (December 1993), p. 11. In accordance with rule 62 of the rules of procedure, the Committee establishes a pre-sessional working group which meets before each session to prepare lists of issues for consideration by the Committee. The working group holds meetings with representatives of NGOs and specialised agencies, each in separate informal meetings: *Human Rights Monitor* 35 (October 1996), pp. 3–4. The dialogue between the Committee and the State representatives takes place on the basis of the written list of issues, which the Committee does not regard as exhaustive: *Manual on Human Rights Reporting*, p. 263. At its 52nd Session in 1996, the Committee recommended that States make their reports fully public and available to NGOs: A/52/40, para. 39. For information to 31 July 2001, see A/56/40, vol. 1, paras. 17–21.

they represent only 'a restricted voice'[21] without the right to question or speak in plenary HRC meetings at which they are observers. Committee members make oral comments at the end of the examination of the country concerned. In 1992, the Committee agreed that, following the consideration of individual reports, it would formulate written comments.[22] The concluding comments – as with other treaty bodies – help to shape opinion about the legality or illegality of particular practices in the country concerned or more generally.[23] Additionally, as with other UN treaty bodies, the Committee adopts general comments,[24] which reflect the experience of the Committee in the consideration of a significant number of reports, and deal with specific articles of the Covenant, or issues raised under it.[25] Many of these comments[26] impinge on indigenous concerns, especially General Comments 12 (21)[27] on self-determination;[28] 3 (13) on implementation;[29] 15 (27) on the position of aliens;[30] 6 (16) on the right to life;[31] 20 (44) on Article 7 – particularly as regards consent to medical or scientific experimentation;[32] 16 (32), on Article 17 concepts of privacy, family, etc.;[33] 22 (48) on freedom

[21] E. Evatt, 'Periodic reporting: the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women', in S. Pritchard (ed.), *Indigenous Peoples, the United Nations and Human Rights* (London and Leichhardt, NSW, Zed Books and the Federation Press, 1998), pp. 135–50, at p. 141.

[22] Prior to this, the Committee did not assess the conduct of individual States, on the (minority) view that the Committee was there to in order to assist States, and that its duty was satisfied by providing an annual report to the GA under Article 45 of the Covenant: Robertson and Merrills, *Human Rights in the World*, pp. 47–8.

[23] Evatt, 'Periodic reporting', p. 142.

[24] There has been some discussion among the treaty body chairpersons of the possibility of preparing joint general statements or comments: *Human Rights Monitor* 41–2 (1998), p. 4. General comments of one body sometimes cite comments from another such body. Joint comments could suggest a powerful consolidation of opinion across a range of instruments, emphasising their interdependence and interrelation. On the other hand, the HRC has phrased the matter delicately, stating that it 'takes care not to sow confusion by reference to the decisions of other treaty bodies. Nevertheless, if another treaty body develops an appropriate jurisprudence, the Committee may draw on it . . . although preferably without citing it': A/52/40, vol. 1, para. 40.

[25] Article 40.4. Some questions have been dealt with twice in the light of the further experience of the Committee.

[26] *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev. 5, 26 April 2001.

[27] The number in parenthesis refers to the session at which the comment was adopted.

[28] A/39/40, annex VI.

[29] A/36/40, annex VII.

[30] A/41/40, annex VI.

[31] A/37/40, annex V.

[32] A/47/40, annex VI.

[33] A/43/40, annex VI.

of religion;[34] 10 (19) on freedom of expression;[35] 11 (19) on advocacy of racial and religious hatred and propaganda for war;[36] 25 (57) on Article 25 – political participation;[37] 18 (37) on equality and non-discrimination;[38] 23 (50) on Article 27 – a reflection on minority rights which has important implications for indigenous groups and refers to their particular concerns;[39] 24 (52) on issues relating to reservations and ratification, etc., of the Covenant and the Optional Protocols,[40] 27 (67) on freedom of movement,[41] and 28 on equality of rights between men and women.[42] At the international level, the 'follow-up' to the work of the Committee consists in submitting an annual report to the UN General Assembly on all the decisions, recommendations, etc., including all cases of concern. Apart from this, there is no specific mechanism to follow up the Committee's concluding observations on State reports.[43]

The Optional Protocol

The Optional Protocol on individual communications, as with similar systems, has the potential to highlight the dramas of rights violation and loss at the level of the individual and the group. It has served as a vehicle for focusing on indigenous rights,[44] prompting legislative and other changes in domestic practice.[45] A party to the Protocol recognises the competence of the Committee to receive and consider 'communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party'[46]

[34] A/48/40. vol. 1, annex I.
[35] A/38/40, annex VI.
[36] *Ibid.*
[37] A/51/40, vol. 1, annex V.
[38] A/45/40, annex VI.
[39] A/49/40, vol. 1, annex V.
[40] A/50/40, vol. 1, annex V. The General Comment is instructive for many reasons, including the enhanced human rights status it accords to Article 27 ICCPR cultural rights and self-determination. It has been the subject of critical responses by States: see in particular the observations of France, A/51/40, vol. 1, annex VI; the United Kingdom, A/50/40, vol. 1, Annex VI, and the United States of America, *ibid.* See also the views of the Special Rapporteur of the International Law Commission on reservations to treaties, A/CN.4/477/Add.1, 13 June 1996.
[41] CCPR/C/21/Rev.1/Add.9, 2 November 1999 – which includes among possibly justified restrictions on such freedom (under article 12) 'limitations on the freedom to settle in areas inhabited by indigenous or minority communities' (para. 16).
[42] CCPR/C/21/Rev.1/Add.10, 29 March 2000. Also CCPR/C/21 Rev. 1/Add. 11.
[43] See A/52/40, para. 36 but see Rule 70A.
[44] Cases are dealt with in the pages following, and in ch. 6.
[45] See A/56/40, ch. VI on 'Follow-up activities under the Optional Protocol'.
[46] Article 1.

of Covenant rights. The usual conditions for receipt of petitions to an international body apply: all available domestic remedies must be exhausted and the communication must not be anonymous, an abuse of the right of submission, or 'incompatible with the provisions of the Covenant'.[47] The concept of 'victim' employed by the Committee raises issues for indigenous groups seeking to pursue a claim. A victim must be someone subject to actual or imminent adverse effects from the alleged violation. A third person[48] can make a claim on behalf of an alleged victim but the victim must give written authority. In *A. D. v Canada*, the Grand Captain of the Mikmaq claimed under Article 1 that the Mikmaq nation be recognised as a State. The claim failed the test of admissibility in part because it was not proved that A. D. was authorised to act for the Mikmaq or that he was personally a victim of the alleged violation.[49] According to the Committee, neither companies nor organisations can claim to be victims as such.[50] In cases of group claims, each member of the group must be a victim. In the *Ominayak* case, the Committee stated that there was no objection to groups of individuals who claim to be similarly affected collectively to submit a petition.[51] It has been suggested that subsequent trends in the Committee make it more difficult for groups to follow the Ominayak pattern – Evatt notes that it now appears that only named individuals can be victims.[52] Such a highly individualised procedure may be limiting in the case of ethnic groups with indeterminate membership – a problem which also arises in other human

[47] Articles 2 and 3. See also Article 5.2 – the rule of exhaustion of domestic remedies is not to apply 'where the application of the remedies is unreasonably prolonged'. Decisions on admissibility can be revised: for an example in the indigenous context, on the issue of non-exhaustion of domestic remedies, see Communication No. 431/1990, *O. Sara et al. v Finland*, A/49/40, vol. II, pp. 257–68. The doubts of the authors of the complaint (reindeer herders of Saami ethnic origin) about the readiness of the Finnish courts to entertain claims based on Article 27 of the Covenant did not justify their failure to avail themselves of domestic remedies available.

[48] NGOs may act on behalf of victims, with their authority: see McGoldrick, *Human Rights Committee*, pp. 169–72.

[49] Communication No. 78/1980, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, CCPR/C/OP/2, pp. 23–5. The Committee decided that this was a case of self-authorisation, not authorisation by the Grand Council of the Mikmaq – para. 7.6. The issue of whether an individual can claim to be a victim of a collective right is considered, see pp. 124–9. The victim requirement goes along with the denial that there can be an *actio popularis* – a general claim that law and practice violate the Convention. See *E. P. et al. v Colombia*, A/45/40, pp. 184–8.

[50] See *inter alios* Communication No. 40/1978, *Hartikainen v Finland, Selected Decisions*, CCPR/C/OP/1 (1981), p. 74.

[51] Communication No. 167/1984, A/45/40, vol. II, pp. 1–30, para. 32.1.

[52] In Pritchard, *Indigenous peoples, the United Nations and Human Rights*, p. 90. Thus in the case of *Ilmari Länsman v Finland*, the alleged victims were forty-eight named individuals, members of the Muotkatunturi Herdsmen's Committee and of the Angeli local community: Communication No. 511/1992, A/50/40, vol. II, pp. 66–76.

rights instruments.[53] Ethnic groups do not typically have membership lists; group identity may be too fluid a notion to be captured in simple formulae. Thus the group must be broken down into its individual components – 'individualised' before it can be accepted by the procedure. There are no oral hearings in the two-stage individual communications procedure[54] – the proceedings are based on written submissions,[55] and meetings are closed meetings under the terms of Article 5.3 of the Protocol. The Committee does not make a judgement at the conclusion of a case; it merely 'forwards its views'[56] to the State party and the individual. On the other hand, the views do not end with the particular finding, but continue with a statement of the obligation of the State party[57] – the Committee normally adds its observations on the remedies to which a victim is entitled.[58] In contrast to the reporting system, there is provision for checking the effect of the views of the Committee[59] through the mechanism of a Special Rapporteur for follow-up.[60] Follow-up information is public; uncooperative States are listed in the annual report. Information is systematically requested by the Special Rapporteur from all States where a violation has been found.[61]

Indigenous peoples and covenant rights

The HRC has visited indigenous issues in the reporting procedure and under the Optional Protocol with great regularity. The present section does not run through all Covenant rights in a search for potential relevance to indigenous groups but focuses on those areas where State reports and committee activities have most clearly elaborated an indigenous dimension. The basic

[53] See ch. 12 in this volume, on the European Convention on Human Rights. Evatt 'Periodic reporting' (p. 90), observes that while the naming requirement does not present an insuperable obstacle to claims, it 'is rather unrealistic for communities'.

[54] Admissibility and merits.

[55] This is the interpretation placed by the Committee on Article 5.1.

[56] Article 5.4.

[57] McGoldrick, *Human Rights Committee*, p. 152.

[58] See discussion in the present chapter of *Ominayak*, and in ch. 11 of *Aloeboetoe*.

[59] A standard formula is now inserted at the conclusion of each finding of violation, reminding the State of its obligations under the Covenant and requesting information on the measures taken to give effect to the Committee's views within 90 days.

[60] The mandate of the Special Rapporteur is in A/45/40, vol. II, annex XI. For amended rules of procedure, see A/49/40, vol. 1, annex VI. An annex 'Follow-up Activities under the Optional Protocol' is included in the Committee's annual report to the General Assembly.

[61] At the conclusion of the 72nd session of the Committee, follow-up information had been received in respect of 198 'views'; no information had been received in respect of 75. In 10 cases, the deadline for receipt of information had not expired. In the view of the Special Rapporteur, only 30 per cent of the replies could be considered satisfactory: A/56/40, paras. 175–80.

State obligation for all rights in the Covenant is set out in Article 2, whereby States' parties 'undertake to respect and to ensure to all individuals within its territory' the rights in the Covenant 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[62] The Committee has commented that obligations are not confined to respect but must also ensure rights, which calls for 'specific activities' by States to enable individuals to enjoy their rights.[63] Obligations are of immediate effect,[64] except for Article 23, where the obligation is to 'take appropriate steps' to ensure equality between spouses. The Committee has emphasised that aliens as well as nationals have rights under the Covenant, except where a right is guaranteed expressly to citizens, as it is under Article 25.[65] States are reminded that, where aliens constitute a minority, they have Article 27 cultural rights – an important consideration for displaced indigenous peoples as well as migrants of various kinds.[66] Article 3 provides that the equal rights of men and women to enjoy all the rights in the Covenant are also to be 'ensured'.[67] The Committee has deemed that implementation of this article requires 'affirmative action designed to ensure the positive enjoyment of rights', which cannot be done

[62] See also the provisions of Article 26. Article 2 also mandates the provision of effective remedies and the development of 'the possibilities of judicial remedy' – Article 2.3(a) and (b). The Committee has observed that 'purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies . . . in the event of particularly serious violations of human rights, especially when violation of the right to life is alleged': *Jose Vicente et al. v Colombia* (*Arhuacos v Colombia*), CCPR/C/60/D/612/1995, para. 8.2.

[63] General Comment 3(13), text in *Manual on Human Rights Reporting*, pp. 180–1. In the Comment, the Committee also stressed the importance of individuals knowing their rights, and recommends that the Covenant should be publicised 'in all official languages of the State'. This seems a less demanding requirement than that flowing from Article 42 of the Convention on the Rights of the Child where translation into indigenous and minority languages appears warranted. The standard view is that States are not obliged to incorporate the Covenant as such into their legislation. See, however, the remarks of Committee Chairperson Medina Quiroga on the third and fourth periodic reports of Australia – 'under Article 2, states parties had considerable discretion in the way that they give effect to rights . . . in the Covenant. However, they did not have the discretion to avoid giving effect to them altogether': CCPR/C/SR.1858, para. 12. According to Committee member Lallah, Australia's report revealed a 'highly unsatisfactory patchwork of legislation': CCPR/C/SR.1856, para. 59. The approach intimates minimum standards of coherence and comprehensiveness in the implementation of the Covenant.

[64] This is somewhat confused by Article 2.2 where the parties undertake to 'take the necessary steps' to give effect to the Covenant; Committee practice supposes that parties 'must respect and ensure the ICCPR rights at once': D. Harris, 'Introduction', in D. Harris and S. Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford, Clarendon Press, 1995), p. 4.

[65] General Comment 15(27).

[66] *Ibid.*, para. 7.

[67] Cf. Articles 2.1 and 26.

'simply by enacting laws'.[68] Article 5 contains provisions purporting, in paragraph 1, to disable any 'State, group or person' from using rights to destroy rights. This was drafted – in spite of various misgivings on the matter[69] – to ensure that various exponents of totalitarian ideologies would not use the covenants to justify their activities.[70] Paragraph 2, in a savings or 'value added' clause, seeks to disallow States' parties from lowering existing standards of protection on the 'pretext' that the Covenant does not recognise the rights or recognises them to a lesser extent.[71]

Self-determination

Self-determination is a major question for indigenous peoples, the parameters of which are explored elsewhere in the present work. The Covenant(s) are important for indigenous groups in offering the unique possibility of exploring the ramifications of the right through a multilateral treaty.[72] The self-determination article, which is identical with that of the International Covenant on Economic, Social and Cultural Rights, commences with the apparently simple proposition that all peoples have the right of self-determination, by virtue of which they 'freely determine their political status and freely pursue their economic, social and cultural development'. This general statement is followed in paragraph 2 by the provision that all peoples 'may, for their own ends, freely dispose of their natural wealth and resources', and that in no case 'may a people be deprived of its own means of subsistence'.

[68] General Comment No. 4 (13), para. 2. The commentary by Pocar in the *Manual on Human Rights Reporting* (p. 186) states that the use of equality as opposed to non-discrimination in Article 3 'intends to indicate that substantive affirmative action may be especially necessary'.

[69] E/CN.4/SR.175, para. 76, and SR.181, paras. 17 and 39 (USA); SR.181, para. 27 (Denmark).

[70] A/2929, ch. V, para. 55, and various citations in M. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht, Kluwer, 1987), p. 105.

[71] Scott considers that this clause does little to protect against 'negative inferentialism' – using one treaty to cap the rights in another. He argues that clauses such as Article 5.2 are directed to States parties to the particular treaty and that another treaty body with its own mandate may rely on the ICCPR as a reason not to develop its own jurisprudence: 'Reaching beyond (without abandoning) the category of "Economic, Social and Cultural Rights"', *Human Rights Quarterly* 21 (1999), 633–60 at 640. On the other hand, he recognises that *States* are prohibited from engaging in such a pretext. The *Manual on Human Rights Reporting* (p. 189) comments that the clause 'recognizes the priority of those provisions which provide the greatest amount of protection'.

[72] On the other hand, as the Committee points out, the right is 'interrelated with other provisions of the Covenant and rules of international law' – General Comment No. 12, para. 2.

According to paragraph 3, the States' parties 'including those having responsibility for the administration of non-self-governing and Trust territories' shall promote the realisation of the right of self-determination.[73]

Three basic and interrelated questions surround the Covenant formula: (1) is the right universal?; (2) who are the peoples contemplated in the text?; (3) how is the right to be exercised? On the first, paragraph 3 of Article 1 stops short of affirming the universality of the right in its ambiguous demand that States, including those with responsibilities for non-self-governing territories, are to promote the right. This appears to leave open the possibility that, while all States must promote self-determination, the right may only be relevant to States which have such territories, etc; but, in combination with the unqualified reference to all peoples, such a view appears untenable. The right must also be a continuing one, otherwise the reference to development would have no sense. Also, for paragraph 2, it can hardly be contemplated that only some peoples but not others could freely dispose of their natural wealth and resources.[74] Despite much equivocation it is now broadly accepted that self-determination, in the above expression, is both a continuing right and one which extends outside the colonial context.[75] The history of self-determination since the UN Charter demonstrates the strength of its paradigmatic application to colonial situations. Among sources for a restrictive view is the declaration by India[76] that the words of Article 1 'apply only to peoples under foreign domination'.[77] A number of States have objected to India's declaration, seen as compromising the article's claim to universality.[78] If this view were accepted, self-determination would come to a full stop on the ending of colonialism. India has restated the claim, and now distinguishes between external and internal aspects of self-determination.[79] The former applies essentially to non-self-governing and trust territories. The latter, which includes choice of government and democracy, appears to continue beyond independence,[80] although the real thrust of the

[73] Article 1.3.

[74] Helen Quane, 'The United Nations and the evolving right to self-determination', ICLQ 47 (1998), 537–72 at 559.

[75] This result flows from customary international law, including the Declaration on Principles of International law referred to in para. 7 of the General Comment. See among a vast literature the collected essays in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, Martinus Nijhoff, 1993); A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995).

[76] The declaration 'was meant only to clarify an existing understanding and is not in any way a derogation from India's obligations under the Covenant': Third Periodic Report of India, CCPR/C/76/Add.6, para. 31.

[77] The position was marked by inconsistency: compare the remarks of the Indian representative in A/C.3/SR.399, para. 4.

[78] ST/HR/R/Rev.4, pp. 44 ff.

[79] CCPR/C/76/Add.6, para. 32.

[80] The statement remains ambiguous on the 'continuation' point.

explanation is to deny the possibility of secession to 'component parts or groups' within States.[81] The universality of self-determination is supported by the *travaux*.[82] Subsequent practice also proceeds on the assumption that the right is universal and continuing. General Comment 12 is based on the assumption of a continuing right – 'an inalienable right of all peoples'.[83] Irrespective of outstanding colonial situations, the HRC clearly requires States to report on the application of self-determination 'internally', and not simply join in a chorus of disapproval for the *bêtes noires* of the age. States are thus required to 'describe the constitutional and political processes which in practice allow the exercise of the right'.[84]

On the question of which peoples are contemplated by the text, the *travaux* make it clear that this was left open and the Committee has not advanced a general definition.[85] In the rush to decolonisation, a standard view reflected in the so-called Colonial Declaration[86] was that it envisioned the whole peoples of colonial territories, which would accede to independence as entire, unbroken polities. In a largely post-colonial world, bearing in mind the continuing nature of the right of self-determination, it would appear logical to transfer the 'whole people' conception to the 'whole peoples' of independent states. The drafting of the Covenant is strongly influenced by such a conception – peoples were clearly to be distinguished from that of 'minorities', a term which in that context would include indigenous groups.[87] For some States, the 'people' was simply the majority in a particular territory.[88] A related notion is that each State contains but one people, an idea that has enjoyed a certain currency.[89] Without benefit of definition, the Committee has gradually accommodated a pluralist view. While the territorial framework is still a dominating feature of their conception, the single territory can apparently

[81] CCPR/C/76/Add.6, para. 32.

[82] Bossuyt, *Travaux*, pp. 19–48.

[83] Para. 2; text in *Manual on Human Rights Reporting*, pp. 177–9. The Committee regretted the position adopted by Azerbaijan on self-determination, recalling that 'under Article 1 . . . that principle applies to all peoples and not merely to colonized peoples': A/49/40, para. 296.

[84] General Comment, para. 4.

[85] In the face of suggestions that peoples should apply to 'large, compact national groups': E/CN.4/L.24 (India), and other groups, including minorities (Bossuyt, *Travaux*, p. 32) the view prevailed that the most general sense of 'peoples' applied and no definition was necessary: E/CN.4/SR.256, p. 7 (Yugoslavia); *ibid.*, p. 9 (Belgium); SR.257, p. 9 (Lebanon). Definition appeared impossible in view of the variety of opinion expressed at all stages of the drafting: A/3077, para. 67.

[86] General Assembly resolution 1514 (XV) 1960; see ch. 4 in this volume.

[87] For example, A/C.3/SR.310, para. 3; A/C.3/SR.399, paras. 5–6; A/C.3/SR.369, para. 13. Also Bossuyt, *Travaux*, pp. 45–6.

[88] China, A/C.3/SR.369, para. 13.

[89] Higgins phrases the principle as implying that 'peoples is to be understood in the sense of *all* the peoples of a given territory – in a given territory there can be a plurality of peoples: *Problems and Process*, p. 124.

contain a number of peoples. On the other hand, the distance between minority rights and peoples' rights is maintained.[90] The shift in perception goes along with a shift in focus on the modalities of exercising self-determination, increasingly directed to its internal application. For many States, self-determination is about participation in democratic processes.[91] For some, autonomy and self-government within the State is specified in a manner which includes indigenous groups. The initial report of the United States[92] is replete with references to Native Americans and self-determination,[93] 'tribal self-determination meant that tribes had the right to operate under their own governmental systems within the American political framework'.[94] Mexico has referred to the right of 'communities' to self-determination[95] and the concluding observations of the Committee echo this.[96] In the light of a varied State practice, the Committee has avoided canonical statements on the nature of the peoples contemplated by the Covenant or on all the modalities of implementation. Instead, the focus is on how self-determination can be appropriately invoked in the light of the State presentations. Concluding observations on the report of Canada[97] illustrate a current approach.[98] The observations take note 'of self-determination as applied by Canada to the aboriginal peoples', regretting that no explanation was given by the delegation concerning the elements that make up that concept. With reference to the conclusion of the Canadian Royal Commission on Aboriginal Peoples, that aboriginal self-government will fail without a greater share of lands and resources, the Committee emphasised the specific wording of Article 1.2, on natural wealth and resources, recommending that the practice of 'extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant'.[99] The focus on paragraph 2 of Article 1 is important for indigenous groups, for many of which land and

[90] The Committee stresses the difference most forcefully – if without elaboration – in General Comment No. 23, paras. 2 and 3.

[91] See for example the Fourth Periodic Report of Chile, CCPR/C/95/Add.11, 3 December 1998.

[92] CCPR/C/81, Add.4, 14 August 1994.

[93] *Ibid.*, paras. 9–76.

[94] CCPR/C/SR.1405, para. 68.

[95] CCPR/C/SR.1763, para. 74.

[96] Fourth Periodic Report, CCPR/C/123/Add.1, observation at CCPR/C/79/Add.109, para. 19.

[97] Fourth Periodic Report of Canada, CCPR/C/103/Add.5; observations in CCPR/C/79/Add.105, 7 April 1999.

[98] See also concluding observations on Mexico, CCPR/C/79/Add.109 (27 July 1999), para. 19, recommending measures to increase the participation of indigenous peoples in the country's institutions and the exercise of the right to self-determination; the reply by the government of Mexico does not refer to self-determination: CCPR/C/79/Add.123 (24 August 2000), paras. 14–15.

[99] Para. 8.

resources are the central issue. For this aspect of the right, the Committee sees no incongruity in its direct application to indigenous groups.[100] In the case of Australia, the Committee's list of questions referred to self-determination in relation to Australia's indigenous peoples. Following government replies, one member of the Committee stressed the underpinning role of Article 1 in relation to indigenous peoples, suggesting that with reference to issues of sustainability of ways of life and effective participation, that 'strengthening the protection of indigenous peoples under Article 1 would give depth and substance to Australia's implementation of the Covenant'.[101] In *Diergaardt et al. v Namibia*,[102] the Committee asserted that 'the provisions of Article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular Articles 25, 26 and 27';[103] a member used the statement to criticise the Committee's excessive individualisation of the rights in Article 25.[104]

The right of self-determination under the Optional Protocol has been dealt with in rather oblique fashion. As noted, the Protocol applies for the benefit of individuals who claim that any of their rights under the Covenant have been violated. In the *Ominayak* case,[105] the communication by Chief Ominayak claimed a violation by Canada of the Lubicon Lake Band's right to self-determination under Article 1 of the Covenant[106] in allowing the Provincial Government of Alberta to expropriate Band territory for the benefit of private corporate interests through leases for oil and gas exploration. The communication alleged that energy exploration in the Band's territory violated their right to dispose of their natural wealth and resources and deprived the band of its means of subsistence – aspects

[100] States may well discern such an incongruity: Fourth Periodic Report of Colombia, CCPR/C/103/Add.3, 8 October 1996, para. 14.

[101] Scheinin, CCPR/C/SR.1856, para. 67. For the list of questions, see CCPR/C/69/L/AUS, 25 April 2000. The Third and Fourth Periodic Reports of Australia are contained in Docs. CCPR/C/AUS/98/3 and 4; CCPR/C/69/L/AUS; HRI/CORE/1/Add.44. The Concluding Observations of the Committee did not explicitly criticise the Australian stance, noting that 'the State party prefers terms such as "self-management" and "self-empowerment" to express domestically the principle of indigenous peoples exercising meaningful control over their own affairs' – (Concluding Observations, advance unedited version) para. 9. The observation intimates a reading of self-determination as 'meaningful control'. See also the Concluding Observations on the Fourth Periodic Report of Norway – CCPR/C/79/Add.112, para. 17 – concerning the Saami people's right to self-determination in view of the Norwegian report (CCPR/C/115/Add.2) addressing Saami issues under this article.

[102] Communication No. 760/1997, CCPR/C/69/D/760/1996, 69th session of the Committee, 10–28 July 2000.

[103] Para. 10.3. Also *Mahuika et al. v New Zealand*, CCPR/C/70/D/547/1993, 27 October 2000, para. 9.2.

[104] Scheinin, individual concurring opinion.

[105] A/45/40, vol. II, pp. 1–30.

[106] Views, para. 2.1.

of self-determination under Article 1.[107] Canada disputed that the Band constituted a people for self-determination purposes, pointing out that 'the Lubicon Lake Band comprises only one of 582 Indian bands in Canada and a small portion of a larger group of Cree Indians residing in Northern Alberta'.[108]

The views of the Committee in this issue were expressed in Delphic terms: 'the question whether the Lubicon Lake Band constitute a "people" is not an issue for the Committee to address under the Optional Protocol';[109] 'the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination . . . which deals with rights conferred upon peoples, as such'.[110] The claims were reformulated in terms of Article 27 of the Covenant.[111] In view of pervasive controversies over the term, the Committee's refusal to pronounce on the meaning of peoples in the Covenant is perhaps understandable, though it might have appraised the particular claim without resort to a universalising formula. The victim aspect suggests that damage to 'peoples' is not to be translated into damage to individuals, that individual and group occupy disconnected spheres. Individuals cannot claim procedurally to be victims of the denial of group rights. If this is the case, it is untenable. If self-determination and individual human rights are understood as existing in a relationship of interdependence and reciprocity,[112] the violation of the collective right will have consequences for individuals, and vice versa.[113] On the other hand, it may be the case that violations of collective rights are appropriately addressed through mechanisms separate from or complementary to those for individual rights, or left to broader political processes.

[107] Para. 2.3.
[108] Para. 6.2.
[109] Para. 32.1.
[110] Para. 13.3.
[111] See ch. 6 of the present work.
[112] General Comment 12, para. 1. The interdependence of self-determination and other rights was forcefully intimated by the Committee in considering Peru's Third Periodic Report (CCPR/C/83/Add.1 and HRI/CORE/Add.43/Rev.1): 'The Committee considers that, in conformity with international law, Article 1 of the Covenant does not authorize the State to adopt a new constitution that may be incompatible with its other obligations under the Covenant' – A/52/40, para. 153. Also *Diergaardt et al.*, para. 10.3.
[113] See the remarks of the present author in Tomuschat, *Law of Self-Determination*. The Committee's views on individuals as victims of self-determination violations appear to have hardened between *A. D. v Canada* and *Ominayak*. In the former, the Committee said only that 'the author has failed to advance any pertinent facts supporting his claim that he is personally a victim of any rights' in the ICCPR. This is different from the later claim that he could not claim to be a victim of a self-determination violation. Spiliopoulou-Åkermark suggests that the case of *Kitok v Sweden* marks the transition: *Justifications of Minority Protection in International Law* (Uppsala, Iustus Förlag, 1997), p. 159, n. 209.

Equality and non-discrimination

The ICCPR refers to non-discrimination in Articles 2(1), 3[114] and 26. While the Covenant does not define discrimination, the Committee has presented its understanding of the concept in terms which draw upon the ICEARD and the Convention on Discrimination against Women (CEDAW).[115] Article 26 combines equality and non-discrimination in a broad formula:

> All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . .[116]

This protects against discriminatory legislative standards (equal protection of the law) and the discriminatory application of legislation (equality before the law).[117] The formulae in Articles 2 and 26 are open-ended, including, besides the enumerated grounds, a reference to 'other status'. It appears that 'statuses' do not necessarily refer to personal characteristics of complainants,[118] and include distinctions based on, *inter alia*, residence or location.[119] On the other hand, there is some Committee opinion to the effect that discrimination is about group membership and not simply about effects on separate individuals.[120] Article 26 is open-ended in another respect. According

[114] See above, pp. 123–4.

[115] General Comment No. 18 (para. 7) describes discrimination as 'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'. Discriminatory purposes as well as effects are caught by this interpretation, a view forcefully expressed in *Adam v the Czech Republic*: 'Whatever the motivation or intent of the legislature, a law may still contravene Article 26 . . . if its effects are discriminatory': Communication No. 586/1994, A/51/40, vol. II, p. 171, para. 12.7. See also *Simunek et al. v the Czech Republic*, Communication No. 516/1992, A/50/40, vol. II, pp. 89–97.

[116] The list of explicitly prohibited grounds is the same as for Article 2, see above, n. 115.

[117] Lord Lester and S. Joseph, 'Obligations of non-discrimination', in Harris and Joseph, *International Covenant*, pp. 563–95 at p. 566.

[118] *Ibid.*, p. 568.

[119] Lester and Joseph, 'Obligations', cite (p. 568) the case of *Lindgren et al. v Sweden* (Communication No. 298–89/1988) for the proposition that place of residence can be a ground of discrimination, adding, however, that discrimination on such a ground *alone* would be unlikely to breach Article 26. In the case of indigenous groups, such a ground could be added to others where actions of State impinge upon traditional indigenous territory.

[120] Aguilar and Wennergren, in *Vos v Netherlands*, Communication No. 218/1986, separate opinion.

to the jurisprudence of the Committee,[121] reflected in its general comments, the guarantees on equality and non-discrimination are not confined to rights enumerated in the Covenant,[122] and extend, for example, into the field of economic, social and cultural rights. The Covenant prohibits both direct and indirect discrimination – formally equal provisions which have a disparate impact upon different groups.[123] The Committee has also affirmed an understanding of discrimination and equality which mandates affirmative action under certain circumstances. In General Comment No. 18, the Committee pointed out that the principle of equality 'sometimes requires States' parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant'. The Comment provides the example of a State where 'the general conditions of a certain part of the population' prevent or impair their enjoyment of human rights. In that case, the State should take specific action to correct those conditions, which 'may involve granting for a time to the part of the population concerned certain preferential treatment in certain matters', adding that 'as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant'.[124] The action is *required*, not merely *permitted*, though neither the triggering conditions nor the modalities of action are further elaborated. The Comment opens up possibilities of supportive action being maintained indefinitely for the benefit of vulnerable groups – as long as such action is needed to correct discrimination.

The HRC has structured linkages between minority and indigenous groups and the principles of Articles 2(1) and 26. The General Comment on Article 27, which makes a number of references to indigenous groups, notes that the necessary positive measures by States to support minority identity, etc., must respect Articles 2(1) and 26 'both as regards the treatment between

[121] *Zwaan de Vries v Netherlands*, Communication No. 182/1984; *Broeks v Netherlands*, Communication No. 172/1984; *Danning v Netherlands*, Communication No. 180/1984 *Selected Decisions*, pp. 196–214. For later cases, which appear to back-pedal on this issue, see M. Schmidt, 'The ICCPR and ECHR: recent developments', in Harris and Joseph, *International Covenant*, pp. 630–59, at pp. 637–9. Germany has entered a reservation which, *de minimis*, seeks to confine applications under the Optional Protocol to rights specifically enumerated in the ICCPR, an approach regretted by the HRC: A/52/40, vol. I, para. 184.

[122] The Committee distinguishes the guarantee in Article 2 – limited to Covenant rights and freedoms – from that in Article 26, which provides an autonomous right, prohibiting discrimination 'in law or in fact in any field regulated by public authorities': General Comment No. 18(37), para. 12. In General Comment No. 23, the Committee states (para. 4) that Article 26 'governs the exercise of all rights, whether protected by the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction'.

[123] Discriminatory purposes (direct) and discriminatory effects (indirect) are caught by the prohibition: General Comment No. 18, para. 7.

[124] Para. 10. See also General Comment No. 4(13), para. 2.

different minorities and the treatment between the persons belonging to them and the remaining part of the population'.[125] But if the measures are aimed at 'correcting conditions', etc., they may constitute a legitimate differentiation under the Covenant.[126] The relations between the articles are not always clear. Positive measures are directed by Articles 2(1), 26 and 27, each in their own sphere. On the other hand, the equality/non-discrimination pairing appears to control Article 27, unless the term 'respect' is given a softer meaning. But, while there is tension between the two principles, the way is apparently open for group support without specific limit of time – in the case of Article 26, the rationale is 'correcting discriminatory conditions'; in the case of Article 27 it would be because the minority is a minority.

The relationship between Article 2 and minority rights was the subject of a brief exchange during discussion of the Fourth Periodic Report of Norway.[127] A member of the Committee (Lallah) questioned the Norwegian policy of affirmative action towards the Saami in the light of Article 2.[128] The representative of Norway observed that the Saami were both a minority and an indigenous group; there was no contradiction between their special status and the norms of the Covenant – their position cannot simply be assimilated to one of non-discrimination.[129] The reply suggests that positive action for minorities has its own legitimacy, and that the Covenant does not disfavour permanent status measures on behalf of particular groups. Another minority/non-discrimination linkage stems from the Committee's insistence that groups can exist in a State, even where they are not discriminated against. Even without an international definition,[130] indigenous and other groups are not simply the product of the prejudices of others.[131]

Minority support cannot be pushed too far – as General Comment 23 indicates, it can spill over into discrimination against majorities and other minorities. *Waldman v Canada*[132] concerned the public funding of Catholic schools in the Province of Ontario. The author, who was of the Jewish faith, paid for Jewish schools for his children from household funds, alleged violations of a number of articles of the Covenant – Articles 26, 18 and 27 taken in conjunction with Article 2(1). The argument was that no similar funding was provided for schools of other religions. The Committee noted that

[125] General Comment No. 23(50), para. 6.2.
[126] *Ibid.*
[127] CCPR/C/115/Add.2.
[128] CCPR/C/SR.1785, para. 72.
[129] CCPR/C/SR.1786, para. 5.
[130] See ch. 2 in the present volume.
[131] General Comment No. 23, para. 4. The Committee has characteristically debated this proposition in the context of reports and communications emanating from France.
[132] Communication No. 694/1996, CCPR/C/67/D/694/1996, views of 3 November 1999.

> the author has sent his children to a private religious school, not because he wishes a private non-government dependent education for his children, but because the publicly funded school system makes no provision for his religious denomination, whereas publicly funded religious schools are available to members of the Roman Catholic faith.[133]

The Committee found a violation of Article 26, observing that while 'the Covenant does not oblige States parties to fund schools which are established on a religious basis . . . if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination'.[134] In a concurring opinion, Committee member Scheinin pointed out that provision for Catholic schools in Ontario was linked to a historical arrangement and should have been examined under Article 27 (and Article 18) as well as Article 26. He observed that Article 27 imposed positive obligations to promote religious instruction in minority religions,[135] and public funding is one means to that end, adding that 'if demands for religious schools do arise, one legitimate criterion for deciding whether it would amount to discrimination is whether there is a sufficient number of children to attend such a school so that it could operate as a viable part in the overall system'. He found that in the instant case, the requirement was met, and that consequently, 'the level of indirect public funding allocated to the education of the author's children amounted to discrimination when compared to the full funding of public Roman Catholic schools in Ontario'.[136] The reasoning demonstrates a way of reaching essentially the same conclusion as the majority through focusing on a legitimate community claim under Article 27. The message is that providing funded education is not *per se* discriminatory, but care must be taken (as with language provision in the case of a plethora of languages) to ensure that distinctions between groups are based on reasonable criteria. The approach seems to bear out the methodology adopted in General Comment No. 23.[137]

Article 26 was used creatively by the Committee in the *Diergaardt* case to deal with the prohibition of the Afrikaans language – the language of the Rehoboth Basters who brought the case – in the public administration of Namibia: civil servants had been instructed not to respond orally or in writing to the communications of the authors in Afrikaans. The Committee decided that the language had been intentionally targeted; the remedy was

[133] *Ibid.*, para. 10.5.
[134] *Ibid.*, para. 10.6.
[135] The author's claims in respect of Article 27 are set out in para. 3.5.
[136] Opinion, para. 5.
[137] A broadly similar case in *Tadman et al. v Canada* was lost because the authors could not prove to have been victims – they sought to remove the Roman Catholic preference without themselves seeking publicly funded religious schools for their children: Communication No. 816/1998, CCPR/C/67/D/816/1998, views adopted on 29 October 1999.

to allow officials to respond in other languages than the official one in a non-discriminatory manner.[138] Strong dissents questioned the element of discrimination, pointing out that a State is entitled to choose an official language, and that Afrikaans (as a former official language until replaced by English) was now in no worse a position than tribal languages.[139] Questions of community languages are normally dealt with under Articles 27 and 19.[140] However, the authors' presentation of the Article 27 complaint in *Diergaardt* related to land use rather than language, so that the language issue was not dealt with under that article.

Individual rights in general

The subtleties of normative relationships are often lost in unsubtle discrimination against indigenous groups, which may be only one human rights hazard to negotiate. The Committee has frequently expressed concern about generalised practices of discrimination,[141] violation of economic and cultural rights, and violence against indigenous groups,[142] without specifying particular articles of the Covenant. The indigenous groups are often found at the bottom of the heap, sharing their fate with other disadvantaged groups,[143] often 'exposed to a wide range of human rights violations'.[144] The Committee has recognised group and individual dimensions of such generalised violations.

[138] Paras. 10.10, 11 and 12.

[139] Dissents of Amor, Ando, Bhagwati, Colville and Yalden. Instruments on minority rights in particular have grappled with issues pertaining to official languages. The OSCE-related *Oslo Recommendations Regarding the Linguistic Rights of National Minorities* (Foundation on Inter-Ethnic Relations, 1998) attempt to summarise relevant international standards, which go much further than envisaged in the above dissents to accommodate local languages.

[140] In a joint concurring opinion, Evatt, Klein, Kretzmer and Medina Quiroga considered that 'the instruction given by the State party to civil servants not to respond in the Afrikaans language, even if they have the personal capacity to do so, restricts the freedom of the authors to receive and impart information in that language', and so violated Article 19.

[141] For example, in the initial report of Brazil, comments in A/51/40, paras. 306–38, para. 320; Colombia, A/52/40, paras. 264–308, para. 291.

[142] Concerning Guatemala, A/51/40, paras. 217–53, para. 230; Bolivia, A/52/40, paras. 191–227, para. 215; Colombia, A/52/40, paras. 264–308, para. 278.

[143] See among many evocations, the Committee's comments on the initial reports of Paraguay in A/50/40, paras. 192–223, para. 213; the United States, *ibid.*, paras. 266–304, para. 291; Brazil, A/51/40, paras. 306–38, para. 337; Guatemala, *ibid.*, paras. 217–53, para. 221; Mexico, A/49/40, paras. 166–82, para. 169; New Zealand, A/50/40, paras. 166–91, para. 182.

[144] Observations on the Fourth Periodic Report of Mexico, CCPR/C/79/Add.109 (27 July 1999), para. 19.

In the case of Mexico, issues were bundled together in the portmanteau recommendation that linked respect for rights and freedoms with respect for customs and culture, and the enjoyment of land and natural resources. The land/culture nexus is of particular vitality in the case of indigenous peoples.[145]

Life and bodily integrity

While not innovative in terms of legal nuance, *Jose Vicente et al. v Colombia*[146] usefully illustrates forms of multiple assault on communal rights. The authors of the communication were all members of the Arhuaco community, a Colombian indigenous group residing in Valledupar, in the department of Cesar, some filing complaints on their own behalf, others on behalf of deceased relatives. The cases were various – indigenous leaders boarding a bus for a meeting with governments leaders never reached their destination, others were arrested and interrogated, suspected of storing arms for a guerrilla movement. The allegations were directed against members of the Colombian armed forces and the Director of the Office of Indigenous Affairs. The Committee found violations of Article 6 (right to life), Article 7 (torture), arbitrary detention (Article 9), making points also on the lack of effective remedies for murder, torture and disappearance in these cases – two military officers implicated had voluntarily retired; the State party apparently offered this as an effective remedy for the acts for which it was responsible.[147] A claim under Article 27 of the Covenant on the grounds that the deceased were spiritual leaders of the community[148] was rejected at the admissibility stage.[149] *Vicente* demonstrates the potential for invocation of any human right under the ICCPR on behalf of indigenous groups. The individual right to life under Article 6, invoked in the case on behalf of individuals, is linked with genocide in paragraph 3,[150] and declared to be

[145] *Ibid*. The full text of the paragraph is on p. 135 of the present work.

[146] UN Doc. CCPR/C/60/D/612/1995, views of the Committee adopted on 29 July 1997.

[147] Para. 8.2.

[148] Para. 3.6.

[149] Views, para. 5.3. The Committee decided, *ibid.*, that the authors had failed to substantiate how 'the right of the Arhuaco community to enjoy its own culture or to practise its own religion' had been violated – language which rephrases Article 27 from an individual to a community right. In such terms, it should not have been difficult to determine that Article 27 had been violated.

[150] In relation to the Aboriginal 'stolen children' in Australia, Committee member Scheinin observed that, while 'it was not the Committee's concern to administer the Convention [against Genocide], Article 15(2) of the Covenant made indirect provision for criminal laws to be applied with retroactive effect in the case of genocide. He did not mean to imply that the removal of indigenous children amounted to

non-derogable by any State party. General Comment No. 6(16) assumes a special poignancy in the light of the *Vicente* case in its reference to the requirement on States parties to take measures 'to prevent arbitrary killings by their own security forces'.[151] The Committee's interpretation of the inherent right to life links the right with areas of economic and social deprivation which have devastated indigenous communities[152] – infant mortality, life expectancy, malnutrition and epidemics – these are Article 6 issues quite as much as the death penalty. Duties to prevent environmental pollution are also indicated by the article.[153] Article 6 has thus been broadly interpreted to instantiate survival rights,[154] susceptible to action under the Optional Protocol. Article 7 – invoked in *Vicente* – incorporates the basic and non-derogable[155] prohibition of torture and cruel, inhuman and degrading treatment or punishment. The ICCPR does not define its terms. Despite its employment of the terms in Article 7,[156] the Committee has not considered it necessary to draw up a list of prohibited acts or to 'establish sharp distinctions between the different kinds of punishment or treatment', but contents itself with the observation that 'distinctions depend on the nature, purpose and severity of the treatment applied'.[157] Even if the definition of torture in the Convention against Torture is taken into account in the interpretation of Article 7,[158] that convention does not define cruel inhuman and degrading

genocide . . . his intention was to emphasize that the wounds were still deep, and that the State party needed to do a great deal more to compensate the individuals and communities who had suffered': CCPR/C/SR.1856, para. 63. Committee member Ando considered that the policy raised issues under Articles 6, 9, 17, 24 and 27 – *ibid.*, para. 73.

[151] Para. 3. The Comment also reflects on genocide in para. 2.

[152] Para. 5. The Comment states only that it would be 'desirable' to take all possible measures to reduce these plagues.

[153] Pocar, in *Manual on Human Rights Reporting*, p. 193; *EHP v Canada*, Communication No. 67/1980 – a case concerning the disposal of hazardous nuclear waste, in which the Committee observed (para. 8) that 'the present communication raises serious issues, with regard to the obligation of States parties to protect human life (Article 6(1))': CCRP/C/OP/2, pp. 20–22, at p. 22.

[154] When ICCPR rights stray into economic and social areas, the usual problems of the nature of the obligation – immediate or progressive – justiciability of claims, etc., inevitably arise. For a spectrum of opinion, see McGoldrick, *Human Rights Committee*, ch. 8, esp. at pp. 329–30, pp. 346–8, and S. Joseph, 'The right to life' in Harris and Joseph, *International Covenant*, pp. 155–83, esp. at pp. 174–7.

[155] Article 4.2.

[156] 'Degrading treatment' was used in *De Bouton v Uruguay*, A/36/40, p. 143; *Gilboa v Uruguay*, A/41/40, p. 128: McGoldrick, *Human Rights Committee*, pp. 370–1.

[157] General Comment No. 20(44), para. 4. Commentators may put it less kindly: 'the HRC has failed to define or establish criteria for distinguishing between the terms in Article 7' – McGoldrick, *Human Rights Committee*, p. 371.

[158] The definition in Article 1.1 of the Torture Convention concentrates on intentional infliction of acts which cause severe pain or suffering, whether physical or mental.

treatment and punishment.[159] Nowak suggests that, in such cases, severity of suffering is less important than humiliation of the victim in the perception of others or that of the victim.[160] In which case, Livingstone observes that factors such as 'the age, sex, religious beliefs, or physical condition of the victim are relevant in determining whether there has been inhuman or degrading treatment'.[161] This takes the understanding of Article 7 close to Article 3 of the ECHR. Further distinctions are possible if, under the ECHR it is true that, whereas 'the distinction between torture and inhuman treatment is frequently one of degree, this may not be the case with degrading treatment, which requires the presence of gross humiliation before others or being driven to act against will or conscience'.[162] While indigenous groups are characteristic victims of torture, inhuman treatment, etc.,[163] some 'traditional practices' in this field may raise issues under the Convention. The prohibitions are strong but not rigid. It is clear from the various points that, for example, community context is important in the understanding of terms – especially to the lesser terms such as 'degrading' treatment or punishment. It may be argued that what is degrading in one community may not be so in another and will not be perceived as such in the mind of the victim. Australia cited precisely such a view emanating from the Australian Law Reform Commission – 'what would be degrading in one community or culture might not be degrading, indeed might be fully accepted in another'.[164] This is difficult ground for human rights and the issue has emerged only occasionally – most of the Committee's work has focused on gross violations of the torture prohibition beyond any nuance. One such indigenous question arose in connection with the initial report of Australia,[165] which had referred

[159] Article 16 of the Convention Against Torture.

[160] M. Nowak, *CCPR Commentary* (Kehl, N. P. Engel, 1993), p. 133.

[161] S. Livingstone, 'Prisoners' rights', in Harris and Joseph, *International Covenant*, pp. 269–95, p. 280.

[162] F. Jacobs and R. C. A. White, *The European Convention on Human Rights* (Oxford, Clarendon Press, 2nd edn, 1996), p. 51. Cf. the views of the European Commission of Human Rights in the *Greek case*, report of 5 November 1969, *Yearbook of the European Convention on Human Rights* 12, pp. 186–510, at p. 186.

[163] See, for example, the Conclusions and Recommendations of the Committee against Torture to Australia, CAT/C/XXV/Concl.3, 21 November 2000. The Committee expressed its concern (para. 6) about 'Legislation imposing mandatory sentences, which has allegedly had a discriminatory effect regarding the indigenous population (including women and juveniles), who are over-represented in statistics for the criminal justice system', recommending (para. 7) the State party to keep the legislation under careful review. The State party was also recommended (para. 7) to 'continue its efforts to address the socio-economic disadvantage that *inter alia* leads indigenous Australians to come disproportionately into contact with the criminal justice system'.

[164] Second Periodic Report of Australia, CCPR/C/42/Add.2, para. 207.

[165] CCPR/C/14/Add.1. See also the Second Periodic Report, paras. 205 and 207.

to traditional punishments in Aboriginal tribal law such as 'spearing the thigh'. Committee questions were directed to the issue of when such practices would be abolished.[166] The Committee has given short shrift to customary practices in a variety of contexts.[167] But the argument remains for some aspects of Article 7 that the community, customary law context is inherent in the notion of 'degrading'. It is precisely from community, in dialogue with other cultural influences, that much of the sense of human authenticity and sense of worth emerges, shaping personal responses to matters of guilt and reparation.[168] Article 7 also provides that, in particular, 'no one shall be subjected without his free consent to medical or scientific experimentation'. According to the *travaux*, the prohibition of experimentation 'was intended to prevent the recurrence of atrocities such as those committed in concentration camps during the Second World War'[169] – hence the *travaux* references to Fascist and Nazi regimes,[170] though the ambit of the prohibition is wider. In course of discussion, it was pointed out that in cases of 'criminal experimentation', references to consent are hardly appropriate.[171] The puzzle is not lessened in the final form of the text, which clearly links the experimentation to torture, etc. Various attempts to provide exceptions to the prohibition were not carried into the final text,[172] though there was some agreement that the Covenant should not attempt to lay down rules concerning medical treatment.[173] The Committee has made a short pronouncement on this aspect of Article 7 in its general comment on a much abused article. The

[166] Tarnopolsky, CCPR/C/SR.401, para. 3; Prado Vallejo, SR.402, para. 13. For a concise overview of the issue in Australia, see S. Pritchard, *An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples* (ATSIC, 2nd edn, 1998), section E – Customary Law and Practices.

[167] Mainly in the field of traditional practices and customary law which impact on women and girl-children. For examples, see Committee observations in the cases of Yemen, A/50/40, vol. I, paras. 255, 256 – referring also to 'Islamic' punishments such as amputation of limbs; Zambia, A/51/40, vol. I, para. 195; Guatemala, *ibid.*, para. 237; Nigeria, *ibid.*, para. 291; Gabon, A/52/40, vol. I, para. 135; France, *ibid.*, para. 398 (concerning New Caledonia); and India, *ibid.*, paras. 431, 432.

[168] See T. Asad, 'On torture, or cruel, inhuman and degrading treatment', in R. A. Wilson (ed.), *Human Rights, Culture and Context* (London and Chicago, Pluto Press, 1997), ch. 5; C. Taylor, *The Ethics of Authenticity* (Cambridge and London, Harvard University Press, 1991).

[169] A/2929, ch. VI, para. 14.

[170] Hence the Lebanese proposal, E/CN.4/193.

[171] A/C.3/SR.849, para. 1 (Canada); SR.852, para. 34 (UK); SR.848, para. 27 (Romania); *ibid.*, para. 30 (Saudi Arabia); SR.853, para. 5 (Panama); *ibid.*, para. 8 (Canada).

[172] Including permission to experiment for reasons of community health: E/CN.4/473 (USA).

[173] A/C.3/SR.849, para. 44 (Saudi Arabia); A/C.3/SR.853, para. 12 (Romania); *ibid.*, para. 39 (Israel).

pronouncement does little more than repeat the sentence, stressing its relevance to persons 'under any form of detention or imprisonment'. The Committee has stressed that even experiments which are not life-threatening are caught by the prohibition.[174] The notion of consent is individual: the Committee has expressed concern to the USA that, 'in some States, non-therapeutic research may be conducted on minors or mentally-ill patients on the basis of surrogate consent in violation of . . . Article 7'.[175] Restricted notions of consent raise issues for indigenous groups in particular contexts. One such is the Human Genome Diversity Project (HGDP), which in the interests of scientific mapping of genome diversity, attempted to take blood and tissue samples from selected individuals in some 7,000 populations worldwide. The project raised many issues for indigenous groups,[176] including that of consent, bearing in mind the need to obtain informed consent before sampling. The situation is summarised in a UN Secretariat paper:

> Many indigenous communities have a communal or hierarchical decision-making structure that overshadows an individual's right to give consent, particularly when the consent has implications for the entire community. In addition, it is arguably not satisfactory for consent to be given by a community leader without the fully informed consent of the individual concerned. Ironically, the characteristics of the target groups that make them scientifically very appealing[177] also make it extremely difficult to deal with the cultural implications of the project for each of the groups.[178]

Family, privacy, custom

The ICCPR protects privacy and the family – a concept which has been broadly interpreted. Both protective elements have achieved a certain salience in the case law. Article 17 provides that no one is to be subjected to arbitrary or unlawful interference with their 'privacy, family, home or correspondence', nor to unlawful attacks on honour or reputation. Privacy is not defined. The linkage of family and home with privacy suggests that 'the concept of privacy is clearly not limited to isolated individuals, but includes the kinship "zone" of the family',[179] or perhaps more generally, relationships

[174] Concerning the report of Mexico, CCPR/C/SR.386, para. 10, cited in McGoldrick, *Human Rights Committee*, p. 366.

[175] A/50/40, vol. I, para. 286.

[176] Discussed at pp. 389–92.

[177] Cultural and genetic isolation, etc.

[178] *Human Genome Diversity Research and Indigenous Peoples*, E/CN.4/Sub.2/AC.4/1998/4, para. 16.

[179] J. Michael, 'Privacy', in Harris and Joseph, *International Covenant*, pp. 333–54, at p. 334.

with others. This is borne out by *Coeriel and Aurik v Netherlands*,[180] where the Committee decided that refusal by the Dutch authorities to allow a change to Hindu names by applicants who had adopted the Hindu religion violated the privacy aspect of Article 17. The point was made that 'the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone'.[181] In a strong dissent, Committee member Ando appeared to take the view that privacy was essentially individual[182] and that, outside Western society, a change of name had consequences not only for the individual but was 'likely to affect other members of the family as well as values attached thereto'.[183] Article 23 describes the family as 'the natural and fundamental group unit of society' which is thus entitled to protection by society and the State. General Comment 16 states that family is to be understood in the light of how the term is employed 'in the society of the State Party concerned';[184] and 'home' is the place where a person resides or carries out their usual occupation.[185] Family and home are to be protected against acts of State authorities or private persons.[186] In General Comment 19, the Committee accepts that 'it is not possible to give the concept [the family] a standard definition'. Article 23 requires that States report 'on how the concept and scope of the family is construed or defined in their own society and legal system'.[187] Protection is engaged 'when a group of persons is regarded as a family under the legislation and practice of a State'.[188] While this suggests a defining role for the State in deciding what is a family for ICCPR purposes, what is practised in a society may not be fully congruent with what is 'legislated'. Allowing States full rein in this regard would represent a different approach to that employed in, for example, for Article 27 for another type of human grouping – State definitions of minority groups are not regarded as ultimately dispositive of the issues.[189] The Committee's case

[180] A/50/40, vol. I, pp. 21–31.

[181] Para. 10.2. The Committee took the view, *ibid.*, that 'a person's surname constitutes an important component of one's identity'.

[182] 'I do not consider that a family name belongs to an individual person alone, whose privacy is protected by Article 17' – A/50/40, vol. I, p. 28.

[183] *Ibid.* In another dissent (pp. 29–31), Herndl argued that the analogy drawn by the Committee (para. 10.2) between forcible change of surname and the instant case was untenable; the ICCPR does not protect the right to have a name changed on request and at a whim.

[184] Para. 5. In the drafting, the Philippines argued that 'family' was redundant: the article protected the individual, and thus 'necessarily extended to the family' – A/C.3/SR.1019, para. 15. See also the remarks of Ghana, *ibid.*, para. 5.

[185] *Ibid.*

[186] General Comment 16, para. 1.

[187] Para. 2.

[188] *Ibid.*

[189] General Comment No. 23(50); see ch. 6 in this volume.

law suggests that the discretion to define 'family' is not unlimited,[190] and excessively narrow approaches by the State could be questionable under Article 1(1) and 26.[191] In sum, the ICCPR employs flexible concepts capable of applying to a variety of kinship situations 'beyond the model of the nuclear "family" and the home simply considered as a "dwelling place".[192] Neither Articles 17 nor 23 are not subject to express limitations.[193] Issues of family and custom were raised in the case of *X v Australia*,[194] a custody dispute between X, a member of the Wiradjuri and Arrente nations, and his non-Aboriginal ex-wife. X claimed a violation of Article 14,[195] on the grounds that the Australian Family Court lacked the necessary impartiality to hear and determine case involving Aboriginals, because it was wedded to the idea of the 'Anglo-Saxon' family group. He also claimed a violation of Article 23, because of rejection by the Australian court of elders' evidence of Aboriginal family structure, as well as violations of Articles 18[196] and 27.[197] In reply, the State party stated that, while there was no judicial recognition of Aboriginal customary law on marriage, evidence of Aboriginal heritage was relevant in assessing the welfare of children, and the nature of the Aboriginal extended family was taken into account by the courts. It was clear to the Committee that the author had not taken all the opportunities available to bring the Aboriginal issues to the Australian courts, and the communication was declared inadmissible for non-exhaustion of domestic remedies. A more successful path in the interrelated areas of family law and privacy was pursued by the applicants in *Hopu and Bessert v France*.[198] The authorities in Tahiti, for which France was responsible, had permitted the building of a hotel complex on a site which included a pre-European burial ground, and bordered a lagoon which was used as a traditional fishing ground, providing subsistence for some thirty families.[199] The authors of the communication

[190] *Aumeeruddy-Cziffra et al. v Mauritius*, Communication No. 35/1978, A/36/40, p. 134.

[191] S. Ghandhi, 'Family and child rights', in Harris and Joseph, *International Covenant*, pp. 491–534, at p. 495.

[192] A/C.3/SR.1019, para. 13.

[193] See comments in *Toonen v Australia*, Communication No. 488/1992, A/49/40, vol. II, pp. 226–37, esp. remarks of Committee member Wennergren, pp. 236–7.

[194] A/51/40, vol. II, pp. 235–42.

[195] The right to a fair trial, which includes (para. 1) an entitlement to 'a fair and public hearing by a competent, independent and impartial tribunal established by law'.

[196] Disparaging remarks made by judges about the Arrente initiation ceremony, attendance at which had delayed proceedings for custody, access and settlement of property.

[197] He alleged that the requirement to give evidence amounted to denial of the right to keep secret his knowledge of the initiation ceremony, thus interfering with his right to practise his culture.

[198] Communication No. 549/1993, UN Doc. CCPR/C/60/D/549/1993; views of the Committee adopted on 29 July 1997.

[199] Views, para. 2.3.

claimed to be the owners of the land in question, and rejected the competence of the French courts to deal with the issue, stating that only traditional indigenous tribunals would have jurisdiction.[200] They also claimed that the authorities had violated Articles 2, 14, 17,[201] 23[202] and 27 of the Covenant. The Committee declared the complaint admissible in as far as it raised issues under Article 14.1, 17.1 and 23.1[203] – despite the refusal of the authors to resort to the French courts. The Committee could not decide the land issue by virtue of the absence of any property clause in the ICCPR. Neither could the case be decided under Article 27, in view of France's well-known reservation against that article.[204] On the merits, the Committee was unable to find a violation of Article 14.1,[205] and could not establish that there had been discrimination on account of the absence of specific legal protection for burial grounds in French Polynesia.[206] However, the Committee decided that the acts of the French authorities violated the authors' rights to family and privacy under Articles 17 and 23 – despite the fact that direct kinship between the complainants and the remains discovered in the burial grounds could not be established.[207] The Committee declared that 'cultural traditions should be taken into account when defining the term "family" in a specific situation',[208] and that the authors 'consider their relationship to their ancestors to be an essential element in their identity and to play an important role in their family life'.[209] This had not been challenged by the State party, 'nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life'.[210] The Committee therefore concluded that 'the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown

[200] Para. 3.1.

[201] Private and family life.

[202] Family protection also *Vakoumé v France*, CCPR/C/70/D/822/1998.

[203] France did not offer observations at the admissibility stage.

[204] Five members of the Committee (Evatt, Medina Quiroga, Pocar, Scheinin and Yalden) expressed their disagreement with the Committee's decision on this issue. They argued that whatever the reservation meant for Metropolitan France, it was irrelevant to overseas territories, which were governed by constitutional provisions which recognised their specific interests within the general interests of the Republic.

[205] The Committee observed that 'the authors could have brought their case before a French tribunal, but . . . deliberately chose not to do so, claiming that French authorities should have kept indigenous tribunals in operation' – views, para. 10.1.

[206] *Ibid.*, paras. 10.4, 10.5. The original admissibility decision did not deal with this claim and was amended – para. 7.2.

[207] *Ibid.*, para. 10.3. France observed that skeletons found in the disputed grounds were regarded by the applicants as 'ancestors' rather than 'relatives': para. 5.10.

[208] *Ibid.*, para. 10.3. Cf. General Comment 16.

[209] *Ibid.*

[210] *Ibid.*

that this interference was reasonable in the circumstances'.[211] This creative playing up of cultural elements to secure an objective for indigenous people was roundly criticised by a minority of the Committee.[212] While they did not reject the view that family should be given a cultural interpretation in line with the General Comment, the term had a discrete meaning:

> It does not include all members of one's ethnic or cultural group. Nor does it necessarily include all one's ancestors, going back to time immemorial . . . The authors have provided no evidence that the burial ground is one that is connected to their family, rather than to the whole of the indigenous population of the area.[213]

In the view of the minority, the values at issue were cultural values, not family or privacy.[214] On privacy, this does not include access to public property, and the 'mere fact that visits to a certain site play an important role in one's identity, does not transform such visits into part of one's right to privacy'.[215] They considered that concern for the indigenous cultural heritage in Polynesia 'does not justify distorting the meaning of the terms family and privacy beyond their ordinary and generally accepted meaning'. It is true that the zones of privacy and family were granted considerable spatial and cultural extension by the decision. On the other hand, cultural dimensions of family had already been pointed up in the views and the General Comment 16. The Committee had also acknowledged in General Comment 19 that 'the concept of a family may differ in some respects from State to State, and even from region to region within a State',[216] making it impossible to find a definition. The articles employed in effect substituted for Article 27 if not completely. If the case had been decided under that article, the lack of consultation of the indigenous group by the authorities would have figured more strongly as a further argument against France. Further, the uses of the adjacent fishing lagoon could have been brought within Article 27, which has been interpreted to mean that when particular forms of economy have cultural dimensions, they function as an aspect of the enjoyment of culture protected by the article.[217]

Language, speech, group protection

Besides Article 27 and the provisions on non-discrimination on grounds of language, Article 14 includes the provision that an individual charged with

[211] *Ibid*.
[212] Ando, Buergenthal, Lord Colville and Kretzmer.
[213] Views, p. 16, para. 4.
[214] *Ibid.*, p. 17, para. 5.
[215] *Ibid*., para. 6.
[216] Para. 2.
[217] General Comment No. 23(50).

criminal offence is entitled as a minimum guarantee to have the free assistance of an interpreter 'if he cannot understand or speak the language used in court'. This is not to be construed as a positive minority rights provision to secure the place of indigenous or minority languages in administrative systems. The purpose is the more limited one of securing fairness in trial proceedings, so that only if there is genuine inability to understand proceedings will the right to an interpreter be triggered.[218] The right can, nonetheless, be of great relevance to indigenous defendants faced with a State apparatus made more threatening by conducting its criminal processes in an alien language. Individual rights to freedom of expression and the protection from hate speech envisaged in Articles 19 and 20 of the Covenant are relevant to indigenous groups in what the rights promote and what they defend.[219] Article 19 incorporates (paragraph 1) the right 'to hold opinions without interference', and (paragraph 2) freedom to 'seek, receive and impart information and ideas'. Paragraph 1 states an unqualified right – although not one deemed to be non-derogable by Article 4. Freedom of expression in paragraph 2 is stated to carry with it special duties and responsibilities and is susceptible to restrictions 'for respect of the rights or reputation of others' and for the protection of national security, public order or public health or morals.[220] Freedom of expression has been described as 'foundational'[221] and, in the context of the ECHR, as an essential element of a democratic society.[222] The basic notion is that societies cannot advance without free exchange of ideas, the pursuit of knowledge, debate about moral values, and the liberty to innovate and experiment in the field of art. Freedom of expression is necessary for the 'open society'. On the other hand, it does not appear to enjoy hierarchical priority over other rights in the context of the ICCPR[223] and is surprisingly not listed in those treaty rights which are regarded as also representing customary law in the Committee's General Comment on reservations.[224] The Comment does refer to Article 20, which prohibits propaganda for war and 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. 'Expression' is a broader concept than 'speech' and includes forms of non-verbal expression, including its artistic and religious forms. Feldman argues that freedom of speech under Article 19 can only be restricted for the benefit

[218] Communication No. 219/1986, *Dominique Guesdon v France*, A/45/40, vol. II, pp. 61–8, para. 10.2.

[219] D. McGoldrick and T. O'Donnell, 'Hate speech laws: consistency with national and international human rights law', *Legal Studies*, 18(4) (1998), 453–85.

[220] Para. 3 (a) and (b).

[221] D. Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford, Clarendon Press, 1993), pp. 547–79.

[222] *Handyside v UK* (1976), Ser. A, No. 24, para. 49.

[223] An attempt to prioritise the right in the context of General Comment 10 did not succeed: CCPR/C/SR.457.

[224] General Comment No. 24(52), para. 8.

of other individuals. Thus he regards the prohibition of blasphemy in the UK as inadmissible under Article 19 – because 'rights under Articles 18(1) and 19(1) attach to individuals . . . a group cannot be the holder of those rights'.[225] However, while respect for the rights and reputation of 'others' suggests a plurality of individuals, General Comment 10 of the HRC interprets this to mean 'the interests of other persons or . . . those of the community as a whole'.[226] Protection of a minority in the field of language formed a backdrop to the case of *Ballantyne, Davidson and McIntyre v Canada*.[227] The dispute concerned the imposition of compulsory French-language signage in Quebec, which was contested by anglophone applicants who preferred English as the language of commercial expression. The authors alleged violations of Articles 2, 19, 26 and 27 of the ICCPR. The HRC took the view (not unanimous) that the case essentially raised a question of freedom of expression. It did not raise an issue under Article 27 (minority rights) because, in the Committee's view, the applicants were not members of a minority, but members of the dominant anglophone community of Canada residing in the Province of Quebec.[228] In their case, the individual right of freedom of expression placed limitations on what demands could be made of the applicants – even granted that, within the terms of Article 19 of the ICCPR, respect for the rights of others could be a legitimate ground for restricting rights. The Committee took the view that it was not necessary, in order to protect the vulnerable position of the francophone minority in Canada, to prohibit commercial advertising in English. While much of the commentary on the case has focused on the view that the anglophones of Quebec were not a minority under Article 27, the case is also important for other reasons. The first is the Committee's clear view that the use of a particular language is an aspect of freedom of expression, a proposition that has not been made clear in, for example, the ECHR.[229] On the relation of language to freedom of expression, the Committee concluded that a State may choose one or more official languages 'but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice'.[230] This constitutes a vital, if limited reading of linguistic freedom for many indigenous groups in the face of a variety of pressures from official or State languages. It may be observed – with reference to other instruments besides the ICCPR – that even in the area of public administration (not just private life), limitations on the use of minority or indigenous

[225] D. Feldman, 'Freedom of expression', in Harris and Joseph, *International Covenant*, pp. 391–437, at p. 416.

[226] General Comment No. 10(19), para. 4.

[227] Views of the Human Rights Committee, Communications Nos. 359/1989 and 385/1989 (1993).

[228] The definition of minority aspect of the case is discussed in ch. 2.

[229] See ch. 12 of the present work.

[230] Para. 11.4.

languages may raise issues of discrimination.[231] The case also insists that protection of the identity of a minority community – in this case for its linguistic aspects – is a legitimate ground for restricting freedom of expression, but it must not be pushed too far.[232] The overall tendency of the decision is towards some concept of linguistic pluralism or bilingualism, and in the context of the case, the Committee indicated that bilingual signage would be the appropriate means of protecting the French language. While research generally suggests that bilingualism is reinforcing and improving of linguistic capabilities, and not destructive of them, [233] in so far as languages contain within themselves a repository of codes, symbols and knowledges, this promotion of bilingualism may not commend itself to those anxious to preserve the integrity of groups. The view that learning any language other than an original community language is damaging in all circumstances and a violation of cultural rights, does not commend itself as a valid interpretation of the ICCPR in the light of *Ballantyne*.

In *Robert Faurisson v France*,[234] the author of the communication complained of the application against him by France of the Gayssot Act, a species of 'Holocaust denial' prohibition, which made it a criminal offence to, *inter alia*, contest the conclusions and the verdict of the Nuremberg War Crimes Tribunal. Faurisson disputed that gas chambers played a role in the extermination of Jews by the Nazis, claiming that 'the myth of the gas chambers' amounted to a 'dishonest fabrication',[235] and that the Nuremberg proceeding were a 'sinister and dishonouring' judicial masquerade.[236] The Committee decided that France had not violated Article 19. In its views, the Committee recalled General Comment 10 with its reference to the interests of 'the community as a whole' as a ground for restricting the right of freedom of expression. It considered that 'Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism'.[237] In other words, the Jewish community formed a discrete part of 'the community as

[231] Cf. references in the present chapter to *Diergaardt*.

[232] Committee member Ndiaye dissented, arguing that the restrictions on the use of English were justified in order, *inter alia*, to 'give French-speakers a sense of linguistic security'. In his view, 'the existence of minorities such as those defined in Article 27 cannot be imagined after the disappearance of the single element which constitutes them, namely, their ethnic character, religion or . . . language'.

[233] T. Skutnabb-Kangas (ed.), *Multilingualism for All* (Lisse, Swets and Zeitlinger, 1995).

[234] CCPR/C/58/D/550/1993, 16 December 1996.

[235] Para. 2.6. According to Committee members Evatt, Kretzmer and Klein, Faurisson 'clearly implied that the Jews, the victims of the Nazis, concocted the story of the gas chambers for their own benefit' – Concurring Opinion, para. 10.

[236] Para. 7.11.

[237] Para. 9.6.

whole', entitled to protection. There was no counterpoint to this view, except that Committee member Lallah, arguing that Article 20 was better suited to the case than Article 19, referred simply to 'people of the Jewish faith' in France.[238] The Committee applied the restriction on freedom of expression in the particular circumstances where the opinions of the author were liable to inflame feelings; it did not pronounce on the application of the Gayssot Act as a whole.[239] The interpretation of Article 19.3 by the Committee suggests that the protection it offers to threatened communities is broader than that provided by Article 20, linked to the more confining notion of incitement.[240]

Democratic participation

Specific instruments on indigenous and tribal peoples such as ILO Convention 169 embrace strong principles on participation of indigenous groups.[241] The same is true of instruments on minorities: the United Nations Declaration on Minority Rights[242] provides for participation of members of minorities in 'cultural, religious, social, economic and public life', as well as in decisions which affect them.[243] The participation right in Article 25 of the ICCPR[244] relates to participation in public affairs and is limited to citizens. The article does not presuppose a particular political tradition, but requires that governments be accountable. The essential points are that, 'without unreasonable restrictions' every citizen has the right to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections which guarantee 'the free expression of the will of the electors', and to have access to public service 'on general terms of equality'. The provisions are the subject of a lengthy General Comment,[245] which invokes as aids to interpretation the principle of non-discrimination and the basic freedoms of assembly, etc., required to support the democratic exercise. The envisaged modalities of participation are direct and indirect. While the thrust

[238] pp. 21–2, para. 9.

[239] Lallah was particularly critical of the Gayssot Act which, 'in its effects, criminalizes the bare denial of historical facts': p. 20, para. 7.

[240] *Compare Ross v Canada*, Views adopted on 18 October 2000.

[241] See ch. 14 of the present work.

[242] General Assembly Resolution 47/135, 18 December 1992.

[243] Article 2.2 and 2.3. The terms and expressions in this declaration have influenced the interpretation of Article 27 of the ICCPR.

[244] Compare Article 21 of the UDHR – extensively discussed in H. J. Steiner, 'Political participation as a human right', *Harvard Human Rights Yearbook*, 1 (1988), 77–134; also A. Rosas, 'Article 21', in A. Eide *et al.* (eds.), *The Universal Declaration of Human Rights: A Commentary* (Oslo, Scandinavian University Press, 1992), pp. 299–317.

[245] General Comment No. 25(27).

of the article is towards national elected bodies, etc., local forms are also contemplated. Direct participation is practised through plebiscites, referenda and 'popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community'.[246] Participation is more than the exercise of voting in periodic elections but develops as a continuous process with an emphasis on participation 'by exerting influence through public debate and dialogue'.[247] Processes also require positive measures to overcome illiteracy, language barriers, etc., a stipulation helpful to indigenous groups, as is the recommendation that 'information and materials about voting should be available in minority languages'.[248] Discriminatory restrictions on the right to stand for election on grounds of education, residence, descent or political affiliation, should be avoided.[249] On the other hand, the various affirmative measures appear to meet an obstacle in the statement that one person, one vote must apply, and that 'within the framework of the State's electoral system, the vote of one elector should be equal to the vote of another'.[250] The relationship between this requirement and the use of special electoral rolls and reduced quotas for smaller communities is unclear. Taken as a simple datum, the equalisation of voting power envisaged by the Committee would appear to contradict the *travaux*. The article was drafted to make allowance for different voting systems.[251] Perhaps the thrust of the Committee's view is not against affirmative action but against gerrymandering, so that the 'drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group'.[252] In which case, the equalisation principle appears as a defence for smaller communities and not in criticism of positive measures.[253] The limits of Article 25 for indigenous groups were tested in the *Mikmaq Tribal Society v Canada*,[254] where the tribal society concerned claimed a violation of Article 25 because it was not invited to participate in a constitutional conference on the rights of Indians in Canada. National associations and leaders of aboriginal groups had been invited to attend the conferences, but not representatives of the Mikmaq who had applied to attend. The authors of the complaint claimed that their interests were not properly represented at the conferences, either through

[246] Para. 6.
[247] Para. 8.
[248] Para. 12. Compare *Ignatane v Latvia*, CCPR/C/72/D/884/1999, 25 July 2001.
[249] Para. 15.
[250] Para. 21.
[251] A/C.3/SR.1096, para. 9 (UK); paras. 12 and 24 (Chile).
[252] Para. 21.
[253] S. Joseph, 'Rights of political participation', in Harris and Joseph, *International Covenant*, pp. 535–61, at p. 543 (the chapter was written before the General Comment was adopted).
[254] No. 205/1986, Views adopted on 4 November 1991, A/47/40, 205–9.

direct representation or success in influencing the invited associations. The Committee found that Article 25 had not been violated, observing that 'It is for the legal and constitutional system of the State party to provide for the modalities of . . . participation'.[255] The Committee observed that

> Invariably, the conduct of public affairs affects the interests of large segments of the population or even the population as a whole, while in other instances it affects more directly the interests of more specific groups of society. Although prior consultations . . . with the most interested groups may often be envisaged . . . Article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in public affairs.[256]

So, direct participation is not mandatory. The General Comment only describes direct participation as a right when citizens exercise power as members of legislative bodies or through holding executive office. For the other modes of direct participation, where they are established, the only requirement in addition to respecting non-discrimination is that 'no unreasonable restrictions should be imposed'.[257] It would appear, therefore, that the forms of direct participation envisaged remain just that: forms and modalities without implying the citizens' right to demand that they *must* be established.[258] There is room for further development of the Committee's opinion – if groups do not have the unconditional right to choose modalities of participation, do they have a conditional right, and, if they have, under what conditions? In many instances, rights of indirect participation may be of limited use to minority or indigenous groups. While the *Mikmaq* decision and the Comment do not contain a special brief for indigenous groups – references to 'segments of the population', 'interested groups', 'specific groups' (*Mikmaq*) and to 'the affairs of a particular community',[259] are broad enough to include them.

The Committee continues its cautious approach. In *Diergaardt*, it was considered that division of lands and amalgamation in regions, which turned the Baster community into a minority, did not violate Article 25: while their political influence may have been affected, the complainants did not substantiate the claim that individual members of the community had been adversely affected in their enjoyment of political rights.[260] In a concurring

[255] Para. 5.4.
[256] Para. 5.5.
[257] General Comment, para. 6.
[258] See the comment in K. Myntti, 'National minorities, indigenous peoples and various modes of political participation', in F. Horn (ed.), *Minorities and Their Right of Political Participation* (Rovaniemi, Northern Institute for Environmental and Minority Law, 1996), pp. 1–26, at p. 1.
[259] Para. 6.
[260] Para. 10.8.

opinion, Committee member Scheinin argued that the relevant paragraph of the views

> unnecessarily emphasizes the individual nature of rights of participation under Article 25 . . . there are situations where Article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under Article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for.[261]

Scheinin's opinion was influenced in part by the Committee's indication that Article 1 informs the interpretation of other articles of the Convention including Article 25. On the facts, he considered that the authors of the complaint had not shown that the operation of powers of local or traditional authorities had been adversely affected by Namibian laws on regional government. In general, it may be argued that while the redrawing of political or administrative boundaries does not violate the Covenant, and is clearly a prerogative of States, attention must be paid to the human rights consequences for particular groups: there may be an ethnic factor to be taken into account.[262] Effective participation can, in some cases, be optimised through forms of autonomy; the suggestion that a group is entitled to self-determination further strengthens the case.

[261] CCRP/C/69/D/760/1996, p. 16.

[262] The question is specifically addressed in instruments on minority rights such as the Council of Europe's Framework Convention for the Protection of National Minorities 1995; see ch. 12 in this volume.

6

The International Covenant on Civil and Political Rights II: Article 27 and other global standards on minority rights

The most regular examinations of indigenous issues by the HRC in the reporting procedure and under the Optional Protocol have taken place in connection with Article 27:

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

The examination of indigenous rights has proceeded despite the fact that Article 27 deals with 'minorities' and not indigenous groups. As noted in a previous chapter, 'minority' is not defined in the article, a silence which many have attempted to fill on the basis of varying degrees of scholarship.[1] The most notable definition remains that of UN Special Rapporteur Capotorti who defined 'minority' not in a canonical manner but specifically for the purposes of Article 27. As noted,[2] the key definitional terms are those of numerical inferiority, non-dominance, citizenship or nationality of the State in question, the possession of cultural characteristics and an implicit sense of group solidarity.[3] The approach combines cultural characteristics with solidarity elements. The reference to the sense of solidarity as 'implicit' suggests that the continuing existence of group through time and adversity raises a presumption of solidarity and thus of group existence. Despite the claims of some authors that the need for a definition of the

[1] For an instructive review of such exercises, see A. Spiliopoulou-Åkermark, *Justifications of Minority Protection in International Law* (Uppsala, Iustus Förlag, 1997), ch. 5. See also O. Andrysek, *Report on the Definition of Minorities* (Utrecht, SIM, 1989); M. Shaw, 'The definition of minorities in international law', in Y. Dinstein and M. Tabory (eds.), *The Protection of Minorities and Human Rights* (Dordrecht, Martinus Nijhoff, 1992), pp. 1–31.

[2] *See* ch. 2.

[3] F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York, United Nations, 1991), para. 568.

subject of rights and duties is 'primordial',[4] the HRC has not obliged, but both sustains and chips away at the Capotorti formula in its General Comment,[5] discarding the requirement that minorities need to be citizens or nationals of the State, or even permanent residents.[6] The rights under Article 27 are not to be confined to the citizens of the State party in question,[7] and the reference to the 'existence' of a minority in the opening phrase of the article 'does not depend upon a decision by that State party but requires to be established by objective criteria'.[8] The 'objective criteria' do not lead to any definition of a minority (let alone of an indigenous people) – the Committee's observation is that 'the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language'.[9] The approach of the Committee to the citizenship issue is somewhat at odds with positions expressed in the drafting of the article which tended to support the requirement that minorities should be citizens for the purposes of the article.[10] On the other hand, post-Article 27 developments at the level of the United Nations, as reflected in the General Comment, enhance the claims of immigrant communities, even without citizenship of the host State, to enjoy cultural rights.[11] On a related issue, the Committee has rejected as 'much too restrictive' the view that only minorities with a

[4] F. Ermacora, 'The protection of minorities before the United Nations', *Recueil des Cours* 1983, vol. IV, pp. 249–370, at p. 288.

[5] General Comment No. 23(50), A/49/40, annex V. Work on the Comment was begun at the 49th session of the Committee and drafts were discussed at the 1,275th, 1,294th, 1,295th, 1,301st, 1,313th and 1,314th meetings. The text was adopted at the last of these meetings on 6 April 1994.

[6] In connection with Estonia, the Committee 'was deeply concerned' at the definition of minorities in national legislation, which excluded permanent residents: A/51/40, para. 121.

[7] The view that members of a minority group need not be citizens of the State has been followed up by the Committee in a number of instances. See for example the comments on the reports of Norway, *Report of the Human Rights Committee, Vol. 1*, UN Doc. A/49/40, para. 94; Italy, *ibid.*, para. 281; Slovenia, para. 345. The Committee view that Article 27 is not confined to 'national' minorities appears, for example, in comments on the reports of Ukraine, A/50/40, para. 322; and the Russian Federation, *ibid.*, para. 384.

[8] Para. 5.2. The reference to 'existence' of minorities within a State derives from a proposal by Chile to replace the requirement that minorities 'have long been established' in a State with 'in which [they] exist': E/CN.4/SR.371, p. 6. This suggests that Chile regarded the existence point as narrowing the scope of the article.

[9] Para. 5.1.

[10] A/C.3/SR.1104, para. 7 (Iraq): 'the obligations of a State within its own territory could only be towards its own citizens'. See also the remarks of the representative of Pakistan, *ibid.*, para. 17. See also the proposal by Yugoslavia, E/CN.4/L.225, which referred to minorities and 'other citizens'.

[11] Debates on the UN Declaration on Minority Rights reflect this perception. A narrower view appears in some European formulations under the rubric of the 'national' minority.

traditional area of settlement in particular regions are within the scope of Article 27.[12] The Committee has generally supported Capotorti's numerical criterion. In *Ballantyne, Davidson and McIntyre v Canada*,[13] that element of the authors' claims to commercial signage in English which pertained to article 27 was dismissed on the grounds that the 'minority' anglophone community in Quebec did not constitute a minority in the *State* of Canada (where they constitute a majority): the ICCPR only looked to minorities within the State as a whole.[14] There is some disquiet with the majority approach. The ruling was the subject of a strong dissent by Committee members Evatt, Ando, Bruni Celli and Dimitrijevic who argued that 'the criteria for determining what is a minority in a State . . . have not yet been considered by the Committee, and do not need to be foreclosed by a decision in the present matter'. The dissenting group expressed concern at withdrawing from the protection of Article 27 minorities in an autonomous province when it was not clear that they constituted a minority in the State as a whole. It remains to be seen if the limiting approach of the Committee majority will be sustained. The numbers game (head-counting of minorities) is not always of the highest relevance to indigenous groups who are, with some possible exceptions, numerical non-dominant groups within modern States. In the reporting process, questions concerning indigenous groups are often asked in connection with Article 27, implying that their connection with the rights set out in the article is generally unproblematic. Many examples are cited below. Later sessions of the Committee have probed situations in Bolivia, Brazil, Colombia, Guatemala, Mexico and the USA[15] under Article 27. Even where the peoples may constitute a majority – as in Bolivia and Guatemala – the Committee has requested information. Perhaps the most important element in the Committee's approach for indigenous groups wishing to engage Article 27 is the insistence that 'minority' has an autonomous meaning within the ICCPR.[16] This is a late manifestation of a

[12] Concluding observations on the Fourth Periodic Report of Germany, A/52/40, para. 183. The Committee added that 'Article 27 applies to all persons belonging to minorities, whether linguistic, religious, ethnic or otherwise, including those who are not concentrated or settled in a particular area or region, those who are immigrants or those who have been given asylum in Germany'.

[13] See ch. 5 in this volume.

[14] Article 27 'refers to minorities in States; this refers, as do all references to the "State" or "States" in . . . the Covenant, to ratifying States . . . English speaking citizens of Canada cannot be considered a linguistic minority' (para. 11.2).

[15] A/52/40, vol. I, pp. 35–9 (Bolivia); A/51/40, pp. 44–8 (Brazil); A/52/40, pp. 44–9 (Colombia); A/51/40, pp. 33–7 (Guatemala); CCPR/C/123/Add.1, concluding observations in CCPR/C/79/Add.109 (Fourth Periodic Report of Mexico); A/50/40, pp. 46–51 (USA).

[16] France has entered a reservation to the ICCPR declaring that Article 27 has no application. For a recent statement, see the Third Periodic Report of France, CCPR/C/76/Add.7, para. 394.

venerable principle of international law, which insists that States recognise demographic complexity where it exists, even where recognition does not fit with idealisations of harmony and unity.[17] The (undeveloped) existence criteria suggested by the Committee can be used to challenge the assertions of States that they do not 'see' or recognise minority groups in their territory.[18] In the case of France, this was linked to the idea that, since the principles of public law 'prohibit distinctions between citizens on the grounds of origin, race or religion, France is a country in which there are no minorities'.[19] The Committee concluded that it 'was unable to agree that France is a country in which there are no . . . minorities', and that: 'the mere fact that equal rights are granted to all individuals and that all individuals are equal before the law does not preclude the existence in fact of minorities in a country'.[20] As previously noted,[21] to conclude otherwise would be to accept the argument that a group is created by the prejudices of others – including prejudicial legislation – and that a State has sole authority to make decisions on group existence. These are legally incorrect propositions.

Community and membership

The assertion of the authority of the Covenant also applies to challenge overly narrow State-imposed or sanctioned membership criteria for minority or indigenous groups. The very first case under the Optional protocol to the Covenant dealt with the rights of an indigenous person and made significant observations on, *inter alia*, the notion of cultural membership. In *Lovelacev Canada*,[22] the gravamen of the complaint was that Sandra Lovelace had lost her status and rights as an Indian in accordance with section 12(1)(b) of the Indian Act of Canada as a consequence of marrying a non-Indian in

[17] Discussed in ch. 2 of this volume in the context of definition. See *Interpretation of the Convention between Greece and Bulgaria respecting Reciprocal Emigration*, PCIJ Advisory Opinion of 31 July 1930, Ser.B, No. 17, p. 33.

[18] For relatively recent examples, see questions and comments in A/47/40, paras. 74 and 75: Morocco claimed that there were 'no problems' on minorities in Morocco; the Jewish community was not considered a minority 'since it lived in symbiosis with the rest of Moroccan society' and the Berbers 'were completely integrated'. Also, Algeria, *ibid.*, paras. 276, 287; Republic of Korea, *ibid.*, para. 502; Egypt, A/48/40, para. 685; Burundi, *ibid.*, paras. 58 and 69. Gabon has reported (14 June 1999) that there is no problem of minorities in Gabon because 'the population is fully integrated socially' (CCPR/C/128/Add.1, para. 50).

[19] CCPR/C/76/Add.7, para. 394.

[20] Concluding Observations of the Human Rights Committee, CCPR/C/79/Add.80, para. 24.

[21] See ch. 2 of this volume.

[22] Communication No. 24/1977; Views adopted on 30 July 1981 – see A/36/40, pp. 166–75.

1970. Pointing out that an Indian man who married a non-Indian woman did not lose his status,[23] she claimed that the Act was discriminatory and contrary to Articles 2(1), 3, 23(1), 23(4), 26 and 27 of the Covenant.[24] In its submission on the merits, Canada recognised that many aspects of the Indian Act needed reform and that the government intended to put a reform bill before the Canadian Parliament.[25] Nevertheless, Canada stressed that the Act was necessary to protect the Indian minority. A definition of Indians was necessary in view of the privileges granted to the communities. Traditionally, patriarchal relationships were taken into account in determining legal claims – reserve land had been felt to be more threatened by non-Indian men than by non-Indian women.[26] The Indians were divided on the question of legal rights and accordingly, reform could not be precipitate.[27] The relevant legislation envisaged a loss of certain rights for Indians who ceased to be members of an Indian band – in particular, they were not entitled to reside by right on a reserve although they could do so if their presence was tolerated by other band members.[28] Mrs Lovelace had ceased to be a member of the Tobique Band in consequence of her marriage and although following a divorce she had returned to her parents on the reserve, there was no possibility of establishing a presence there by right. Mrs Lovelace itemised the consequences of loss of status, including the cultural benefits of living in an Indian community, and the emotional ties to home, family, friends and neighbours, and the loss of identity.[29] The Committee considered that the essence of the complaint was the continuing effects of the Indian

[23] Para. 1.

[24] *Ibid.*

[25] Para. 5. In consequence of the abrogation of S.12(1)(b) of the Indian Act, the case of *L. S. N. v Canada*, which had been declared admissible by the Committee, was withdrawn: *Selected Decisions*, CCPR/C/OP/2, pp. 6–7. See also the response by Canada, *ibid.*, Annex I. However, the Committee has continued to press Canada post-*Lovelace*, and has expressed concern 'about ongoing discrimination against aboriginal women', noting that, although the status of Indian women who had lost status because of marriage was reinstated, the amendment 'affects only the woman and her children, not subsequent generations, which may still be denied membership in the community': Concluding Observations on the Fourth Periodic Report of Canada, CCPR/C/79/Add.105, para. 19.

[26] *Ibid.* Lovelace disputed the contention that legal relationships within Indian families were traditionally patrilineal in nature (para. 6). This is discussed, if a little obscurely, by B. Clavero, 'Lovelace versus Canada: indigenous right versus constitutional culture, *Law and Anthropology* 10 (1998), 1–13 at 2: 'Lovelace's representation contests the argument that the problem is posed by a supposedly patrilinear structure of the native community, but it also provides some extensive data which confirm that such an interior regime exists and that she respected it during her marriage'.

[27] Para. 5.

[28] For some consequences – dissension among Band members, see para. 9.7.

[29] Paras. 9.9, 13.1.

Act in denying Indian status to Sandra Lovelace,[30] 'in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique reserve'.[31] Most of the effects listed by the complainant did not, in the view of the Committee, adversely affect the rights protected in the Covenant. The exception was the loss of cultural benefits to which Article 27 was directly applicable. The Committee asserted that:

> Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant.[32]

The statement is qualified: it will 'normally' be the case that membership is driven by individual choice. But while it is not entirely correct to say that this places the 'right to the community' or cultural membership in the hands of the individual as an act of individual determination,[33] the Committee assumes that individual choice is the primary datum: 'normalized', so that State or tribe-generated membership limitations would be subject to critical scrutiny. The Committee observed that although the right to live on a reserve is not 'as such'[34] guaranteed by Article 27, Mrs Lovelace belonged to the community and her right to enjoy her culture in community with other members of her group was subject to continuing interference 'because there is no place outside the Tobique reserve where such a community exists'.[35] They also reflected on the extent of interference with the enjoyment of rights, observing that 'restrictions affecting the right to residence or a reserve of a person belonging to the minority concerned must have both a reasonable and objective justification and be consistent with other provisions of the Covenant, read as a whole'.[36] The conclusion was that:

> Whatever may be the merits of the Indian Act in other respects, it does not seem . . . that to deny Sandra Lovelace the right to reside on a reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee

[30] In the Committee's view, family life issues under Articles 17, 23 and 24 were 'only indirectly at stake', and the finding under Article 27 made it unnecessary to examine questions of discrimination under Articles 2, 3 and 26: Views para. 18. Considerations *ratione temporis* affected discrimination issues under Article 26 – Lovelace had lost Indian status before the Covenant came into force for Canada. The individual opinion submitted by Committee member Bouziri argued that the *ratione temporis* argument was invalid – there were breaches of the non-discrimination provisions of the Covenant because Mrs Lovelace 'was still suffering from the adverse discriminatory effects of the [Indian] Act in matters other than that covered by Article 27' – i.e., there were continuing effects analogous to the continuing effects under Article 27.

[31] Para. 13.1.

[32] Para. 14.

[33] Clavero, Lovelace versus Canada p. 3.

[34] Para. 15.

[35] Para. 15.

[36] Para. 16.

> therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under Article 27 . . . read in the context of the other provisions referred to.[37]

The case established some of the parameters for the application of Article 27 and had an important influence on subsequent developments. Significant points in the decision for present purposes include the prevalence of the international standard over the national in the matter of the 'existence' of minorities. Another relevant issue is that, despite the individualist phrasing of Article 27 – rights are for 'persons belonging to' minorities and not minorities as such,[38] individual and community elements of right are recognised and put into balance in *Lovelace*, including the need 'to preserve the identity of the tribe'.[39] As the Committee observed much later, the rights under Article 27 are individual rights, but 'they depend in turn on the ability of the minority group to maintain its culture, language or religion'.[40] In some cases such prescriptions may run contrary to the aspirations of individuals. The Committee also affirmed the need to interpret Article 27 in the overall context of the Covenant, including the principles of non-discrimination and equality.[41] Perhaps the most important contribution of the *Lovelace* case was to welcome Article 27 into the canon of human rights. The Committee read the author's continuing distress as the product of the denial of a specific right: the identity right in Article 27, the essence of which did not emerge through juggling with combinations of other rights.[42]

[37] Para. 17.

[38] This was explicitly discussed in the drafting, and a drafting suggestion – E/CN.4/Sub.2/112 – to the effect that *minorities* shall not be denied the right, etc., was not adopted. 'Persons belonging to' minorities was the preferred phrase as, *inter alia*, 'persons' were susceptible to definition in legal terms. The idea of the group was maintained by the phrase 'in community with': E/CN.4/358, paras. 39–48; Sub-Commission resolution E(III). The Committee has generally been careful to use 'persons belonging to' in the reporting process when speaking of rights among many possible examples, see the citation from the 1999 observations on Cambodia – CCPR/C/79/Add.108, para. 19.

[39] Para. 17.

[40] General Comment 23, para. 6.2.

[41] In a recent exchange, the representative of Ukraine discerned 'a certain contradiction' between Articles 27 and 26, 'the former obliging States parties to afford a degree of preferential treatment to national minorities and the latter asserting equality before the law irrespective of national origin'; Committee member El Shafei did not agree – Articles 2, 26 and 27 'should be read as complementary': CCPR/C/SR.1418, paras. 25 and 53.

[42] In General Comment 28 on equality of rights between men and women, *Lovelace* is cited in connection with the requirement on States to 'report on any legislation or administrative practices related o membership in a minority community that might constitute an infringement of the equal rights of women under the Covenant'. The Comment adds that similarly, 'States should report on measures taken to discharge their responsibilities in relation to cultural or religious practices within minority communities that might affect the rights of women' – CCPR/C/21/Rev.1/Add.10, para. 32.

Despite the judgements of those who argued that the Article adds little or nothing to the Covenant,[43] the Committee continues to stress its distinct nature and develop its meaning.[44] Issues of cultural membership, definition, group identity and State responsibility were also at the heart of *Kitok v Sweden*.[45] The author of the communication was Ivan Kitok, a member of a Saami family which had been involved in reindeer breeding for some 100 years. The allegation was that he had inherited rights to reindeer breeding in Sorkaitum Saami village but was denied the exercise of the rights because of loss of membership of the village through the operation of Swedish law.[46] The rights were lost if the individual concerned engaged in any other profession for a period of three years. The law effectively divided Saami into two groups: the reindeer herders and the rest.[47] According to the government:

> The *ratio legis* for this legislation is to improve the living conditions for the Saami who have reindeer husbandry as their primary income, and to make the existence of reindeer husbandry safe for the future . . . From the legislative history it appears that it was considered . . . of general importance that reindeer husbandry be made more profitable. Reindeer husbandry was considered necessary to protect and preserve the whole culture of the Saami.[48]

Those with Saami rights were estimated by the government to number 2,500 out of a total Saami population of between 15,000 and 20,000; the majority of ethnic Saami, therefore, had 'no special rights under the present law. These other Saami have found it more difficult to maintain their Saami identity and many of them are today assimilated in Swedish society'.[49] Kitok claimed violations of Articles 1 and 27 of the Covenant. The claim under Article 1[50] was declared inadmissible,[51] but that under Article 27 was to be admitted since 'the author had made a reasonable effort to substantiate his allegations that he was the victim of a violation of his right to enjoy the same rights enjoyed by other members of the Saami community'.[52] On the merits of the claim, the Committee observed that

[43] See Thornberry, *International Law*, ch. 18, for a spectrum of views.

[44] General Comment 23 takes considerable pains to stress the distinct nature of the article, notably in paras. 1, 2, 3, 4, 5 and 9.

[45] Communication No. 197/1985; Views of the Committee in A/43/40, pp. 221–41.

[46] Para. 2.1.

[47] Para. 4.2.

[48] Para. 4.2.

[49] Para. 4.2.

[50] The claim included the statement that: 'The old Lapp villages must be looked upon as small realms, not States, with their own borders and their government and with the right to neutrality in war' (para. 5.2).

[51] Para. 6.3: the individual could not claim to be a victim of any violation of that right.

[52] *Ibid.*

> The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under Article 27.[53]

The Committee accepted that the law had as its *raison d'être* the preservation of the Saami minority, and accordingly took the view that the State's measures were reasonable and consistent with Article 27.[54] Nevertheless, the appreciation of Swedish law was not without a certain tension. The Committee cited sections 11 and 12 of the Reindeer Husbandry Act 1971: section 11 limits membership of a Saami community to those participating in reindeer husbandry within the pasture area of the community, those who have so participated and have not turned to another main economic activity, and specified relations of qualified persons; section 12 provides that others can be accepted as members with a right of appeal in the case of a refusal for special reasons. The Committee had 'grave doubts'[55] as to whether certain provisions of the reindeer Husbandry Act were compatible with Article 27, observing that the law

> provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Saami can be held not to be a Saami for the purposes of the Act. The Committee has been concerned with the ignoring of objective ethnic criteria in determining membership of a minority . . . the application to Mr. Kitok of the designated rules may have been disproportionate to the legitimate ends sought by the legislation.[56]

Despite this critique, the Committee in a brief resolution of the issue, stated:

> In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the *ratio decidendi* of the Lovelace case . . . namely, that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole . . . the Committee is of the view that there is no violation of Article 27 by the State party. In this context, the Committee notes that Mr. Kitok is permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish.[57]

The resolution of the issue has unsatisfactory aspects. It would appear that assimilation is the fate of the Saami majority in the face of Swedish legislation. Protection related only to a defined group within the Saami population as whole. It is a paradox that strong legal protection of a privileged core

[53] Para. 9.2.
[54] Para. 9.5.
[55] Para. 9.6.
[56] Para. 9.7.
[57] Para. 9.8.

within an ethnic group was to be achieved by neglect of the wider community. Perhaps the result was too favourable to the respondent State, although the case provides further evidence that concern for 'the community' functions as a valid constraint on the untrammelled exercise of individual rights. On another footing, *Kitok* promotes the important notion that where regulation of economy has cultural dimensions, these must be accounted for in the calculus of rights. Many indigenous peoples have particular forms of economy which are as much forms of cultural self-expression as strategies for survival. This culture–economy nexus has been subsumed into the General Comment.

However, there is no necessary connection between a distinct culture and particular economic forms. In *Diergaardt*,[58] the Committee assessed the relationship between the way of life of the authors and the lands covered by their claims, concluding that, although the link between the Rehoboth community and their lands dated back some 125 years, 'it is not the result of a relationship that would have given rise to a distinctive culture'.[59] The concurring opinion by Evatt and Medina Quiroga distinguished the Rehoboth claim in this respect as economic rather than cultural. They observed that the issues

> are more readily resolved in regard to indigenous communities which can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and . . . cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects.[60]

This suggests that it is not enough to simply assert the economy–culture nexus; the culture must be bound up with the economic mode in a reciprocating way.

The requirement of positive action

Article 27 provides only that members of minorities 'shall not be denied' their rights, an unusual negative formulation in the context of the ICCPR. The idea that Article 27 represented only a classic example of 'restrictive toleration'[61] of minorities and was not in any sense a call to positive action on the part of the State was broadly accepted in early commentary. This interpretation was justified in the light of State comments during drafting and the rejection of drafts which would have subjected States to specific

[58] See ch. 5 of this volume.
[59] Para. 10.6.
[60] CCPR/C/69/D/760/1996, p. 14.
[61] J. Robinson, 'International protection of minorities: a global view', cited in Thornberry, *International Law*, p. 178.

action in the fields of culture, education, etc.[62] The reading of Article 27 underplayed the general Covenant requirement to 'respect and ensure' rights, which include Article 27. If States took no action to address imbalances between vulnerable groups and powerful majorities, they were neither 'securing' nor 'respecting' Article 27.[63] It also ignored the conceptual underpinning of the concept of minority protection which, in contrast to non-discrimination, has usually been interpreted to require positive measures.[64] The HRC has gradually but forcefully hardened up Article 27 to mandate action by States for the benefit of minority communities. The term 'ensure' features regularly in the Committee's dialogue with States, as do the phrases 'positive action' and 'concrete measures'.[65] In the case of Algeria, the Committee requested information on how the State would 'foster and preserve' Berber culture and language.[66] The Committee queried the withdrawal of affirmative action programmes by the USA reminding the government that rights are to be provided 'in fact as well as in law'.[67] Brazil received a recommendation to 'guarantee' rights of persons belonging to minorities and to indigenous communities.[68] Costa Rica was questioned on the delivery of rights 'in actual practice' and on 'measures taken'.[69] Gabon was taken to task about the 'lack of measures' to implement Article 27.[70] Concern was expressed about 'levels of support' for cultural diversity within the UK.[71] In the case of Cambodia, the Committee demanded that 'immediate measures should be taken to ensure that the rights of members of indigenous communities are respected'.[72] General Comment 23 stressed the need for positive action to implement Article 27, imparting a horizontal[73] element to the obligation:

> Although Article 27 is expressed in negative terms, that article . . . does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence of and the exercise of this right are protected against their denial or violation.

[62] See for example, E/CN.4/21, annex A (Secretariat); E/CN.4/237 (Soviet Union); E/CN.4/L.222 (Soviet Union).

[63] Capotorti, *Study*, pp. 36–7.

[64] See the statement by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities at its first session in 1947, E/CN.4/52, Sect. V.

[65] Spiliopoulou-Åkermark, *Justification of Minority Rights*, pp. 139–40.

[66] A/47/40, para. 276.

[67] A/50/40, para. 303.

[68] A/51/40, para. 337.

[69] A/49/40, para. 164.

[70] A/52/40, para. 133.

[71] A/50/40, para. 425.

[72] CCPR/C/79/Add.108, para. 19, 27 July 1999. In the case of Guatemala, the Committee recommended 'legislation . . . without delay': A/51/40, para. 250.

[73] Requiring States to protect members of minorities not only against acts of State institutions, but against those of private individuals.

> Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.[74]

In a number of cases the Committee has been specific on what measures are to be taken, to the extent of commending or urging legislative pathways and programmes, the implementation of relevant treaties, and even the incorporation of Article 27 into domestic law.[75] Examples include the commendation of devolution of responsibility on cultural matters to the Saami Parliament;[76] the recommendation to Brazil that the process of demarcation of indigenous lands be speeded up;[77] the concern expressed to Guatemala that a constitutionally required law on indigenous communities had not been enacted;[78] the recommendation to the USA that steps be taken to ensure that 'previously recognized aboriginal Native American rights cannot be extinguished';[79] and the hope expressed by the Committee that New Zealand would take account of the Treaty of Waitangi[80] in decisions concerning claims before the Waitangi Tribunal.[81]

The many forms of culture

On the substance of the rights to culture, language and religion, these central elements have been addressed by the Committee in the widest terms. The various drafts of Article 27 made selective attempts to capture the principal forms of cultural existence and how it could be preserved and developed.[82] They constantly mention schools, libraries, museums and other institutional aspects of culture. There are also references to the use of language in public affairs and education through the medium of minority languages. An early proposal mentioned schools, cultural and religious institutions, and use of minority languages before the courts and other organs of State, in the press

[74] Para. 6.1.

[75] In connection with the Second Periodic Report of Austria, A/47/40, para. 121.

[76] Observations on the Third Periodic Report of Norway, A/49/40, para. 89.

[77] A/51/40, para. 337.

[78] A/51/40, para. 238 – the lack of implementation was 'despite the signing of an accord between the government and the armed opposition on 31 March 1995 on the identity and rights of the indigenous population'. For the text of the Accord, see *The Guatemala Peace Agreements* (New York, United Nations, 1998), pp. 59–84.

[79] A/50/40, para. 302. The recommendation continued in even more specific terms: 'The Committee urges the Government to ensure that there is a full judicial review in respect of determinations of federal recognition of tribes'.

[80] For background and analysis of the Tribunal, see Brownlie, *Treaties and Indigenous Peoples*; P. Havemann (ed.), *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Auckland, Oxford University Press, 1999) – various contributors.

[81] A/50/40, para. 188.

[82] Thornberry, *International Law*, ch. 19.

and public assembly.[83] Libraries and museums figure prominently in Soviet drafts.[84] Some proposals evinced a somewhat Eurocentric and static approach to culture – the culture of the museum and the library, buildings where the achievements of high culture could be displayed. On the other hand, 'culture', as Raymond Williams observed, 'is one of the two or three most complicated words in the English language'; the complexity 'is not finally in the word but in the problems which its variations of use significantly indicate'.[85] The term carries a heavy historical encumbrance and embraces a range of meanings[86] from 'high culture' and 'popular culture' to culture in the anthropological sense 'as way of life',[87] or 'all that is transmitted through society'.[88] The Committee recognises the complexity of 'culture' in General Comment 23, where it observes 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.[89]

This aspect of the General Comment has been strongly influenced by reporting and cases involving indigenous groups.[90] In the reporting procedure, the issue of indigenous land rights has frequently been pressed by the Committee. The reflects an expansive reading of 'culture' bearing in mind that land rights

[83] E/CN.4/21, annex A, Article 46 (Secretariat).

[84] E/CN.4/237; E/CN.4/L.222.

[85] R. Williams, *Key words: A Vocabulary of Culture and Society* (London, Fontana Press, 1988), pp. 87 and 92.

[86] Possible meanings are more fully canvassed, *see* ch. 7 in connection with the Convention on Economic, Social and Cultural Rights.

[87] R. O'Keefe, 'The 'right to take part in cultural life" under Article 15 of the ICESCR', *ICLQ* 47 (1998), 904–23.

[88] M. Leiris, *Race and Culture* (Paris, UNESCO, 1958), pp. 20–1.

[89] Para. 7. The endnote references for the paragraph are to the *Ominayak* and *Kitok* cases.

[90] Members of the Committee appear occasionally to have deployed a broad-brush approach to African and other customary systems. In discussion of the Third Periodic Report of Cameroon (CCPR/C/102/Add.2; CCPR/C/Q/CMR/1), Committee member Klein asked, concerning the practice of polygamy: 'How could the delegation explain the coexistence of two different judicial systems [State and customary] as being consistent with its obligation to abide by the Covenant?' (CCPR/C/SR.1798, para. 29). *Ex facie*, this looks like a blanket condemnation of customary systems, meriting the response that it can hardly be an obligation under the Covenant to dismantle them. Alternatively, the remarks may be read as connected to the particular question of polygamy; the Concluding Observations of the Committee focus more narrowly on 'customary law incompatible with the Covenant' and 'areas in which customary practices lead to discrimination against women' (CCPR/C/79/Add.116, para. 9).

as such are not addressed in the Covenant. The concern of the Committee is frequently expressed in terms which link land, development, environment and indigenous groups. Various reports of Ecuador chart the Committee's concern. The Committee has posed questions on the impact on family life of removal from lands because of drilling for oil,[91] and on 'how the ecological deterioration of the . . . Amazon region was affecting the social and cultural organization of the indigenous communities living there'.[92] In response to a similar question on Ecuador's Fourth Periodic Report,[93] the representative admitted that oil drilling had given rise to serious problems but pointed to practices of 'communication and negotiation' with affected groups. He continued:

> The peoples concerned were few in number and they were members of nomadic Amazonian communities whose culture was being destroyed by the invasion of modern life and the many related service activities that went together with oil drilling. In that connection . . . Ecuador's policy had never been to isolate indigenous peoples and shut them up in reserves; its guiding principle had always been that individual and community freedom must be respected.[94]

The Committee was apparently not satisfied with the replies, but expressed its concern 'at the impact of oil extraction on the enjoyment by members of indigenous groups of their rights under Article 27',[95] pressing for further measures be taken so that the groups were protected against adverse effects of oil extraction 'particularly with regard to preservation of their cultural identity and traditional livelihood'.[96] The importance of defining the cultural space of indigenous groups was at issue in connection with Brazil where the Committee recommended that 'the process of demarcation of indigenous lands is speedily and justly settled'.[97] Issues in the case of Mexico included the need to sensitise development programmes – the Committee pointed out that the process of agrarian reform was often implemented to the detriment of indigenous groups.[98] The concluding observations on

[91] A/33/40, para. 571.
[92] A/47/40, para. 257.
[93] CCPR/C/84/Add.6.
[94] CCPR/C/SR.1674, para. 13.
[95] Concluding Observations, CCPR/C/79/Add.92, para. 19. In line with its regular opinion that rights must be real and not merely 'paper rights', the Committee noted that Ecuadorian legislation had not produced the desired effects. See also additional information supplied by the State party: CCPR/C/84/Add.8, paras. 189–94, which includes a reference to Ecuador's ratification of ILO Convention 169.
[96] *Ibid.*
[97] A/51/40, para. 337.
[98] A/49/40, para. 177. See also A/38/40, para. 80. On the Fourth Periodic Report of Mexico, a Committee member (Scheinin, CCPR/C/SR.1763, para. 57) was moved to comment: 'As to agrarian reform, he welcomed the progress being made but whether it might not take decades, or even centuries, to ensure the full implementation of agrarian rights for more than a small portion of Mexico's indigenous peoples'.

Mexico's Fourth Periodic Report bundled together a range of issues including that of land:

> The State party should take all necessary measures to safeguard for the indigenous communities respect for the rights and freedoms to which they are entitled individually and as a group; to eradicate the abuses to which they are subjected; and to respect their customs and culture and their traditional patterns of living, enabling them to enjoy the usufruct of their lands and natural resources.[99]

The statement is notable for the picture painted of the holistic nature of the abuses to which indigenous groups are subjected and the effect that such manifold pressures have on the possibilities of cultural survival. Land is part of the equation but is not the only issue.[100] The statement departs from the carefully crafted references in the ICCPR to individual rights – the peoples are entitled to rights and freedoms 'individually and as a group' – unless, that is, we counter-intuitively read 'rights' as applying to individuals and 'freedoms' to the group. The Committee's recommendation shows how difficult it is to maintain a focus on purely individual rights in the face of wholesale attacks on communities. The holistic nature of indigenous attachment to land and how this can be threatened by industrialised uses features in a lands case in which Canada was deemed to violate Article 27. In *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*,[101] the author alleged Canada's responsibility in allowing the Provincial Government of Alberta 'to expropriate the territory of the Lubicon Lake Band[102] for the benefit of private corporate interests (e.g., leases for oil and gas exploration) . . . violating the band's right . . . guaranteed by Article 1, paragraph 1 of the Covenant'.[103] Furthermore, 'energy exploration in the Band's territory . . . entails a violation

[99] CCPR/C/79/Add.109, para. 19, see p. 135 of the present work.

[100] Cf. Committee member Scheinin's critique of the Third and Fourth Periodic Reports of Australia (CCPR/C/AUS/98/3 and 4; CCPR/C/69/L/AUS; HRI/CORE/1/Add.44): 'to approach the issue of rights under Article 27 solely in terms of native title legislation was somewhat misleading . . . he would like more information about the actual situation, and about what steps were being taken to secure the culture and sustainability of the way of life of Aboriginal communities. The delegation had stated that Australia could not turn the clock back. While that was true in one sense, it was not true in the sense that it implied that indigenous cultures would inevitably be assimilated into a pattern of life which was fundamentally European . . . it could be argued that there was need to turn the clock back, in order to see what could be done to secure the sustainability of traditional forms of Aboriginal economic and cultural life' (CCPR/C/SR.1856, para. 65).

[101] Communication No. 167/1984; *Report of the Human Rights Committee, vol. II* (1990), UN Doc. A/45/40, 1–30.

[102] Approximately 10,000 square kilometres had been expropriated.

[103] References were also made to the construction of a pulp mill near Peace River which 'frustrated any hopes of the continuation of some traditional activity' (para. 29.6).

of Article 1, paragraph 2'. Thus, in 'destroying the environment and undermining the band's economic base, the band is . . . deprived of its means to subsist and of the enjoyment of the right of self-determination'.[104] The Committee reformulated the author's claim of self-determination to one under Article 27.[105] A range of sweeping allegations made against Canada under other articles of the Covenant – Articles 6, 7, 14, 17, 23 and 26 – were effectively shunted aside by the Committee as not sufficiently substantiated.[106] The exceptional detail of the submissions by the parties – allegations and replies concerning the negotiations between the parties, deliberate delays occasioned by the government and/or Lubicon inaction, failure to exhaust domestic remedies, etc., – caused the Committee to observe that 'the persistent disagreement between the parties as to what constitutes the factual setting for the dispute a issue . . . has made the consideration of the claims on the merits most difficult'.[107] Substantively, and in line with *Kitok*, the Committee noted that economic and social activities can be part of the protected culture of a community.[108] Their unelaborated conclusion was that

> Historical 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.[109]

The offer of the Canadian government to set aside 95 square miles of land and pay compensation for historical inequities was deemed an appropriate remedy by the Committee – though again the Committee did not explicitly describe the nature and extent of this 'appropriate' action.[110] 'Historical

[104] Para. 2.3. In view of the allegations, the Committee had requested Canada to take interim measures to avoid irreparable damage to Ominayak and other members of the Band: para. 29.3.

[105] Para. 13.4.

[106] Paragraph 32.2. *Inter alia*, the author had claimed violations of Articles 17 and 23 on account of conditions leading to the destruction of homes and families: 'in an indigenous community, the entire family system is predicated upon the spiritual and cultural ties to the land and the exercise of traditional activities. Once these have been destroyed, the essential family component of the society is irremediably damaged' (para. 16.4). Article 18 was violated because in consequence of the destruction of land, 'the Band members have been robbed of the physical realm to which their religion – their spiritual belief system – attaches' (para. 16.4). In as far as these allegations were taken into account, they were subsumed under Article 27 (para. 32.2).

[107] Para. 30.

[108] Para. 32.2.

[109] Para. 33.

[110] An advisor to the Lubicon Crees noted the 'subtlety' of the HRC, but their subtleties 'included a failure to specify what "recent events" meant and what "appropriate plans" were. Such vagueness allowed both sides to declare victory': *On the Record* 3 (Geneva, 30 July 1991), 4. He added (*ibid.*) that the Lubicons 'have no confidence in the institutions of non-aboriginal society'.

inequities' was shorthand for the unfolding of a long chain of events which tended to erode progressively the material basis for the Band's economic activities. The scenario typifies the struggle for survival of many other groups – remorselessly threatened by an accumulation of pressures over time as much as by dramatic upheavals or attacks. The review of this case must also refer to the statement of Committee member Ando in whose opinion the 'outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of society as a whole'.[111] Any endorsement by international law of such an attitude would undercut the fundamentals of indigenous rights, minority rights or the rights of other groups attempting to preserve themselves against the schemes of governments determined on 'development'. The Ando view was not, in effect, shared by the Committee as a whole. Indigenous rights should not necessarily 'bend' to the greater good of national development. In such a balance the indigenous will inevitably lose. The erosion of the Lubicon resource base and the remedy agreed by the Committee suggests that in analogous circumstances Article 27 requires a land base sufficient for the pursuit of particular forms of economy.[112]

In further development of the interpretation of Article 27 as it affects indigenous groups displaced by development projects, the Committee continues to recognise the strength of the indigenous people–land nexus. In cases of such projects, 'relocation and compensation may not be appropriate in order to comply with Article 27'.[113] Therefore, when planning actions that affect members of indigenous communities, 'the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions which affect them'.[114] This can be read as a general formula incorporating the Lubicon approach but transcending it. This coupling of sustainability and participation is instructive. The language of sustainability and sustainable development is not reflected in the General Comment, while that of participation is.[115] The insistence that minorities should participate in public affairs has been increasingly stressed in Committee practice over a number of years.[116] Participation can derive from Article 25, particularly

[111] Individual opinion of Mr Nisuke Ando.

[112] Cf. B. Kingsbury, 'Claims by non-State groups in international law', *Cornell International Law Journal* 25 (1992), 481–514.

[113] Concluding Observations on the Fourth Periodic Report of Chile, in CCPR/C/79/Add.104, para. 22.

[114] *Ibid.* See also the Concluding Observations on the Second Periodic Report of Guyana: 'The State party should ensure that there are effective measures of protection to enable members of indigenous Amerindian communities to participate in decisions which affect them and to enforce their . . . rights under the Covenant' (CCPR/C/79/Add.121, 25 April 2000, para. 21).

[115] Para. 7.

[116] Spiliopoulou-Åkermark, *Justification of Minority Rights*, pp. 149–52.

where the emphasis is on representation in parliament, the right to elect and to be elected, etc.[117] Participation also links with Article 1 through the concept of participatory democracy.[118] The view that Article 27 incorporates the specific right of members of minorities to take part in decisions which affect them also demonstrates the influence of newer instruments of international law. In the UN Declaration on Minority Rights,[119] persons belonging to minorities 'have the right to participate effectively in cultural, religious, social, economic and public life',[120] and the right 'to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live'.[121] Sustainable development is also one of the contemporary mantras, represented institutionally in the UN through the Commission on Sustainable Development.[122] In the present context, it means the ability of an indigenous group to maintain its cultural cohesiveness and choose the development it wishes to embrace without that choice being overborne by outside powers. It follows that if an indigenous group chooses to modify its technological base for resource exploitation, that choice should be respected. The ICCPR does not require that groups retreat to a mystical simplicity in order to qualify for Article 27 rights.[123] Questions of technological adaptation, *inter alia*, are prominent in the *Länsman* cases. In the first, *Ilmari Länsman et al. v Finland*,[124] the authors of the complaint were all reindeer breeders of Saami origin.[125] They argued that an agreement between the Finnish Central Forestry Board and a private company to allow stone quarrying in a reindeer herding area would disturb that practice and amount to a violation of Article 27, 'which has traditionally been and remains essentially based on reindeer husbandry'.[126] Among other facts and claims, it was noted that the herders had installed a complex system of reindeer fences in the area; that a village near the quarry was the only remaining village in Finland with a homogeneous Saami population,[127] and that the quarry site (Mount Etela-Riutusvaara) is a sacred place in the old Saami religion, though the practice

[117] Recall, however, the limitations of Article 25; See ch. 5 in this volume.
[118] See comments of the Committee on Colombia, A/47/40, paras. 352, 378, 391.
[119] Contained in General Assembly resolution 47/135, 18 December 1992.
[120] Article 2.2.
[121] Article 2.3.
[122] For reflections, see A. Boyle and P. Birnie, *International Law and the Environment* (Oxford, Clarendon Press, 1992).
[123] Cf. the Committee's questions on the initial report of concerning the term 'backward customs' used therein: A/45/40, vol. I, para. 479. A reply was not forthcoming.
[124] Communication No. 511/1992; Views in A/50/40, pp. 66–76.
[125] Ilmari Länsman and forty-seven other members of the Muotkatunturi Herdsmen's Committee and members of the Angeli local community.
[126] Views, paragraph 3.1.
[127] Para. 2.5.

of slaughtering reindeer there had been discontinued.[128] Finland did not dispute that 'culture' in Article 27 covered reindeer herding, nor that this was an essential aspect of Saami culture,[129] asserting also that the article can 'be deemed to cover livelihood and related conditions in as far as they are essential for the culture and necessary for its survival'.[130] Finland contended, however, that appropriate consultations with Saami representatives had been undertaken, and that damage was minor and insignificant in relation to the rights of the authors. On the application of Article 27, the State cited *Lovelace* for the proposition that not every interference can be regarded as a denial of rights, that: 'not every measure and every effect of it, which in some way alters the previous conditions, can be construed as adverse interference in the rights of minorities'.[131] The reading of the *Ominayak* case by the authors to the effect that even minor measures obstructing or impairing reindeer husbandry violated Article 27 was rejected by Finland,[132] who also denied any equivalent issue of historical inequities in the *Ominayak* sense.[133] It was also claimed that 'States enjoy a certain degree of discretion in the application of Article 27 – which is normal in all regulation of economic activities'.[134] Finland cited the Views in *Kitok* as authority for this last proposition – though the appropriate paragraph therein (9.3) refers only to the need to place enjoyment of a right in context, and that this cannot be determined *in abstracto* – this is not quite the same as a claim of State 'discretion'. Reference was also made to the practice of the European Court of Human Rights.[135] The Committee was unable to find a violation of Article 27 in the events to date, but made important observations on how to read the article and on future possibilities for development in the Saami claims. A useful clarification implied that Article 27 is not tied to a static concept of culture. The Committee noted that the technological changes in methods of reindeer herding did not prevent the invocation of the article, which was not confined

[128] Para. 2.6.
[129] Para. 7.3.
[130] Para. 7.10.
[131] Para. 7.10.
[132] According to the State party, this reading of *Ominayak* was offered by the authors in proceedings before the Supreme Administrative Court of Finland: Views, para. 7.12.
[133] See also para. 8.4 in which the authors of the communication claimed that the State party had set an unacceptably high standard for the application of Article 27 in appearing to suggest that 'only once a State Party has explicitly conceded that a certain minority has suffered historical inequities, it might be possible to conclude that new developments which obstruct the cultural life of a minority constitute a violation . . . [on the other hand, the authors contend] . . . what was decisive in Ominayak was that a series of incremental adverse events would together constitute a "historical inequity"'.
[134] Para. 7.12.
[135] Views, para. 7.13.

to the defence only of *traditional*[136] means of livelihood.[137] Nor was the Committee convinced by arguments about the 'margin of appreciation': rather, the freedom to develop economic activity is to be judged with reference to the *obligations* of the State.[138] This evaluation of the weight of international obligations in relation to the range of permissible readings of obligations by the State may have significance beyond the instant case.[139] In as far as the point may be generalised from the Committee's cautious language, their implementation practice on Article 27 reflects a reserved attitude towards attempts to soften the impact of legal obligation through strategies of discretion/appreciation or the over-contextualisation of commitments. The Committee went on to distinguish between economic measures which have only a limited impact on the minority way of life and those which amount to a denial of the right to enjoy culture: the limited impact measures 'will not necessarily amount to a denial'[140] of rights. The Committee's opinion that there was no violation was also affected by their favourable reading of the degree of consultation undertaken by the State party in line with the right to minority participation set out in the General Comment on Article 27. As to the future, the Committee considered that activities must 'be carried out in a way that the authors continue to benefit from reindeer husbandry',[141] and that any significant expansion of mining could violate Article 27.

The related case of *Jouni E. Länsman et al. v Finland*,[142] also saw Saami claimants[143] mount an unsuccessful challenge against activities of the Finnish Central Forestry Board, this time in connection with the approval of the board's plans in respect of logging and construction of roads. Some 3,000 acres covered by the board's permit are situated within the winter herding lands of the herdsmen's area, who have had difficulty competing with Swedish and other reindeer-herders, partly on account of their 'nature-based traditional Saami'[144] methods which rely on utilisation of the forest. The authors connected their observations with those on the earlier *Länsman* case, noting that logging was not the only threat, and interpreting paragraph 9.8 of that case[145]

[136] Present author's emphasis.
[137] Views, para. 9.3.
[138] Para. 9.4.
[139] See McGoldrick, *The Human Rights Committee*, pp. 160 and pp. 165–6 for reflections on the doctrine in the light of *Hertzberg and Others v Finland*, A/37/40, p. 161.
[140] Para. 9.4.
[141] Para. 9.8.
[142] Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995, 22 November 1996. The communication was declared admissible on 14 March 1996, and Views adopted on 30 October 1996.
[143] Four members of the Muotkatunturi Herdsmen's Committee.
[144] *Views*, para. 2.5.
[145] *See* p. 168 above.

as 'a warning to the State party regarding new measures that would affect the living conditions of local Saamis', in that they 'would amount to a denial of the local Saamis' right to enjoy their own culture'.[146] A lower Finnish court dealing with the Saami invocation of Article 27 before it, had decided that the disputed activities would have caused some minor adverse effects. This conclusion was contradicted by the Rovaniemi Court of Appeal which, in a judgment confirmed by the Supreme Court, pointed out that effects would be more severe but still did not amount to a denial of rights under Article 27. In addition to citing the previous views of the Committee, and ILO Convention 169,[147] the authors cited the UN draft Declaration on Indigenous Peoples.[148]

In the complex welter of factual claims and counterclaims, the reading of Article 27 to include traditional livelihoods accepted by Finland in the earlier *Lansman* case was restated, but limited impact/interference measures do not necessarily amount to a denial of rights under Article 27.[149] This was again a threshold issue in the reading of Article 27.[150] The concept of denial of rights cannot be pressed so far as to diminish the rights of all other than the herders, including private individuals outside State-owned areas.[151] Saami participation in decision-making which affected them had also been secured. On the other hand, the authors alleged[152] that the adverse consequences of the logging could take years or decades to materialise, and consequences were already alarming, forcing Saami into occupations additional to herding. They argued that the limited impact of quarrying in the first *Länsman* case cannot be used as a yardstick in the present case in view of the altogether greater magnitude of the adverse effects. They denied that there had been effective participation. They read the 'threshold' as interpreted by Finland as meaning 'giving up reindeer herding', and not as 'continuing to benefit from reindeer husbandry'.[153]

The Committee's views reiterate many of the points in the earlier *Länsman* case, reaching the same conclusion: that the present case revealed no breach of Article 27. However, with a slight change of focus, the Committee noted the existence of other potential threats to the Saami environment beyond the particular issue of logging (*Views*, para. 10.7):

[146] Para. 2.7.

[147] Cited in the previous *Länsman* case, para. 3.2.

[148] *Views*, para. 3.1. A request for interim measures of protection on grounds of causing irreparable damage was set aside by the Committee: *Views*, para. 5.2. Matters were complicated by evidence from Saami foresters who submitted to the Committee (*Views*, 4.3.) that forestry and reindeer husbandry can (happily?) coexist.

[149] *Views*, paras. 6.1./6.14.

[150] *Ibid*., 6.10.

[151] *Ibid*., 6.11.

[152] *Ibid*., paras. 7.1–7.15/9.1–9.3.

[153] *Ibid*., para. 7.13, echoing the point in the earlier *Länsman* case, para. 9.8.

> the State party must bear in mind when taking steps affecting the rights under Article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Saami people to enjoy their own culture.

Thus, in the area of responsibility of the Finnish State for the Saami right to culture, the Committee develops its temporal and holistic view of threats to the enjoyment of the right. This perspective points towards a doctrine of cumulative effects so that a patterned aggregation of limited events can signpost a larger violative process pressing on the integrity of a culture. The sense of moving to the collective from the woes and travails of individuals is as evident here as elsewhere in the developing jurisprudence of the Committee; the sheer *quiddity* of the group dimension moves by a slow osmosis through the skin of their deliberations.

Language and religion

The Committee has also concentrated on other specific cultural manifestations, notably that of language, though its readings have been less ambitious than those on culture in general. Governments have regularly been questioned[154] on the use of language in schools,[155] its use for official purposes including court proceedings,[156] language maintenance programmes,[157] etc. The Committee has stressed the importance of indigenous access to education, and the reduction of illiteracy.[158] Language issues in the media have also been the subject of comment by the Committee.[159] General Comment 23 does not elaborate on the use of language, but affirms it as a right, taking care to distinguish it from its employment in Articles 19 and 14. It would seem clear that any general provision on the 'use' of a language envisages a right in wide terms, not confined to speaking it. If Article 27 is to have substantive meaning, the right should be interpreted to produce as far as possible material equality between users of minority and majority languages. The fact that the Committee has not chosen to highlight the language issue into its General Comment should not detract from its elaboration in the reporting process. Case law elaboration of language rights has been stunted by the French reservation to Article 27 and the refusal of the Committee to

[154] For a concise summary, see Spiliopoulou-Åkermark, *Justification of Minority Rights*, pp. 142–6.

[155] A/38/40, para. 274 (Mexico); A/51/40, para. 345 (Peru) – 'education in national and native languages'.

[156] A/40/40, para. 215 (Canada); A/43/40, paras. 195–6 (Denmark).

[157] A/38/40, para. 80 (Mexico).

[158] A/52/40, para. 307 (Colombia); A/51/40, para. 337 (Brazil).

[159] Spiliopoulou-Åkermark, *Justification of Minority Rights*, pp. 146–7.

regard the anglophones of Quebec as a minority.[160] In the Breton cases,[161] various attempts were made to assess the compatibility of France's restrictions on the use of Breton in areas such as education, the court system and postal services with Article 27 and other articles.[162] Aside from the reservations issue, the Committee has not been generous on the language implications of Article 27, which does not require, for example, that postal cheques be made out in a minority mother tongue.[163] In the light of the development of international law, including both the development of instruments and principles on minority and indigenous rights, the approach of the Committee is likely to undergo modification. The key issue is the effect on a particular community of the language regime elaborated by the State. Article 27 is in principle capable of providing a response to any State project, large or small, which seeks to undermine the ability of a community to maintain a specific linguistic identity. The opportunity in *E. P. et al. v Colombia*[164] to examine under the Optional Protocol the implications of a large-scale project for the 'Colombianization'[165] of the English-speaking overwhelmingly Protestant population of the San Andres and other islands was lost for procedural reasons.[166]

Minority rights in the area of religion have not been extensively discussed. Religion is referred to in the General Comment, but without interpretative nuances. Committee questions on religion have largely been posed in the area of State funding for religions and its potential consequences for human rights.[167] Much of the Committee's elaboration of the issues of religion is reserved to Article 18, which is 'not limited in its application to traditional religions or to religions and beliefs with institutional characteristics analogous to traditional religions',[168] and under which religious minorities are protected equally with dominant religions.[169] While the Committee's reference to 'traditional religions' may be intended to contrast older and

[160] *Ballantyne*.

[161] See the useful discussion in Spiliopoulou-Åkermark, *Justification of Minority Rights*, pp. 164–9.

[162] Violations of Articles 27 were alleged in conjunction with, *inter alios*, Articles 2, 14, 16, 19, 25 and 26.

[163] Communication No. 228/87, *C. L. D. v France*, A/43/40; the communication was declared inadmissible under Article 5 of the Optional Protocol.

[164] Communication No. 318/1988, A/45/40, vol. II, pp. 184–8.

[165] The language component of this alleged process is set out in para. 2.5, and includes education only in Spanish, harassment for using English in public, and mass media entirely in Spanish.

[166] The authors of the communication failed to demonstrate that they were victims and had not exhausted domestic remedies.

[167] See references to State funding in reports of Sweden, A/46/40, para. 346; Luxembourg, A/48/40, paras. 132–40; and the UK, A/34/40, para. 327.

[168] General Comment 22 (48), para. 2.

[169] *Ibid.* See also para. 9.

grander institutions with new religious movements, the terms of the Comment are wide enough to include the traditional religions of indigenous peoples. *Inter alia*, the General Comment on Article 18 observes that 'The observance and practice of religion and belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing . . . participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group'.[170] Religion was among the Article 27 issues in the *Ilmari Länsman* case – the Committee recognised that Mount Etela-Riutusvaara, the locus of quarrying, 'continues to have a spiritual significance relevant to their [the Saami] culture'.[171] The Special Rapporteur of the UN Commission on Human Rights on religious intolerance has pointed out some implications for indigenous religions in the *Lubicon* case, suggesting that, while the HRC did not pronounce on some claims of the Band, 'it is reasonable to assume that the way of life and culture of the Lake Lubicon Band cannot . . . be separated from its right to practise its own religion'.[172] It may be noted that the Special Rapporteur has also commented extensively on the treatment of indigenous religions in the USA[173] and Australia.[174] Comments in both cases underline particular difficulties faced by 'native religions', including treatment in prison, employment and many other issues, and transcend the specific situations described. Particular interest attaches to the Rapporteur's remarks that, under 'Western' legal systems, the significance of sacred sites to aboriginal/native religion has to be 'proved', a need which may conflict with indigenous codes of secrecy.[175] In both cases, it appeared that indigenous earth-based religions were receiving less protection than

[170] Customs and related issues are also addressed in the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief, proclaimed by General Assembly resolution 36/55 of 25 November 1981.

[171] Para. 9.3.

[172] *Racial Discrimination and Religious Discrimination: Identification and Measures*, A/CONF.189/PC.1/7 (13 April 2000), para. 99. The Special Rapporteur pointed to paragraphs in *Lubicon* where the Band claimed that resource developments, etc., would deny them 'access to traditional burial grounds or other special places' (Views, para. 3.7), and the claim that Band members 'have been robbed of the physical realm to which their religion attaches in violation of Article 18, paragraph 1' (*ibid.*, para. 29.7).

[173] E/CN.4/1999/58/Add.1.

[174] E/CN.4/1998/6/Add.1.

[175] A summary of information received appears in para. 60 of the report on the USA: 'In general, the charge is often made that legislation derived from a Western legal system is incapable of comprehending Native American values and traditions'. Apart from proof of sacred sites, the information was to the effect that 'the adoption of neutral laws of general applicability enables economic projects to be undertaken on sacred sites, which is tantamount to profaning them or destroying them . . . Similarly, legislation to protect animals or prohibit the use of certain plants may affect Native American religious practices'.

other religions, despite acknowledged attempts to remedy the situation. Article 27, while unelaborated compared to Article 18 on the issue of religion, benefits from the positive spin attributed to it by the Committee, and is not explicitly encumbered by restrictions analogous to those in Article 18.3.[176] Article 27 links culture and place so that religious sites and spaces are clearly within its protection as dimensions of communal spirituality and identity.[177] Article 27 will apply equally to customary and traditional institutions, ceremonies and practices, including the adaptations communities choose to make.

The UN Minority Rights Declaration[178]

An account of major UN provisions on minority rights would not be complete without mention of the cumbersomely entitled UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM).[179] The Declaration is a succinct representation of 'the model of minority rights' commented upon extensively in the drafting of the Declaration on Indigenous Peoples. Despite the paragraph in its preamble claiming inspiration from Article 27, the Declaration represents a fresh start and is not simply an expansion of the ICCPR. The text took some fourteen years to emerge from the bowels of the UN, in which time ideological and political configurations had changed enormously. The Declaration was the UN's response to changes which by 1992 had already begun to reveal their dark side in the former Yugoslavia and the former USSR. The drafters of the instrument were clearly aware of distinctions between individual and collective rights. In contrast with instruments of indigenous rights, rights in the UNDM are consistently for 'persons belonging to' minorities. On the

[176] 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'

[177] Cf. the remarks of Committee chairperson Medina Quiroga on the Third and Fourth Periodic Reports of Australia: 'The perception of land in Australian law was based on the notion of individual ownership, whereas for aboriginals land was perceived as having more than economic significance . . . guardianship of the secrets of sacred sites was entrusted only to women: the fact that the Australian authorities had given responsibility for management of those sites to a man was proof of a profound misunderstanding' (CCPR/C/SR.1856, para. 75).

[178] Two commentaries are particularly relevant: P. Thornberry, 'The UN Declaration on the Rights of [etc.] Minorities: background, analysis, observations, and an update', in A. Phillips and A. Rosas (eds.), *Universal Minority Rights* (London and Åbo, Minority Rights Group and Åbo Akademi University, 1995), pp. 13–76; A. Eide, *Commentary to the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*, E/CN.4/Sub.2/AC.5/2001/2.

[179] Adopted by General Assembly resolution 47/135, 18 December 1992.

other hand, Article 1.1 of the Declaration transcends the tentative phrasing of Article 27 and explicitly describes identity and existence as fundamental attributes of groups. The obligation to protect existence and identity is set out as mandatory. The Declaration does not offer a definition of minority, and raises the question of whether citizenship of the State in question is a requirement for minority 'status'; a question which is generally answered in the negative.[180] As with Article 27, most indigenous groups are 'covered' by the prescriptions of the Declaration, if they choose to invoke them – the Declaration merely adds 'national' to the list of minority descriptors in line with European usage. A meagre diet of rights is set out in Article 2, which begins brightly by replacing the 'shall not be denied the right' of Article 27 with the positive 'have the right'. While the textual limitations of Article 27 have not prevented the HRC from declaring that 'positive measures of protection are . . . required',[181] the explicitly positive approach of the Declaration removed some intellectual doubts about the international community's reception of minority rights: the Article 27 formulae initially appeared to suggest that a kind of 'aggrieved hospitality' was at work,[182] but not welcome. The Declaration makes an important textual departure from Article 27 in its wide-ranging specification of participation rights – minority rights 'to participate effectively in cultural, religious, social, economic and public life', and the right to participate effectively in decisions affecting them. Modalities of participation remain unspecified but the development of mediating organisations to facilitate participation is legitimate since the article sets out a right to establish and maintain associations. The 'own associations' right is supplemented by rights to establish and maintain free and peaceful contacts including 'contacts across frontiers with citizens of other States to whom they (the members of minorities) are related by national or ethnic, religious or linguistic ties'. Article 3 mitigates the individualism of

[180] For references, see Thornberry, n. 178 in this chapter. The Eide commentary suggests (paras. 10 and 11) that 'While citizenship as such should not be a distinguishing criterion which excludes some persons or groups from enjoying minority rights under the Declaration, other factors can be relevant in distinguishing the rights that can be demanded by different minorities. Those who live compactly together in a part of the State territory may be entitled to rights regarding the use of language, and street and place names which are different from those who are dispersed, and may in some circumstances be entitled to some kind of autonomy. Those who have been established for a long time on the territory may have stronger rights. The best approach appears to be to avoid making an absolute distinction between "new" and "old" minorities'. These are very controversial propositions: while many States would support these views, others would insist that, as with Article 27 of the ICCPR, minority rights are not predicated upon the holding of a particular citizenship.

[181] UN Doc. CCPR/C/21/Rev.1/Add.5, para. 6.1.

[182] W. Barbieri, 'Group rights and the Muslim diaspora', *Human Rights Quarterly* 21 (1999), 907–26, at 910.

the Declaration by envisaging the exercise of rights individually 'as well as in community' with other members of the group – in case States should be tempted to 'decide' that culture, religion, etc., are to be carried on only in private. Eide makes the salient observation that 'This principle [in Article 3] is important, because Governments or persons belonging to majorities are often tolerant of persons of other national or ethnic origins until such time as the latter assert their own identity, language and traditions. It is often only when they assert their identity as persons belonging to a group that discrimination or persecution starts'.[183]

The measures set out in Article 4 in qualified language confront important aspects of group life and should, by analogy with measures in the International Covenants, be 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised'.[184] Mandatory language extends to members of minorities the promise that they may 'fully and effectively' exercise all their human rights without discrimination and on a basis of equality. Measures are not defined, but the term is appropriate to cover both legislative and non-legislative measures.[185] Article 4.2 indicates that States must facilitate the expression and development of minority culture, traditions and customs, etc., 'except where specific practices are in violation of national law and international standards'. The qualification specifically addresses the objection sometimes placed against minorities and indigenous peoples: that group traditions may incorporate *practices* inconsistent with human rights. This, however, raises but does not dispose of issues of distinguishing or severing the links between cultural practices on the one hand, and cultures and cultural values, on the other, with the objective of limiting the first, while validating the second.[186] The provisions on learning and instruction in the mother tongue are qualified and ambiguous. The intended contrast in the references to 'instruction in' and 'learning' the mother tongue is between learning through the medium of one's own language, and being taught the rudiments of that language.[187] The important point is the validation of mother tongue education, though linguistic 'purism' – as elsewhere in the human rights canon – is not encouraged. So, while mother tongue education is legitimated, this does not dispense with the need to learn the official or State language, a point made more explicit in some

[183] Eide, *Commentary*, para. 53.

[184] See General Comment No. 3 of the Committee on Economic, Social and Cultural Rights entitled 'The nature of States' parties obligations', in UN Doc. HRI/GEN/1, 43 and ch. 7 in this volume.

[185] Cf. Article 1.

[186] The question is addressed particularly in the introduction and conclusions of the present work.

[187] 'States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.'

European texts. Eide speaks of the minorities' 'duty to integrate',[188] and extraordinarily sensitive issue for many indigenous groups,[189] and nowhere explicitly mentioned in the Declaration. The philosophical point of Article 4 – expressed in its fourth paragraph –[190] is to promote self-knowledge on the part of minorities, and their awareness of the wider world, while informing society at large of the cultural and other contributions of minorities to the nation as a whole. Accordingly, the culture, history, traditions, etc., of minority groups should be the subject of positive valuations and not of the kind of distorted representations which produce low self-esteem in the groups and negative stereotypes in the wider community. Reciprocally, minority doctrines of ethnic exclusiveness are discouraged. Eide comments that the provision suggests the need for 'both multicultural and intercultural education. Multicultural education involved educational policies and practices which meet the separate educational needs of groups in society belonging to different cultural traditions, while intercultural education involved . . . policies and practices whereby persons belonging to different cultures . . . learn to interact constructively with each other'. It may be observed that the appropriate verb in the paragraph is 'should' (States *should*), denoting a 'softer' sense of the right thing to do, but not amounting to a mandatory instruction. The Commentary observes (para. 69) that 'formation of more or less involuntary ghettos where the different groups live in their own world without knowledge of, or tolerance for, persons belonging to other parts of the national society would be a violation of the purpose and spirit of the Declaration'. It is also asserted (*ibid.*, para. 68) that the Declaration is against tendencies 'towards fundamentalist or closed religious or ethnic groups'. Similar questions have arisen in the context of the Convention on the Elimination of All Forms of Racial Discrimination.[191] Much depends on what one means by a 'ghetto', on what counts as a 'closed' society and which societies are 'fundamentalist'. The Declaration was drafted with some sensitivity to the case of the indigenous,[192] but its gaze is largely directed elsewhere. Elsewhere, Eide appraises indigenous rights and the rights in the UNDM as implying that, 'whereas the Minority Declaration and other instruments concerning persons belonging to minorities aim at ensuring a space for pluralism in togetherness, the instruments concerning indigenous

[188] Eide, *Commentary*, para. 61.

[189] Consider the case of ILO Convention 107: see chapter 13 of this volume.

[190] 'States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.'

[191] See ch. 8 of this volume.

[192] The author was present at key sessions of the Working Group of the HRC which drafted the Declaration: Thornberry, 'The UN Declaration' in Rosas and Phillips.

peoples are intended to allow for a high degree of autonomous development'.[193] This is important to bear in mind, though it should also be borne in mind that no person (or community) can in principle be *compelled* to exercise minority rights[194] – a principle that sits poorly with Eide's evocations of the 'duties' of minorities, since duties are presumably not options.

Articles 5, 6 and 7 set out important elements of development and cooperation in the matter of minority rights. Article 8 sets minority rights in their universal context and 'balances' their exercise with the rights of others, implying that measures for minorities are generally compatible with equality, though this also suggests that they should not be pushed too far to the detriment of others. Article 8.4[195] connects with the fear of some States that minority rights may lead to self-determination. To the extent that a secessionist threat exists, it must be in virtue of other principles of international law, and this applies equally to the converse argument that the Declaration 'protects' territorial integrity from valid claims to self-determination. The General Comment on article 27 goes to great pains to eliminate any 'confusion' between the two rights, and notes in analogous fashion to the Declaration that: 'enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party'.[196] Despite the fact that the Declaration has nothing to say about self-determination, States have enthusiastically invoked Article 8 in drafting sessions for the Declaration on the Rights of Indigenous Peoples in order to counter secessionist ambitions.[197] Article 9 points to contributions from the UN to the realisation of the purposes of the text. The language is such as to implicate all the relevant organs of the UN system. The follow-up to the Declaration proceeded slowly. The Commission on Human Rights adopted, on 3 March 1995, resolution 1995/24 authorising the Sub-Commission to establish a Working Group on Minorities. The mandate of the Working Group is entrusted to (a) review the promotion and practical realisation of the Declaration; (b) examine possible solutions to problems involving minorities; and (c) recommend further measures, as appropriate, for the promotion and protection of the rights of persons belonging to minorities. The Working Group met for the seventh time in 2001, and now enjoys an 'indefinite'

[193] A. Eide and E.-I. A. Daes, *Working Paper on the Distinction between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, E/CN.4/Sub.2/2000/10, para. 8.

[194] Article 3.2. of the UNDM provides that 'No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration'.

[195] 'Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.'

[196] General Comment, para. 3.2. See also paras. 2 and 3.1.

[197] See the conclusions to the present work.

mandate.[198] Issues pertaining to indigenous groups have been discussed from time to time, and a number of valuable papers have been prepared for the sessions.[199] The Working Group focuses to a significant extent on conceptual clarification of the minority question and thus indirectly to key parameters of indigenous rights – existence, recognition, definition, self-determination, autonomy, language rights, education, and so on. The conceptual crossing over is mirrored by the manner in which some NGOs present themselves at the Working Group and the WGIP. A key facet of Working Group activity is the mainstreaming of minority rights considerations into UN work in general. As with indigenous rights, there are now many invocations of minority rights at all levels in the UN. The Vienna Declaration of the World Conference on Human Rights reaffirmed, in language which again shows the influence of the UNDM and Article 27 of the Covenant on Civil and Political Rights:

> the obligation of States to ensure that persons belonging to minorities may exercise fully and effectively all human rights and fundamental freedoms without any discrimination and in full equality before the law [in accordance with the UN Declaration on Minorities] . . . [and] . . . persons belonging to minorities have the right to enjoy their own culture, to profess and practise their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination.[200]

There was some discussion on prospects for a convention on minorities stemming from the preparatory work for the World Conference against Racism. The proposal from the Geneva Expert seminar on racism, refugees and multi-ethnic States was that the World Conference should recommend 'that the United Nations elaborate an international instrument of a binding character defining the rights and obligations of persons belonging to minorities'. The proposal did not survive. The emergence of the Special Rapporteur for indigenous peoples may well bring forth proposals for an analogous institution for minorities.

[198] The background to the establishment of the Working Group and its mandate are set out in *Report of the Sixth Session*, UN Doc. E/CN.4/Sub.2/2000/27.

[199] The *Commentary to the Declaration* was prepared in the context of the Working Group. Among many contributions, see particularly J. Bengoa, *Working Paper on the Existence and Recognition of Minorities*, E/CN.4/Sub.2/AC.5/2000/WP.2; *Report of the Seminar on Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations Involving Minorities and Indigenous Peoples*, E/CN.4/Sub.2/AC.5/2000/WP.3; R. Samaddar, *Autonomy, Self-determination and the Requirements of Justice in Asia*, E/CN.4/Sub.2/AC.5/2001/CRP.2; L. Hannikainen, *Examples of Autonomy in Finland: The Territorial Autonomy of the Aaland Islands and the Cultural Autonomy of the Indigenous Saami People*, E/CN.4/Sub.2/AC.5/2001/WP.5.

[200] UN Doc. A/CONF.157/23, para. 19.

Comment

The two chapters on the ICCPR demonstrate some of the potential of a general instrument to benefit specific groups. The HRC has been 'creative' in its application of the text in the light of our increasing knowledge of vulnerable communities. Virtually all the rights have the potential to secure some good or other for indigenous communities. Disappointments have flowed from the attempt to progress beyond the framework of individual rights towards the validation of indigenous self-determination, at least in terms of the Optional Protocol. The Committee's emphasis on cultural sustainability and participation in public life is insistent even if again stultified under the Protocol. The essence of covenant 'philosophy' is to link the privations of indigenous peoples with those of other human beings, while recognising the legitimacy of a separate domain and the requirements of justice for disparaged communities.

The above analysis also suggests some of the attractions and difficulties of 'the model of minority rights' for indigenous peoples, a question which is returned to more fully in the conclusions to the present work. A notable feature is the extent to which indigenous peoples have laboured in the vineyard of minority rights under Article 27. Major developments in the elaboration and exegesis of Article 27 have resulted from the efforts of indigenous groups in Canada, Sweden, Finland and elsewhere. As a consequence, the international community better understands the concept of a human community, group membership, the nexus between ethnicity and economy, the spiritual dimensions of land and territory, the complex interrelationship of gender and ethnicity, the need for affirmative action, the importance of participation, and the relationship between globalisation and locality. The principled *validation of minority cultures* is perhaps the key 'plus' of contemporary elaborations of minority rights. It is not all down to the 'cases'; the State dialogues with the HRC have also made a real impact. The character and limits of minority right as an avenue for indigenous groups are also better understood: the highly individualised UNDM, the nervousness of States in the face of largely imaginary threats to sovereignty and territorial integrity resulting in the clear distancing between minority rights and self-determination and the general refusal to countenance a right to territorial autonomy. While the *bona fide* application of minority rights would satisfy the claims of many indigenous groups, some facets do not align themselves with the more ambitious indigenous claims.

7

The Covenant on Economic, Social and Cultural Rights

General

The Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain a specific article on indigenous groups or – unlike the ICCPR[1] – on minorities.[2] None the less, concern about the conditions of indigenous life has exercised the Committee on Economic, Social and Cultural Rights (the ESC Committee) on many occasions and will doubtless continue to do so. The Covenant is structured as a programmatic or promotional human rights treaty.[3] The basic obligation for the States' parties is set out in Article 2.1 whereby each party 'undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights' recognised in the Covenant. Not all the obligations in the ICESCR are subject to resource constraints. Thus, the parties 'undertake to guarantee'[4] the non-discriminatory application of the rights in the Covenant,[5] and 'undertake to ensure' the equal rights of men and women in the enjoyment of Covenant rights.[6] The ESC Committee has endeavoured to provide a cutting edge to the rights guarantees in order to avoid the indefinite postponement of their delivery. It has underlined that the obligation to 'take

[1] Its 'twin sibling' – P. Alston, 'The International Covenant on Economic, Social and Cultural Rights', in *Manual on Human Rights Reporting* (Geneva, United Nations, 1997), pp. 65–169 at p. 65.

[2] At 1 December 2000, the Covenant had been ratified or acceded to by 144 States: E/C.12/2000/21, para. 1.

[3] For wide-ranging background, see *Select Bibliography of Published Material Relating to Economic, Social and Cultural Rights*, E/C.12/1989/L.3/Rev.3, 3 October 2000.

[4] Article 2.2.

[5] 'In other words, if the resources are available to enable any degree of enjoyment of a given right, then it must be under circumstances which do not discriminate' (Alston, 'International Covenant', in *Manual*, p. 65).

[6] Article 3.

steps' towards the goal of realisation of the rights is itself unqualified, and that such steps should be 'deliberate, concrete and targeted' towards meeting Covenant objectives.[7] Legislation may therefore be indispensable to implement ICESCR guarantees,[8] and administrative, financial, educational and social measures may also be appropriate.[9] The promotional nature of the rights implies and obligation to move as expeditiously and effectively[10] towards the goal of full realisation. The Committee addresses lack of resources by identifying a 'minimum core obligation'[11] and by insisting that resources include those available 'from the international community through international cooperation and assistance'.[12] The Comment in effect interprets the Covenant as imposing a standard of due diligence upon governments incorporating focused programmes for the implementation of rights. In later general comments, the ESC Committee has deconstructed the basic Covenant obligations to include obligations to respect, protect and fulfil the right in question.[13]

Reports

The implementation of the Covenant is based primarily on the system of State reports, scrutinised by the ESC Committee. The Covenant does not make specific provision for such a Committee, providing rather that the reports[14] are to be scrutinised by the UN Economic and Social Council (ECOSOC) which has fifty-four State members. The system whereby a sessional Working Group of ECOSOC dealt with reports was regarded as unsatisfactory.[15] The arrangements were fundamentally revised in 1985[16] with the setting up of an eighteen-member expert Committee on Economic, Social and Cultural Rights which in effect parallels the Human Rights Committee of the ICCPR.

[7] General Comment No. 3 (1990), para. 2, in *Manual on Human Rights Reporting*, p. 74.

[8] *Ibid.*, para. 3.

[9] *Ibid.*, para. 7. According to para. 4 of the General Comment, 'the ultimate determination as to whether all appropriate measures have been taken remains for the Committee to make'.

[10] General Comment No. 3, para. 9.

[11] Para. 10.

[12] Para. 13.

[13] According to *General Comment No. 14*, 'The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right . . . The obligation to *protect* requires States to take measures that prevent third parties for interfering with . . . guarantees . . . the obligation to *fulfil* requires States to adopt appropriate legislative, budgetary, judicial, promotional and other measures towards the full realization of the right' (para. 33, emphasis in the original).

[14] Articles 16–25 of the Covenant.

[15] Robertson and Merrills, *Human Rights in the World*, pp. 278–82.

[16] ECOSOC resolution 1985/17, 28 May 1985.

The working methods of the ESC Committee are relatively open to NGOs – which contribute to its work in a variety of ways.[17] Article 18 envisages reports from UN specialised agencies on progress on implementing Covenant norms within their province.[18] Additionally, a pre-sessional working group is open to the submission of information in person or writing, and the Committee sets aside the first afternoon of its working sessions to enable NGOs to provide oral information.[19] The ESC Committee, after the style of other treaty bodies, adopts concluding observations on each report which are formally and publicly adopted on the final day of each session.[20] Additionally, it adopts General Comments[21] and holds a day of general discussion on particular rights or a particular aspect of the Covenant. Article 22 reflects a distinctive feature of the mandate in that the Committee advises ECOSOC on which measures of technical assistance that body should recommend for matters arising out of reports.[22] The Committee has also considered the possibility of supplementing the reporting mechanism through a system of petitions which would address allegations of violations of economic, social and cultural rights.[23] The Committee operates a follow-up procedure.[24]

The Covenant and indigenous peoples

Population

All of the rights set out in the Covenant from the right of self-determination onwards are potentially relevant to indigenous peoples, although ESC

[17] The modalities are explored in *NGO Participation in the Activities of the Committee on Economic, Social and Cultural Rights*, E/C.12/2000/6, 7 July 2000.

[18] Contributions have been formalised under ECOSOC resolution 1988 (LX). The ILO makes a particularly important contribution in view of its conventions on indigenous peoples: see for example E/C.12/2000/SA/1, 17 February 2000 (27th report of the ILO).

[19] *Manual*, pp. 157–60.

[20] *Manual*, p. 161. Exceptions are possible.

[21] At the time of writing, fourteen General Comments have been made – relevant abstracts in this chapter.

[22] See General Comment No. 2 (1990) on International Technical Assistance Measures – text in *Manual*, pp. 164–8. Elements in the *Report on the Technical Assistance Mission to Panama of the Committee on Economic, Social and Cultural Rights*, presented as an appendix to the reports of the ESC Committee's 12th and 13th sessions, are considered below.

[23] See particularly the ESC Committee's report on a 'draft Optional Protocol for the Consideration of Communications concerning non-Compliance with the Covenant', Committee on Economic, Social and Cultural Rights, *Report on the Fourteenth and Fifteenth Sessions*, annex IV.

[24] See *Follow-up to the Consideration of Reports under Articles 16 and 17 of the Covenant*, E/C.12/2000/3, 3 February 2000.

Committee practice has concentrated on some rights more than others in the context of indigenous peoples, minorities and other vulnerable groups. In the general reporting guidelines, the usual information (in common with the other UN treaty bodies) is required on the demographic composition of the population, including ethnic, demographic and religious characteristics. The under-reporting of indigenous presence is not uncommon in State reports. In the ESC Committee's *Report on 10th/11th sessions*,[25] concerning the report of Argentina,[26] it expressed a simple doubt on the Argentinian figures on the small size of the population.[27] The issue of translation of the Covenant into local languages also arises in this context.[28] Concerning Paraguay,[29] the ESC Committee expressed regret at failure to disseminate the covenant in the Guarani language – the State had done little to inform indigenous peoples of their rights.[30] State responses are requested on the implementation of self-determination. The ESC Committee has also shown 'a consistent interest in ascertaining whether or not any of the rights . . . may be vindicated in the courts', a highly pertinent consideration for indigenous and other claims.[31] In General Comment No. 9, the Committee takes the view that

> a State party seeking to justify its failure to provide any domestic legal remedies for violations . . . would need to show that such remedies are not 'appropriate means' . . . or that . . . they are unnecessary. It will be difficult to show this.[32]

Self-determination

The Article 1 provision on self-determination is identical to that in the ICCPR; States which have not ratified the latter can still take advantage of General Comment 12 of the HRC.[33] The *Manual on Human Rights Reporting* reminds the reader that self-determination is not simply about political processes, but about the right of peoples to 'freely pursue . . . economic, social and cultural development', and that Article 1 prohibits the deprivation of a people's own means of subsistence.[34] Questions are asked by the

[25] E/1995/22; E/C.12/1994/20; ECOSOC OR, 1995, Supplement No. 3.

[26] Second Periodic Report, E/1990/5/Add.18, discussed paras. 221–42.

[27] Para. 239. See also the list of issues for Venezuela, E/C.12/Q/VEN/1, 23 May 2000, para. 2 – questioning statistics on the indigenous population.

[28] *Manual*, pp. 68–9.

[29] Initial report of Paraguay, E/1990/5/Add.23, discussed at the 14th and 15th Sessions of the Committee, E/1997/27; E/C.12/1996/6, paras. 63–94.

[30] Para. 80.

[31] Alston, *Manual*, p. 85.

[32] General Comment No. 9 (1998), para. 3, text in *Committee on Economic, Social and Cultural Rights, Report on the Eighteenth and Nineteenth Sessions*, UN Doc. E/1999/22; E/C.12/1998/26, annex IV.

[33] *Manual on Human Rights Reporting*, p. 72.

[34] *Ibid.*

ESC Committee on self-determination. Among recent examples are the case of Sudan, asked about the self-determination of the southern States,[35] and Australia, where the ESC Committee asked for information on issues relating to the rights of indigenous Australians to self-determination.[36]

Discrimination

Provisions on non-discrimination in the Covenant are analogous to other texts, and the list of prohibited grounds in Article 2 is the same as in the ICCPR. In the case of Guatemala,[37] for example, the ESC Committee pointed to the need for affirmative action for indigenous groups,[38] and commented on manifestations of far-reaching discrimination against them.[39] The ESC Committee also made a general observation on adverse effects of economic and social disparities on the indigenous peoples and other vulnerable groups.[40] The general observation on disparities and deprivations hitting vulnerable groups hardest is often made by the ESC Committee. In the case of Peru,[41] the ESC Committee commented on the existence of 'acute forms of discrimination' against indigenous peoples,[42] and observed that, envisaging the structure of Peruvian society as a pyramid: 'at the bottom of the pyramid live the bulk of the population, namely the indigenous Indians of the Alto Plano or the mountains or the Amazon jungle'.[43] In the case of Australia, the ESC Committee expressed its deep concern that, despite efforts and achievements of the State party, 'the indigenous populations of Australia continue to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights, particularly in the field of employment, housing, health and education'.[44]

[35] E/C.12/Q/SUD/1, (13 December 1999) para. 10; the government's reply is dated 24 June 2000 (UN website).

[36] E/C.12/Q/AUSTRAL/1 (23 May 2000), para. 3. See also the list of issues for Georgia, E/C.12/Q/GEOR/1, and the reply of the government of Georgia, 28 March 2000 (UN website).

[37] Initial Report of Guatemala, E/1990/5/Add.24, *Report of the Fourteenth and Fifteenth Sessions*, paras. 114–46.

[38] Para. 140.

[39] Para. 128.

[40] Para. 127.

[41] Initial Report of Peru, E/1990/5/add.29, discussed at the 16th and 17th Sessions of the ESC Committee, E/1998/22; E/C.12/1997/10, paras. 130–69.

[42] Para. 141(f).

[43] Para. 140. In the case of Mexico, the ESC Committee expressed concern at 'the persisting plight of indigenous populations', particularly in Chiapas, Guerrero, Veracruz and Oaxaca, which had limited access to health services, work, adequate nutrition and housing: *Report on the Twentieth and Twenty-First Sessions*, E/2000/22; E/C.12/1999/11, para. 380; see also paras. 387 and 406.

[44] Concluding observations on the Third Periodic Report of Australia, E/C.12/1/Add.50 (11 September 2000), para. 15.

Labour

Guidelines on the right to work – Article 6 – require State responses on groups which are vulnerable or disadvantaged with respect to employment. On both Article 6 and 7, the Guidelines cross-reference many conventions of the ILO on labour rights. The list of conventions does not include either ILO Convention No. 107 or Convention 169, both of which incorporate significant sections on labour rights in recognition of the role of labour in the life of indigenous peoples. The Guidelines on Article 10 on family, marriage, mothers and children request information on the meaning of 'family' in particular societies. This invites comparison with the delineation of 'family' in the *Hopu and Bessert* case and General Comment 16 of the HRC, with their attendant implications for indigenous societies.[45]

Housing

The ESC Committee has made many observations on the relationship between Article 11 of the Covenant and indigenous peoples. Paragraph 1 provides for recognition of 'the right of everyone to an adequate standard of living . . . including adequate food, clothing and housing and to the continuous improvement of living conditions'. Paragraph 2 refers to 'the fundamental right of everyone to be free from hunger' and States are to take measures to improve food production, etc., by, *inter alia*, 'developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources'. The reporting Guidelines[46] require information on the situation of 'especially vulnerable or disadvantaged groups' including, *inter alios*, 'landless peasants' and 'indigenous peoples'. The ESC Committee has produced an extensive General Comment on the right to adequate housing,[47] which deals with issues which include security of tenure, availability of services, habitability, accessibility and location, cultural adequacy and forced eviction. The paragraph on 'cultural adequacy' provides that housing policy

> must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed.[48]

Recognition of rights in the areas of security of tenure, location and relocation, and forced evictions[49] have particular poignancy for many indigenous groups.

[45] See chs. 5 and 6 of this volume.
[46] *Manual on Human Rights Reporting*, pp. 119–24.
[47] General Comment No. 4 (1991), *Manual on Human Rights Reporting*, pp. 124–32.
[48] General Comment, para. 8 (g).
[49] 'the Committee considers that instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law': General Comment, para. 18.

The ESC Committee has not been slow to spot the connection between all these and indigenous land claims. The ESC Committee has undertaken technical assistance missions to the Dominican Republic and Panama to deal with issues including forced evictions. The Report of the Mission to Panama[50] makes a number of points on indigenous peoples and includes a section entitled 'The specific case of the indigenous territories'.[51] In relation to the indigenous communities in the provinces of Bocas del Toro, Chiriqui and Veraguas, the ESC Committee observed that: 'Their main demand, which they explained to the mission in simple and often very poetic language, is the demarcation of their territory (comarca), for which they have been fighting since the 1960s'.[52] The ESC Committee also made references to the incursion of mining companies whose activities threaten the survival of the peoples and noted the call for ratification by a general congress of the Ngobe-Bugle people of ILO Convention No. 169.[53] With reference to obligations under Article 11, elaborated earlier in General Comment No. 4, it was recommended that the government of Panama 'put an end to the government practice of expulsion, both in the indigenous areas and throughout the country',[54] and consider ratifying ILO 169 as requested by the indigenous communities.[55] On general resource and subsistence issues in relation to Paraguay,[56] the Committee listed among its principal subjects of concern the condition of the indigenous population, as well as the 200,000 landless mestizo peasant families,[57] observing that: 'the main reason for hunger and malnutrition among the indigenous population and the deprivation of their rights is linked to the severe problem of obtaining access to traditional and ancestral lands'.[58] Accordingly, the ESC Committee recommended particular attention to the land problem.[59] A note of alarm was sounded in the case of the Russian Federation:[60]

> The Committee expresses its concern at the situation of the indigenous peoples of the Russian Federation, many of whom live in poverty and have inadequate

[50] *Report on the Twelfth and Thirteenth Sessions of the Committee*, E/1996/22; E/C.12/1995/18, annex V.

[51] *Ibid.*, p. 120 (paras. 66–70).

[52] Para. 68.

[53] Paras. 69 and 70.

[54] p. 122, para. 79 (iii).

[55] *Ibid.*, para. 79 (iv). See also the *Report on the Twentieth and Twenty-First Sessions*, paras. 259 and 277 (Second Periodic Report of Argentina) – concern about the implementation of domestic provisions already in place for indigenous land titles, and failure to ratify Convention 169.

[56] *Report of Fourteenth and Fifteenth Sessions*.

[57] Para. 71.

[58] Para. 71.

[59] Para. 83.

[60] Third Periodic Report, E/1994/104/Add.8, discussed at the 16th and 17th Sessions of the ESC Committee, E/1998/22; E/C.12/1997/10, ECOSOC OR, 1998, Supplement No. 2, paras. 87–129.

> access to food . . . The Committee is particularly concerned for those whose food supply is based on fishing and an adequate stock of reindeer, and who are witnessing the destruction of their environment by widespread pollution. It is alarmed at reports that the economic rights of indigenous peoples are violated with impunity by oil and gas companies which sign agreements under circumstances which are clearly illegal, and that the State party has not taken adequate steps to protect the indigenous peoples from such exploitation.[61]

On the same issue that was dealt with by CERD, the ESC Committee in concluding observations on Australia noted that amendments to the Native Title Act were regarded by the indigenous population as 'regressive'.[62] The ESC Committee was particularly trenchant on indigenous issues in Canada.[63] In general, the Committee made critical observations on 'the gross disparity between aboriginal peoples and the majority of Canadians with respect to the enjoyment of Covenant rights'.[64] It also noted

> the direct connection between aboriginal marginalization and the ongoing dispossession of aboriginal peoples from their lands . . .principles that violate aboriginal treaty obligations and the extinguishment, conversion or giving up of aboriginal rights and title should on no account be pursued by the State party.[65]

Recommendations included the need for 'concrete and urgent steps to restore and respect an aboriginal land and resource base adequate to achieve a sustainable aboriginal economy and culture'.[66] The Committee has also had occasion to welcome the restitution of traditional lands.[67] Issues of resource base appear in General Comment No. 12 on The Right to Adequate Food (Article 11).[68] The normative content of the Article is expressed in

[61] Para. 100. The ESC Committee's recommendations on this point are set out in para. 116.

[62] E/C.12/Add.50, para. 16: the amendments were considered to have affected the reconciliation process between the State party and indigenous populations – a process praised elsewhere in the concluding observations (*ibid.*, para. 8). The ESC Committee encouraged Australia to pursue its reconciliation efforts (para. 25).

[63] *Report on the Eighteenth and Nineteenth Sessions of the Committee*, E/1999/22; E/C.12/1998/26, ECOSOC OR, 1999, Supplement No. 2, Third Periodic Report of Canada, E/1994/104/add.17, discussed at paras. 376–435.

[64] Para. 392.

[65] Para. 393.

[66] Para. 418. See also *Report on the Twentieth and Twenty-First Sessions* (Initial Report of Cameroon), where the ESC Committee (para. 337) linked the food issue and 'depletion of the natural resources of the rainforest' in the case of the Baka pygmies. In the same set of observations, the ESC Committee deplored (paras. 328 and 347) the continuance of traditional practices in Cameroon which negatively affected the rights of women.

[67] *Report on the Twentieth and Twenty-First Sessions* (observations on the Second Periodic Report of Argentina), para. 252.

[68] *Report of the Twentieth and Twenty-First Sessions*, E/2000/22; E/C.12/1999/11, annex V. For context, see the study by A. Eide, *The Right to Adequate Food and to be Free from Hunger*, E/CN.4/Sub.2/1999/12, 28 June 1999.

terms of availability, which incorporates the notion of acceptability within a given culture, and 'the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights'.[69] On economic and physical accessibility, the Comment observes that vulnerable groups may need attention through special programmes, and that 'A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened'.[70] The Comment also interprets Article 11 obligations to mean that 'the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources . . . including food security'.[71] The many invasions of indigenous territories are brought to mind in the observation that violations of the right to food can occur through the direct action of States or 'other entities insufficiently regulated by States'.[72] National strategies for the right to food depend in part on 'people's participation', and States', parties are urged to 'respect and protect the work of human rights advocates and other members of civil society who assist vulnerable groups'.[73]

Health

The Covenant's provisions on health rights (Article 12) have also attracted questions on the vulnerability of particular groups – a concern strongly reflected in the Guidelines.[74] The implications of Article 12 have been spelled out by the ESC Committee in a lengthy General Comment.[75] This complex comment specifies, *inter alia*, the relationship between health rights and environment,[76] the importance of popular participation in decision-making[77] and the need for all health facilities to be culturally appropriate, 'i.e. respectful of the culture of individuals, minorities, peoples and communities'. A specific section is devoted to indigenous peoples,[78] 'in the light of emerging international law and practice'[79] and recent measures taken by

[69] Para. 8.
[70] *Ibid.*, para. 13.
[71] Para. 15.
[72] *Ibid.*, para. 19.
[73] *Ibid.*, paras. 23 and 35.
[74] *Manual*, pp. 136–8. The Guidelines require disaggregation of health indicators by 'socio-economic or ethnic group' (para. 4(a)), 'urban/rural', or simply 'groups' whose position may be significantly worse than that of the majority of the population (para. 5) – 'vulnerable and disadvantaged groups' (para. 5(d)).
[75] General Comment No. 14, The right to the highest attainable standard of health, E/C.12/2000/4, 11 August 2000 – runs to 21 pages.
[76] Para. 11.
[77] *Ibid.*
[78] Para. 27.
[79] Instruments cited include ILO Convention 169, the Convention on the Rights of the Child and the Convention on Biological Diversity. Additionally, Agenda 21 of UNCED, and the World Conference on Human Rights are cited, as well as Article 3

States.[80] The Comment incorporates the claim that indigenous peoples have the right to specific measures to improve their access to health services and care,[81] adding that

> These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services . . . vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should . . . be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.[82]

The validation of traditional practices is backed by the demand that States should not impede traditional preventive care –[83] though the Comment comes down strongly against 'harmful social or traditional practices': the State is, for example, obliged to step in and prevent third parties from coercing women to undergo traditional practices.[84]

Education

The provisions on 'the right of everyone to education' in Article 13[85] impact on indigenous groups form many viewpoints, including the injunction in the

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of the UN Framework Convention on Climate Change (which does not specifically refer to indigenous peoples but spells out key principles such as sustainable development and the precautionary principle) and Article 10.2(e) of the UN Convention to Combat desertification . . . particularly in Africa – whereby national action programmes are deemed to require frameworks to develop partnerships 'between the donor community, governments at all levels, local populations and community groups'.

[80] Discussion of the draft comment in E/C.12/2000/SR.15, 9 May 2000, paras. 11–31.

[81] Committee member Riedel explained that the text (then in draft) 'emphasized the fact that all countries in the world experienced problems relating to indigenous people, but not all countries had minority groups threatened with extinction. For that reason, the problems of indigenous people were being separated from the general problems of minority groups' (E/C.12/2000/SR.15, para. 18).

[82] Para. 27.

[83] Para. 34.

[84] Para. 25; see also *ibid.*, paras. 37 and 51: the latter paragraph lists 'failure to discourage the continued observance of harmful traditional medical or cultural practices' among the violations of obligations under Article 12.

[85] The obligation of the State in relation to primary education, which 'shall be compulsory and available free to all' (Article 13.2(a)) is clearly not 'programmatic' but immediate. See also General Comment No. 11.

article that education 'shall promote understanding, tolerance and friendship among all national and all racial, ethnic or religious groups'.[86] The Guidelines[87] make specific reference to indigenous groups in requiring information on how, *inter alios*, 'children belonging to linguistic, racial, religious or other minorities, and children of indigenous people, enjoy the right to literacy and education' spelled out in Article 13. While the article does not elaborate the content of education beyond the above indication, the Guidelines ask for State responses on 'the availability of teaching in the mother tongue of the students'.[88] Evidence of bilingual or mother tongue teaching have been the subject of favourable appreciations by the ESC Committee. Commenting on language programmes referred to for the report of Peru,[89] the ESC Committee considered that 'they help to preserve indigenous languages and to strengthen the cultural identity of the groups speaking the languages concerned'.[90] On the other hand, the ESC Committee noted an 'insufficient fulfilment of the right to education of the indigenous and black populations'.[91] In the report of the 14th and 15th sessions of the ESC Committee, Finland[92] was commended for promoting the teaching of the Roma and Saami languages in schools.[93] Concerns were expressed to Mexico on indigenous groups who experienced difficulties 'in preserving their culture and in teaching their language'.[94] The connection between identity, development and education is brought out in ESC Committee expressions of concern on Iraq and 'the adverse impact of recent drainage programmes in areas inhabited by Marsh Arabs on the community's ability to conserve its culture and traditional lifestyle and to exercise its right to education'.[95] The Committee has been critical of the position in Australia, specifically noting the situation of Aboriginals in education 'which affects their prospects for future employment, as well as the problems of illiteracy among the adults of this group, the majority of whom do not have primary and secondary education'.[96]

[86] Article 13.1.

[87] *Manual on Human Rights Reporting*, pp. 142–4.

[88] For a discussion of assimilation and integration in the context of Mexico, see E/C.12/1999/SR.46, paras. 61–4.

[89] See p. 186 in this volume.

[90] Para. 139.

[91] Para. 144.

[92] Third Periodic Report, E/1994/104/Add.7, discussed in paras. 296–321.

[93] Para. 302.

[94] *Report on the Eighth and Ninth Sessions*, E/1994/23; E/C.12/1993/19, discussing the Second Periodic Report of Mexico, E/1990/6/Add.4, in paras. 226–41, at para. 233.

[95] *Report on the Tenth and Eleventh Sessions*, E/1995/22; E/C.12/1994/20, Second Periodic Report of Iraq, E/1990/7/Add.15, discussed in paras. 125–43, at para. 138.

[96] 8th and 9th Sessions of the Committee, Second Periodic Report of Australia, E/1990/7/Add.13, discussed in paras. 143–62, para. 150.

The ESC Committee issued two general comments on education at its 21st session in 1999.[97] Comment 13 – The Right to Education – is the wider Comment,[98] and implicates indigenous groups in a number of its observations, even if not by name. According to the Comment, 'education in all its forms and at all levels shall exhibit the following interrelated and essential features' –[99] those of availability, accessibility (which incorporates 'overlapping dimensions' of non-discrimination, physical accessibility and economic accessibility), acceptability and adaptability.[100] Of these 'essential features', some have very specific significance for indigenous and minority groups – notably the emphasis on non-discrimination in access to education, and the notion of 'acceptability'. On the former, the Comment draws in principles from, *inter alia*, the ICEARD, the UNESCO Convention against Discrimination in Education, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention.[101] In particular, the Comment 'affirms' Article 2 of the UNESCO Convention on the validity of separate systems of education under particular circumstances.[102] On 'acceptability', the Comment explains that education must be 'relevant, culturally appropriate and of good quality'.[103] It is asserted further that in the appropriate application of these interrelated and essential features, 'the best interests of the student shall be a primary consideration'.[104] Concerning the purposes of education (13 (1)), the Comment states that, among educational objectives, 'perhaps the most fundamental is that "education shall be directed to the full development of the human personality" '.[105] Additionally, various purposes of education set out in related texts – including the World Conference on Human Rights and the CRC – are deemed to be 'implicit in, and reflect a contemporary interpretation of Article 13 (1)' –[106] a claim which, like

[97] General Comment No. 11 (Plan of Action for Primary Education – Article 14); General Comment No. 13 (Article 13), *Report on the Twentieth and Twenty-First Sessions*, E/2000/22; E/C.12/1999/11, annexes IV and VI respectively.

[98] Article 13 is 'the most wide-ranging and comprehensive article on the right to education in international human rights law' (General Comment 13, para. 2).

[99] *Ibid.*, para. 6.

[100] The '4-A scheme': see the progress report of the UN Human Rights Commission's Special Rapporteur on education (K. Tomasevski), E/CN.4/2000/6, p. 3 (1 February 2000).

[101] Para. 31.

[102] Para. 33. The UNESCO provisions are discussed in Thornberry, *International Law*, pp. 287–90. The most relevant provision for present purposes is the principle that separate educational systems 'for religious or linguistic reasons' are not discriminatory 'if participation in such systems . . . is optional and if the education provided conforms to such standards as may be laid down by the competent authorities, in particular for education at the same level'; see also Article 5.1(c) on national minorities.

[103] *Ibid.*

[104] Para. 7. Cf. 'the best interests of the child' in Article 3.1 of the CRC.

[105] Para. 4.

[106] Para. 5.

much else in the Comment, suggests systemic connections between the various expressions of rights. The Comment notes that while the instruments cited contain elements not explicitly found in Article 13 (such as gender equality and respect for the environment as educational aims), they none the less inform its interpretation. If this is the case, elements of indigenous rights may also be deemed intrinsic to readings of the text. Evidence for this approach is found in the Comment's reading of Article 13 (2) from which the following particulars are distilled:

> States have obligations to respect, protect and fulfil each of the 'essential features' (availability, accessibility, acceptability and adaptability) of the right to education. By way of illustration, a State must respect the availability of education by not closing private schools . . . fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all.[107]

This is an important validation of the contemporary sensitivity of international law to cultural diversity: the affirmation in the Comment of culturally appropriate education is of the highest relevance. The Comment also explores connections between this concept and instruments on indigenous and minority rights,[108] which are deemed to supply essential guidance on the meaning of the Covenant, as well as having their own binding force.

Culture

Extensive Guideline references to the indigenous occur in the context of Article 15, wherein the States' parties recognise the right of everyone, *inter alia*, 'to take part in cultural life',[109] enjoy the benefits of scientific progress and benefit from scientific and artistic productions of which they are the author.[110] According to the ESC Committee,[111] States should report on the availability

[107] Comment, para. 50.

[108] The absence of specific reference to minorities may be noted: for a suggestion of sensitivities, see E/C.12/1999/SR.48.

[109] Article 15.1(a).

[110] A day of discussion devoted to the right of everyone to benefit from the protection of intellectual property in accordance with Article 15.1(c) was held on 27 November 2000 – *United Nations Press Release*, CESCR 24th session. Experts noted, *inter alia*, that protection of intellectual property was not written into ILO convention 169, and that the draft Declaration on Indigenous Peoples had not rectified the matter. Distinctions were drawn between intellectual property law and a human rights approach; the discussion focused in part on the relationship between traditional knowledge and intellectual property systems: a member of the ESC Committee (Riedel) observed that Article 15.1(c) was not sufficiently defined. It may be surmised that the attention given to indigenous issues in the discussion would condition any eventual general comment on this aspect of Article 15.

[111] *Manual on Human Rights Reporting*, pp. 149–51.

of funds for cultural development,[112] on how they promote cultural identity 'as a factor of mutual appreciation among individuals, groups, nations and regions',[113] on promotion of awareness and enjoyment 'of the cultural heritage of national ethnic groups and minorities and of indigenous peoples',[114] etc. Reports on a variety of such issues are to be assessed for positive and negative results 'particularly concerning indigenous and other disadvantaged and particularly vulnerable groups'.[115]

As intimated in an earlier chapter,[116] the complex term 'culture' may for convenience be divided into Western-centric 'high' culture, mass or globalised (low?) culture, and 'culture as way of life' ('traditional culture' or 'culture in the anthropological sense').[117] The anthropological sense may be further subdivided. Tylor defined it as 'That complex whole which includes knowledge, belief, art, morals, law, custom and other capabilities and habits acquired by man as a member of society':[118] essentially a list of traits or characteristics which can be empirically observed. This approach can lead to a static view of culture, and proved unattractive for later anthropologists, who, while not necessarily abandoning the 'traits/characteristics' approach, have understood culture as meaning – a web of texts which must be interpreted[119] – or as process, emphasising the constant creation of culture.[120] The drafting of international instruments employing the term 'culture' has tended to assume its meaning as élite culture, science, and cultural artefacts,[121] although in practice, as demonstrated elsewhere in the present work, the concept of culture as a process of community self-creation and development is now more widely understood.[122]

No general Comment is available to unpick the mysteries of 'culture' in Article 15. In the day of debate on education,[123] one speaker pertinently noted that it was the political price of education that frightened governments, not resources – i.e., the right to education could not be ensured without its cultural dimensions.[124] It was further observed that Article 15 of

[112] Para. 1(a).
[113] Para. 1(c).
[114] Para. 1(d).
[115] Para. 1.
[116] Ch. 6.
[117] For variations on this triumvirate, see R. O'Keefe, 'The "right to take part in cultural life" under Article 15 of the ICESCR', *International and Comparative Law Quarterly* 47 (1998), 904–23; A. Xanthaki, 'Indigenous cultural rights in international law', *European Journal of Law Reform* 2(3) (2000), 343–67.
[118] E. Tylor, *Primitive Culture* (London, Murray 1871), vol. I, p. 1.
[119] C. Geertz, *Interpretation of Cultures* (New York, Basic Books Inc., 1973).
[120] Discussion in A. Gray, *Indigenous Rights and Development: Self-Determination in an Amazonian Community* (Providence, Oxford, Berghahn Books, 1997), pp. 167–9.
[121] Thornberry, *International Law*, pp. 187–90.
[122] As for example in the *Länsman* cases before the ICCPR.
[123] *Report of Eighteenth and Nineteenth Sessions*, E/1999/22.
[124] *Ibid.*, para. 482.

the Covenant could serve as an antidote to homogenisation and the flattening out of diversity.[125] An earlier day of discussion was devoted to Article 15.[126] It may fairly be said that all three aspects – high, low, traditional – were represented in the discussion. The concept of culture as way of life in the context of indigenous peoples was broadly discussed, and its importance for individual and communal identity. There seemed to be general agreement that

> The concept of participation in cultural life has two components. The first was the right to create cultural, literary, artistic and scientific – in a word, spiritual – values. The second . . . was the right to benefit from cultural values created by the individual or the community.[127]

The proposition that there was no hierarchy among cultures, and that cultures threatened by outside forces should be protected, were presented: both propositions have significance for indigenous peoples. Despite the phrasing of Article 15 as an individual right, there was support for the proposition that Article 15 could sustain group rights,[128] a view that appears to be borne out in the practice of the ESC Committee, which regularly addresses itself to the community context of the right. The individual–collective nexus may be tested further if the proposed Optional Protocol on Communications (allowing the ESC Committee 'to receive and examine communications from any individuals or groups') becomes operational.[129] Another day of discussion on Article 15.1(c) (protection of moral and material interests of authors) was held on 27 November;[130] indigenous issues connected with traditional knowledge were the subject of interventions.[131] The comment by Meyer-Bish is particularly appropriate

> 'Cultural property' . . . means more than 'intellectual property' because account must be taken not only of what is produced by an artist, a scientist or a writer, but also of what is produced by a cultural community, by the custodians of a heritage or by a people. Each creative activity is based on a common cultural

[125] Para. 483.

[126] *Report on the Seventh Session*, E/1993/22; E/C.12/1999/2, paras. 202–23.

[127] *Ibid.*, para. 217.

[128] *Ibid.*, para. 205. O'Keefe argues that 'There is no juridical reason why the right embodied in Article 15 cannot be characterized as *both* an individual and a group right, depending on the context in which it is to be exercised': 'The "right to take part"', at 917. See also P. Meyer-Bisch, *Protection of Cultural Property: An Individual and Collective Right*, E/C.12/2000/16, 16 October 2000.

[129] *Report on the Fourteenth and Fifteenth Sessions*, p. 98 (proposed Article 1).

[130] The genesis of Article 15.1(c) is outlined in M. Green, *Drafting History of Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2000/15, 9 October 2000.

[131] See notably the paper by the Aboriginal and Torres Strait Islander Commission (Australia), *Protecting the Rights of Aboriginal and Torres Strait Islander Traditional Knowledge*, E/C.12/2000/17, 27 October 2000.

> capital – this explains why individual creativity and collective property must be protected *at the same time*. This means establishing a close link between article 15, paragraph 1 (b)[132] and (c), as two aspects of the protection of the right to take part in cultural life.[133]

The ESC Committee has asked questions on budgetary resources for indigenous culture.[134] In the case of Australia, the ESC Committee was concerned that Aboriginals and Torres Strait Islanders 'do not have sufficient opportunities fully to involve themselves in creating awareness of their cultural heritage'.[135] Culture and education issues are a regular concern in the examination of reports. In recent observations on the Third Report of Denmark, the ESC Committee noted 'with appreciation' that the culture of the Greenlandic community is well respected and that the Greenlandic language is official.[136] In the case of the Solomon Islands, the ESC Committee noted that 'the unique *kastom* and *wantok* culture of the population has to date been largely kept intact' and that the traditional extended family system had helped to absorb economic shocks.[137] Questions to Honduras disclose a broad collectivist or holistic view of culture where this is appropriate – the government was asked to provide details of the measures taken 'to protect the cultural identity of indigenous ethnic groups, and to preserve their habitat, natural resources, languages, customs and traditions'.[138] A similar holistic view appears in questions concerning the Ainu culture and traditions.[139] Members of the ESC Committee have been perceptive on differences between dominant and non-dominant cultures, and the possibility of using Article 15 to protect the latter.[140] The phrase 'take part in cultural life' thus has many dimensions; for indigenous peoples it appears to open possibilities of preservation and promotion of their own culture, while safeguarding access to the 'outer world' on a non-discriminatory basis.

[132] The right to enjoy the benefits of scientific progress and its applications.

[133] Meyer-Bisch, *Protection of Cultural Property*, para. 6 (emphasis in the original). See the statement by the Committee entitled *Globalization and its Impact on the Enjoyment of Economic, Social and Cultural Rights*, 18th Session of the ESC Committee, May 1998, *Report on the Eighteenth and Nineteenth Sessions*, E/1999/22; E.C.12/1998/26, paras. 436–61; also the statement by the Committee to the WTO, E/C.12/1999/9 (26 November 1999), para. 4.

[134] To Colombia, E/1990/23, para. 179.

[135] E/1994/23, para. 153.

[136] *Report on the Twentieth and Twenty-First Sessions*, para. 95.

[137] *Ibid.*, para. 198.

[138] E/C.12/Q/HON/1, 13 December 1999, para. 48; see also para. 47 – information requested on educational programmes in local languages to meet the educational needs of minority ethnic groups, thus preserving their cultural identity.

[139] E/C.12/Q/JAP/1 (24 May 2000), para. 45. See also questions to Bolivia, E/C.12/Q/BOL/1 (21 September 2000), paras. 39–42.

[140] See remarks of ESC Committee member Marchan Romero in examining the Second Periodic Report of Argentina, E/C.12/1999/Sr.35, para. 52.

Comment

The Covenant highlights the bleak truth about the existence of many indigenous groups under modern conditions: that the peoples live lives of poverty, deprived of subsistence, education, health, land and culture. At first sight, the focus of the Covenant appears highly 'economistic', focusing on the valued goods of contemporary life and measuring comparative deprivation. However, the emphasis on intangibles such as culture suggests that the Covenant is a more complex whole. Accordingly, there has been a gradual individuation of an indigenous perspective in key areas, and an appreciation that notions such as 'health', education, etc., are Janus-faced from indigenous viewpoints: education in particular has functioned as an impressive engine of assimilation for many groups. The General Comment on education emphasises its cultural dimensions, even if it is reticent on institutional separatism. The elaboration of perspective on the consequences of land loss and the focus on subsistence aspects of self-determination are major contributions of the Covenant, as is its activist methodology expressed in principles of targeted action.

8

Racial discrimination and indigenous peoples – in particular under the Racial Discrimination Convention

Introduction

The major instrument of the UN devoted to the issue of race discrimination is the International Convention on the Elimination of All Forms of Racial Discrimination (ICEARD). The Convention – preceded by a Declaration on the same subject[1] – was adopted by the GA on 21 December 1965 by 106 votes to 0,[2] and entered into force on 4 January 1969.[3] By December 2001, the Convention had 161 States' parties. The text incorporates a preamble of twelve paragraphs, seven substantive articles (Part I of the Convention), a further nine articles addressing implementation (Part II) and nine articles on entry into force, denunciation, revision, reservations, etc. (Part III).[4]

[1] Contained in General Assembly resolution 1904(XVIII), 20 November 1963. For a review, see Thornberry, *International Law*, chs. 29 and 30.

[2] General Assembly resolution 2106(XX).

[3] 660 UNTS, 195. The implementation of the Convention is complemented by the work of the Special Rapporteur (of the Commission on Human Rights) on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; at the time of writing, the latest report of the Special Rapporteur, Mr M. Glélé-Ahanhanzo, is contained in E/CN.4/2001/21, 6 February 2001. The Work of the Special Rapporteur overlaps with that of CERD in view of the fact that the Rapporteur deals with States' parties to the Convention, as well as those which are not.

[4] Article 20 on reservations contains an unusual provision setting out the rule that a reservation incompatible with the object and purpose of the Convention shall not be permitted, 'nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by the Convention would be allowed'. The paragraph (20.2) goes on to say that a reservation 'shall be considered incompatible or inhibitive if at least two thirds of the States' parties to this Convention object to it'. This would not be taken to diminish the role of the Committee in making assessments of compatibility in the absence of such a majority of the States' parties; clearly, the Committee's scope for action must be wider, not least in view of its general duty to monitor the implementation of the Convention. Attention in this respect centres particularly on the wide-ranging reservation attached to the ratification by the USA

The system of supervision resides with the Committee on the Elimination of Racial Discrimination (CERD), established in 1970, which has three principal functions: the examination of periodic State reports,[5] the consideration of communications from aggrieved individuals and groups[6] and the examination of inter-State complaints.[7] The reporting procedure is the most active. Besides issuing recommendations to individual States in the procedure, the Committee has issued a set of General Recommendations, including one dedicated to indigenous issues.[8] Only thirty-four States' parties have accepted the individual communications procedure under Article 14 of the Convention. The inter-State procedure under Article 11 has not been used, though Robertson and Merrills have observed the incidence of 'disguised inter-State disputes'[9] when one State is criticised in the report of another State.[10] CERD has broadened its activities in other respects. A Working Paper entitled 'Prevention of discrimination, including early warning and urgent procedures' was adopted at the 48th Session of the

in 1994. The ninth meeting of treaty-body chairpersons, including the chairperson of CERD, expressed support for the approach of the HRC in General Comment 24 (see ch. 5 of this volume). The USA submitted its initial report in 2000 (CERD/C/351/Add.1), adverting to its position on reservations in paras. 145 and 146. For a comment on the position of the USA, see S. Grant, 'The United States and the international human rights treaty system: for export only?', in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000), pp. 317–29. See also A/56/18, para. 391.

[5] The reporting procedure is obligatory (Article 9). The word 'examination' in connection with the reports suggests the need for a broad approach to the sources of information available to the Committee, in that information contained in such reports may need to be tested. Accordingly, in adopting Decision 1(XL), the Committee stated that, while the Committee would continue to base its suggestions and recommendations on the basis of information in State reports, 'At the same time, in examining the reports of State parties, members of the Committee must have access, as independent experts, to all other valuable sources of information, governmental and non-governmental' (A/46/18, p. 104). In practice, this means that NGOs play an invaluable part in CERD proceedings, although CERD does not have a 'formal' relationship with NGOs. Consolidated General Guidelines for the submission of reports are found in CERD/C/70/Rev.4, 14 December 1999.

[6] Article 14.

[7] Articles 11, 12 and 13.

[8] General Recommendation XXIII(51), text in A/52/18, 122–3, discussed at pp. 216–18 in this volume.

[9] A. H. Robertson and J. G. Merrills, *Human Rights in the World* (Manchester and New York, Manchester University Press, 3rd edn 1996), p. 101.

[10] Also M. Banton, *International Action against Racial Discrimination* (Oxford, Clarendon Press, 1996), pp. 108–12. CERD has reminded States' parties of the use of Article 11, 'which is the only procedural means available to States for drawing to the attention of the Committee situations in which they consider that some other State is not giving effect to the . . . Convention': General Recommendation XVI, cited in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev. 5, p. 185.

Committee.[11] The Working Paper formed the immediate basis for initiatives in relation to Kosovo and Croatia.[12] Among the other uses of the mechanisms, proposed changes to Australian legislation on native title led to the activation of the early-warning procedure in 1998.[13] The Convention is the centrepiece of global action on the 'race' issue, and the work it does is set in the context of successive 'decades' to combat racial discrimination, leading to the third World Conference against Racism in the autumn of 2001.

Basic notions

Philosophy

Banton writes that the Convention is based on a 'noble lie' – the lie that racial discrimination could be eliminated was none the less noble 'because it made possible the mobilization of international opinion to combat a nearly universal evil'.[14] While it is arguable that the Convention would be more accurately styled a convention on 'the reduction'[15] of racial discrimination, rather than on its elimination, such a limited goal would perhaps lessen the required mobilisation effect. The question of whether racial discrimination can be 'eliminated' relates in part to an understanding of the aetiology of the practice: if it is regarded as coterminous with colonialism, then it will disappear with the end of empire; if it is not, and is millennial or pre- and post-colonial, then it may be assumed that discrimination will take new forms, and that the ambition of elimination is faced with a practice 'deeper and less tractable than the contemporary consensus seems to suppose'.[16] Like all the treaties canvassed in the present work, the Convention is a historical product, but the interesting problem is how and to what extent it is capable of responding to changing social and political understandings of what counts as racist practice. The Convention – and the Declaration which preceded it – is strenuous in its demonisation of the evils of discrimination – in particular 'policies of apartheid, segregation or separation', which 'are still in evidence in some areas of the world'.[17] The preamble lays great stress on the equality and dignity of human beings and on the deleterious

[11] A/48/18, 125–9.

[12] Banton, *International Action*, pp. 161–8.

[13] For a view that in the matter of early warning, etc., CERD stretches its mandate 'in a creative manner', see T. van Boven, 'United Nations strategies to combat racism and racial discrimination: past experiences and present perspectives', background paper for the World Conference on Racism, etc., E/CN.4/1999/WG.1/BP.7, para. 5(a).

[14] Banton, *International Action*, p. 305; see also p. 50.

[15] *Ibid.*, p. 73.

[16] B. Boxill, 'Introduction', in B. Boxill (ed.), *Race and Racism* (Oxford University Press, 2001), pp. 14–15.

[17] Preamble.

consequences of racial discrimination for world order and for 'the harmony of persons living side by side within one and the same State'. It also states that 'the existence of racial barriers is repugnant to the ideals of any human society',[18] a claim which, in the drafting of the Convention, was contested by Austria on the ground that it 'was not in harmony with the fundamental rights of national and ethnic minorities'.[19] Coupled with the Convention's repudiation of 'separation', difficult issues are raised for any ethnic group arguing for a degree of separation in order to conserve its identity. *Ex facie*, there is some potential for the Convention to validate assimilationist approaches towards ethnic groups within States, and problematise approaches which recognise group claims to a distinct identity.[20]

The Convention was drawn up under the shadow of apartheid, with its system of 'autonomous indigenous communities', and provides part of the normative weaponry to struggle against it. CERD has continued to remind States of the terms of Article 3, which particularly condemns racial segregation and apartheid, observing that, while it 'may have been directed exclusively to South Africa', its import is wider.[21] According to CERD, the Convention extends to conditions of partial segregation arising in cities, etc., as perhaps the unintended consequence of actions of private persons.[22] States are invited to 'work for the eradication of any negative consequences which may ensue'.[23] Some members of the Committee were uncomfortable with draft General Recommendation XIX, noting the harmless nature of 'Chinatowns' in many of the world's cities, etc.[24] In the reporting procedure, CERD has expressed its concern about both 'formal'[25] and 'informal'[26]

[18] This reference was introduced in the Third Committee of the General Assembly by Brazil, Colombia and Senegal: UN Doc. A/C.3/L.1217.

[19] UN Doc. A/C.3/SR.1310, para. 5.

[20] The general thrust of the Convention is integrationist – see for example, Article 2(1)(e), which provides that States' parties 'undertake to encourage, where appropriate, integrationist multiracial organizations . . . and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division' – discussed in Thornberry, *International Law*, pp. 267–8.

[21] Banton, *International Action*, pp. 200–2.

[22] 'In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race . . . [etc.] . . . so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds' (General Recommendation XIX, para. 3).

[23] General Recommendation XIX, adopted at the 47th Session of the Committee in 1995.

[24] See UN Doc. CERD/C/SR.1078 (February/March 1995).

[25] In the case of Bangladesh, the Committee had information that 'there were cluster camps in areas inhabited by indigenous peoples, and that people in those camps were subject to various restrictions, being unable to travel without permission' (A/47/18, para. 120).

[26] Examples include France, where concern related to 'social trends which result in segregation in areas of residence and in the school system' (A/49/18, para. 149).

segregation, including segregation in education.[27] Of course, the essence of segregation policies or practices is that they are chosen or driven by the activities of those who are not within the 'target' groups; this applies whether the segregation is legally or socially sanctioned. On the other hand, the Chinatowns of this world may be in part the product of the choices of those who inhabit them.[28] It is noted that the thrust of General Recommendation XIX is on the negative consequences of informal segregation, which is perhaps the key, including stigmatisation, etc., which does not incorporate the self-descriptions of those who 'choose' their neighbourhoods.[29] The Roma are a particular case in point – General Recommendation XXVII[30] urges, *inter alia*, that States 'develop and implement policies aimed at avoiding segregation of Roma communities in housing',[31] and 'act firmly against any discriminatory practices affecting Roma by local authorities and by private owners, with regard to taking residence and access to housing'.[32] There is sometimes a fine line between such phenomena and the often defensive choices of groups anxious to preserve their distinctiveness – including the territorial component, especially relevant to indigenous peoples.[33] It has – not surprisingly – taken some time to clarify any potential in the Convention to support a politics of group recognition,[34] with the elements of 'separate domain' which such a politics may entail.

CERD drew the attention of The Netherlands to General Recommendation XIX(47) in the light of evidence of 'increasing racial segregation in society, mainly in the big towns, with so-called "white" schools and neighbourhoods' (A/53/18, para. 103). In Concluding observations on Sweden, the Committee expressed concern about 'increasing residential de facto segregation', recommending that the State party 'ensure compliance with the law against discrimination in the allocation of housing' and supply information on *de facto* segregation in its next report: A/55/18, para. 338.

[27] In concluding observations on Slovakia, the Committee noted that 'a disproportionately large number of Roma children . . . are segregated or placed in schools for mentally disabled children', recommending that the government 'expand strategies to facilitate the integration of children of minority pupils into mainstream education' (A/55/18, para. 262).

[28] See Banton *International Action*, on self-segregation and related phenomena, discussed in relation to the FRG, Sweden, France and The Netherlands, pp. 200–2. The segregation issue has been raised in connection with Germany: CERD/C/SR.1449, para. 49.

[29] Cf. the segregation created by the parallel existence of public and private schools: concluding observations on the Second, Third and Fourth Periodic Reports of Zimbabwe, A/55/18, para. 196.

[30] Adopted at the 57th Session, 31 July–25 August 2000.

[31] Para. 30.

[32] Para. 31.

[33] For further reflections on informal segregation, see M. Banton, 'The causes of, and remedies for, racial discrimination', background paper for the World Conference Against Racism, etc., E/CN.4/1999/WG.1/BP.6, 26 February 1999, paras. 25–30.

[34] Thornberry, *International Law*, ch. 29; on the emergence of concern with indigenous peoples, see also ch. 1 in this volume.

Racial discrimination

While 'race' as such is not defined in the Convention, the term 'racial discrimination' is defined as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.[35] The scope of the Convention is thus broader than most folkloric or 'scientific' notions of race or the 'idiom of race as a way of defining . . . otherness'.[36] The description incorporates what appear to be overlapping notions of 'descent' and 'national or ethnic origin'. 'Descent' was suggested by India in the Third Committee[37] and was approved without much debate – the drafting record does not elucidate relevant distinctions. Schwelb comments that 'it is reasonable to assume that "descent" includes the notion of "caste" '.[38] This appears to be the view of CERD which, in the context of examination of reports by India has affirmed that descent 'does not solely refer to "race" ',[39] concluding that the situation of India's Scheduled Castes and Scheduled Tribes falls within the purview of the Convention.[40] This conclusion is challenged by India through linking 'descent' to 'race' and arguing that ' "race" in India is distinct from "caste" '.[41] The position of India has demonstrated some mutability in this, and information on castes and tribes had been submitted by India in previous reports.[42] However, in the drafting of the Convention, representatives took the view that castes and tribes were primarily a social and economic issue, and that the caste system affected people 'of the same racial stock and ethnic origin as their fellow citizens'.[43] India

[35] Article 1.1.

[36] Banton, *International Action*, p. 76.

[37] Thornberry, *International Law*, pp. 261–2.

[38] E. Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination', *ICLQ* 15 (1966), 996, n. 43.

[39] A/51/18, para. 352. The position was forcefully expressed by many individual members of the Committee: 'If "descent" was the equivalent of "race", it would not have been necessary to include both concepts in the Convention' (Wolfrum, CERD/C/SR.1161, para. 20); 'The Committee's conceptions of "race" and "descent" clearly differed from those of the Government of India' (Van Boven, CERD/C/SR.1162, para. 14); 'The fact that castes and tribes were based on descent brought them strictly within the Convention' (Chigovera, *ibid.*, para. 22).

[40] *Ibid.*

[41] Consolidated Tenth to Fourteenth Periodic Reports of India, CERD/C/299/Add.3: 'both castes and tribes are systems based on "descent" . . . It is obvious, however, that the use of the term "descent" in the Convention clearly refers to "race" . . . the policies of the Indian Government relating to Scheduled Castes and Scheduled Tribes do not come under the purview of Article 1 of the Convention' (para. 7).

[42] See the caveat in CERD/C/299/Add.3, *ibid.*

[43] UN Doc. A/C.3/SR.1306, para. 25.

has nevertheless indicated its willingness to provide information on these groups.[44] Analogous issues have since been raised by reports of Bangladesh,[45] Japan[46] and Nepal.[47] In the case of Japan, the Committee observed that it considered 'contrary to the State party, that the term "descent" has its own meaning and is not to be confused with race or national or ethnic or national origin', recommending the State to ensure the protection of the rights 'of all minorities, including the . . . Burakumin'.[48] In a parallel move, the Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution on 'Discrimination based on work and descent' in 2000, and commissioned the preparation of a working paper.[49] The issue – commented on extensively in the present work – is an aspect of a larger question of determinations of group status, including claims by States to uniqueness[50] in social arrangements, thus eluding capture by the purportedly transcultural categories[51] of international law. Schwelb combines the various terms above in a complex formula – the terms cover distinctions 'on the ground of present or previous nationality in the ethnographical sense and on the ground of previous nationality in the politico-legal sense of citizenship'.[52]

[44] A/51/18, p. 128. One of the representatives of India offered a more nuanced view in stating that the 'notion of "race" was not entirely foreign to that of "caste"; but . . . racial differences were secondary to cultural ones . . . race had never really been determinant for caste' (CERD/C/SR.1163, para. 3).

[45] Concluding Observations of the Committee, CERD/C/58/Misc.26/Rev.3, para. 11.

[46] The Report of Japan, CERD/C/350/Add.2, 26 September 2000, made no reference to the issue of the Buraku.

[47] Concluding Observations of the Committee in A/55/18, para. 299: 'The Committee remains concerned at the existence of caste-based discrimination and the denial which this system imposes on some segments of the population of the enjoyment of the rights contained in the Convention'.

[48] Concluding Observations of the Committee, A/56/18, para. 165. Extensive submissions were made to the Committee by NGOs before and during consideration of the report of Japan, including a report by the Japan Federation of Bar Associations (JFBA). A number of submissions highlighted the plight of Burakumin – a community historically identified with work in certain 'unclean' trades. Appraisals of an effective methodology for NGOs anticipating a State report are made in A. Tanaka and Y. Nagamine, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Guide for NGOs* (Tokyo and London, IMADR and Minority Rights Group, 2001).

[49] E/CN.4/Sub.2/Res/2000/4, 11 August 2000. *Inter alia*, the resolution declares (para. 1) that 'discrimination based on work and descent is a form of discrimination prohibited by international human rights law'.

[50] 'Scheduled Castes and . . . Tribes are unique to Indian society and its historical process' (Fourteenth Report of India, CERD/C/299/Add.3, para. 7).

[51] 'the drafters of the Convention had thought "race" was a transcultural concept for which equivalents existed in all languages' (CERD Chairman (Banton), CERD/C/SR.1161, para. 8).

[52] Schwelb, *The International Convention*, 1007; contra I. Diaconu 'The definitions of racial discrimination', background paper for the World Conference on Racism, etc., E/CN.4/1999/WG.1/BP.10, who states (para. 17) that the definition was composed

On the core notion of discrimination, General Recommendation XIV(42)[53] observed that 'differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'.[54] The Committee observes further that discrimination is always invidious, while differentiation may be acceptable.[55] The incorporation an element of intention (purpose) in the definition of discrimination has provoked speculation on whether unintentional discrimination is caught by the Convention.[56] It appears to be so in view of the term 'effect' –[57] this is also the view of CERD, which will 'critique State practices, however socially significant and well intended',[58] which unintentionally discriminate.

Group membership

As with most other instruments on human rights, the question of membership of the various intimated groups is not further elaborated,[59] though in General Recommendation VIII on 'identification with a particular racial or ethnic group'[60] CERD made the important normative statement that membership of a group '*shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned*'.[61] This echoes the statement in ILO Convention No. 169,[62] that self-identification shall be 'a fundamental criterion' for assessing indigenous and tribal group membership. In the ILO

simply by adding together as many elements as possible in order to avoid lacunae, and that 'no case of discrimination on grounds of previous citizenship, without involving the grounds of ethnic or national origin, was presented in the more than 25 years of activity of . . . CERD'. Article 1.3 of the Convention states that it does not apply to distinctions, etc., between citizens and non-citizens.

[53] Adopted on 17 March 1993.

[54] Text in *Manual on Human Rights Reporting*, pp. 272–3.

[55] See comment in M. O'Flaherty, 'Substantive provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in S. Pritchard (ed.), *Indigenous Peoples, the United Nations and Human Rights* (London, Zed Books, 1998), pp. 162–83.

[56] For example, Banton, *International Action*, pp. 192–3.

[57] For a critique of basic concepts, see K. Frostell, 'Gender difference and the non-discrimination principle in the CCPR and the CEDAW', in L. Hanikainen and E. Nykanen (eds.), *New Trends in Discrimination Law – International Perspectives* (Turku Law School, 1999), pp. 29–57.

[58] O'Flaherty, 'Substantive provisions', p. 166.

[59] In practice, as Banton notes, linking the prohibition of discrimination to 'origin' has proved simpler than attempting to relate it to an ethnic group – with the attendant problems of assessing group membership: *International Action*, pp. 194–5.

[60] A/45/18.

[61] See the reminder (Concluding Observations) to Greece on the principle of self-identification in respect of its Eighth, Ninth, Tenth and Eleventh Periodic Reports at the 41st Session of the Committee, A/47/18, para. 91.

[62] See discussion in ch. 2 of this volume.

formula, this subjective criterion is set in the context of other parameters for 'indigenous' and 'tribal', with no further indication in that text on how conflicting claims (group/individual) are to be resolved. The CERD formula proposes self-identification as the stem principle from which derogations must be justified, placing the onus on those who contest the self-description of individuals.[63] Apart from challenging State laws directly limiting appurtenance to groups on poorly argued grounds,[64] this prioritisation of the individual could also challenge the right of groups to limit membership – a species of local restriction which could generate international law consequences. It is clear that while the definition of racial discrimination is linked to the domain of 'public life',[65] the Convention obliges States to intervene in cases of discrimination by non-State actors – by, for example, prohibiting and bringing to an end 'racial discrimination by any persons, group or organization'.[66]

Special measures

The definition of racial discrimination allows limited space for special measures:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure . . . equal enjoyment in the exercise of human rights . . . shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of special rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.[67]

The Convention goes beyond this exemption of special measures from the prohibition of discrimination. In the context of the general undertaking of States

[63] In discussions on CERD's draft General Recommendation on Demographic Information, the Chairman (Aboul-Nasr) 'questioned the novel idea of self-identification with a particular group or minority' (CERD/C/SR.1363/Add.1 (1 September 1999), para. 9). CERD member Diaconu, on the other hand, 'stressed the recognized importance of personal choice in determining membership of a group or community' (*ibid.*, para. 10). Cf. para. 94, where Diaconu argued that the principle of individual decision on membership of a group was consistent with the UN Declaration on Minorities.

[64] 'From the debate in CERD it is clear that the bare denial by a State that an individual is a member of a group would not constitute a "justification to the contrary"' (O'Flaherty, 'Substantive provisions', p. 166).

[65] See the reservation of the United States stating that under the Convention, the USA does not propose to regulate private conduct to any greater extent than under its Constitution and laws: ST/LEG/SER.E/14, p. 102.

[66] Article 2(d). See also Article 4(a). In General Recommendation XX – A/51/18, annex VIII – the Committee states (para. 4): 'To the extent that private institutions influence the exercise of rights or the availability of opportunities, the State Party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination'.

[67] Article 1.4.

to 'pursue by all appropriate means and without delay a policy of eliminating racial discrimination',[68] Article 2.2 makes obligatory the taking of 'special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them', 'when the circumstances so warrant'. The restrictive formula in Article 1.4 is adapted to ensure that such measures 'shall in no case entail . . . the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved'. In the drafting of the Convention, a number of States expressed reservations concerning the inclusion of special measures – claiming, *inter alia*, that they would perpetuate separation from the wider community[69] and would open the door to all sorts of 'legal manoeuvring to justify various kinds of racial discrimination'.[70] The notion of special measures now sits more comfortably in the general discourse of human rights.

Group orientation

The Convention is group-orientated to the extent that 'advancement', 'development' and 'protection' relate to groups as well as individuals, opening up significant possibilities for addressing the collective interests of indigenous groups within the parameters of the Convention rights.[71] Further, the States' parties undertake not to engage in any 'act or practice of racial discrimination against persons, *groups of persons* or institutions', and shall make punishable incitement to racial discrimination against 'any race or *group of persons* of another colour or ethnic origin'.[72] Article 14 gives States the option to allow CERD to receive communications from individuals or *groups* of individuals. Text and procedure are therefore less thoroughly individualised than comparable human rights instruments.

Prohibitions and rights

Other articles of the Convention require only brief description in the present context. Article 4 sets up a potential conflict between the elimination of racial discrimination and freedom of expression by requiring that States' parties 'condemn all propaganda and all organizations which are based on ideas or

[68] Article 2.1. There is also a Convention requirement to promote interracial understanding. CERD has observed that, towards the ends of eliminating discrimination and promoting understanding 'States must be prepared to use both coercion and persuasion – utilizing the power of the law to prohibit and punish, as well as the power of education and information to enlighten and persuade' (General Recommendation XIV(42).

[69] Chile, E/CN.4/Sub.2/SR.416, para. 13.

[70] Ivory Coast, A/C.3/SR.1306, para. 23.

[71] In the Declaration on the Elimination of Racial Discrimination, 'advancement' related only to individuals – see Thornberry, *International Law*, p. 268.

[72] Articles 2(a), and 4(a) – present author's emphasis.

theories of superiority of one race or group of persons of one colour or ethnic origin'. However, obligations are to be exercised with due regard to 'the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention'.[73] Article 5 is a primary focus of reports as it guarantees equality before the law 'notably in the enjoyment of the following rights' – a long list follows, including civil and political, and economic and social rights. The list is regarded by CERD as indicative rather than exhaustive, a view supported clearly by the text.[74] However, if the list in Article 5 is only indicative, the source of 'other rights' is not equally indicated. O'Flaherty refers to individual CERD opinions that it extends to 'all rights recognised by the State regardless of source'.[75] CERD General Recommendation XX(48) recalls only the UN Charter, the UDHR and the international covenants. Perhaps it might be better to say that Article 5 extends to all rights obligating the State[76] by virtue of hard or soft human rights law, having regard to the general evolution of standards rather than particular instruments. On the other hand, the view cited by O'Flaherty suggests that even a right which is not obligatory under international law must be accorded on non-discriminatory principles.[77] Diaconu agrees, adding that the definition (Article 1.1) directs the prohibition of discrimination against discrimination in any field of public life as opposed to any particular category of rights. This makes it clear 'that the scope of the rights to be protected [is] against discrimination in general . . . not limited to the categories of rights enshrined in . . . international instruments',[78] but extends to 'any field regulated and protected by public authorities'.[79] In either case, the legal result is significant for indigenous peoples in that any of their rights developed under international processes would also implicate non-discriminatory application – whatever this means in terms of appropriate comparators for individual or collective indigenous rights.

The Convention and indigenous peoples

The broad range of human groups included under the rubric of racial discrimination clearly includes indigenous peoples, even if they are not specifically

[73] See General Recommendation XV(42), HRI/GEN/1/Rev. 5, 184–5; *LK v Netherlands*, Communication No. 4/1991, A/48/18 (1993).

[74] General Recommendation XX(48), HRI/GEN/1/Rev. 5, 188–9, para. 1.

[75] In Pritchard, *Indigenous Peoples*, p. 179.

[76] General Recommendation XX states that Article 5 does not of itself create rights 'but assumes the existence and recognition of . . . rights' (para. 1).

[77] Article 2 is relevant in view of the very broad ambition to eliminate all forms of racial discrimination. The O'Flaherty interpretation is supported by General Recommendation XX.

[78] Para. 24.

[79] *Ibid.*

mentioned. While CERD has concerned itself with indigenous peoples for a considerable period of time, State recognition of the ethnic diversity of societies has been slow to emerge. This applies to States with indigenous peoples as to others. Initial reports, and responses of States to the promptings of CERD, sometimes contained denials of the existence of indigenous groups as separate entities. Additionally, or in the alternative, governments denied the existence of any racial discrimination in the State. Venezuela denied both the existence of separate races and any racial discrimination.[80] Brazil admitted to a multiplicity of races on its territory, but denied racial discrimination.[81] The Committee treated such claims with varying degrees of caution and scepticism.[82] State policies concerning indigenous peoples were under scrutiny in the 1970s and Committee interest continues to grow. In recent years, the concern of the Committee with indigenous issues has become pervasive. Taking only the reports for 1996[83] and 1997[84] as examples, indigenous issues – counting as 'indigenous' those cases where the term, or 'tribal' is employed by the Committee – surface in the cases of Argentina,[85] Bolivia,[86] Brazil,[87] Colombia,[88] Denmark,[89] Finland,[90] Guatemala,[91] India,[92] Mexico,[93] Norway,[94] Pakistan,[95] Panama,[96] Philippines,[97] Russian Federation[98] and Sweden.[99] The Committee continues to comment regularly on discrimination against indigenous peoples. At the sessions in 2000, concluding observations on various aspects of indigenous rights were made in relation to Australia,[100] Denmark,[101] Finland,[102] and Sweden. In the concluding observations at the fifty-eighth session in

[80] A/31/18, para. 126.
[81] A/31/18, para. 124.
[82] Thornberry, *International Law*, ch. 30.
[83] *Report of the Committee on the Elimination of Racial Discrimination*, UN A/51/18.
[84] A/52/18.
[85] A/52/18, pp. 69–73.
[86] A/51/18, pp. 41–5.
[87] A/51/18, pp. 45–8.
[88] A/51/18, pp. 15–17.
[89] A/52/18, pp. 59–62. The reference in this case is to the population of Thule who practise seal hunting.
[90] A/51/18, pp. 29–32.
[91] A/52/18, pp. 15–18.
[92] A/51/18, pp. 51–5.
[93] A/52/18, pp. 42–6.
[94] A/52/18, pp. 77–9.
[95] A/52/18, pp. 28–31.
[96] A/52/18, pp. 46–9.
[97] A/52/18, pp. 55–9.
[98] A/51/18, pp. 25–8.
[99] A/52/18, pp. 65–7.
[100] A/55/18, paras. 23–43.
[101] *Ibid.*, para. 69.
[102] *Ibid.*, para. 214; Sweden, paras. 337–8.

March 2001, concluding observations on Argentina, Bangladesh, Japan and Sudan referred in one way or another to indigenous groups.[103] In the case of Japan, the Committee referred to the Ainu of Hokkaido as indigenous, whereas in the report they were referred to rather as 'Ainu people', practising the 'Ainu culture' and 'speaking the Ainu language'.[104]

Heritage and the Convention

Both the UDHR and the ICESCR place relevant intellectual property protection in the sphere of rights of an individual, rather than a collective right. A step towards recognition of a collective element is taken by the ICEARD, which prohibits discrimination in relation to the 'right to own property alone as well as in association with others'.[105] In the domain of individual rights such as copyright and patent, the general rule is that protection extends only to new products and only for a limited time, after which the product, knowledge, etc., is in the public domain and freely available to all. The application of this model to indigenous peoples would, according to the Special Rapporteur, have the same disastrous effect on them as the individualisation of the ownership of their lands.[106]

The government of Sweden observed that Swedish intellectual property law does not distinguish between the rights of Saami and other citizens. One may surmise that governments may bring the provisions of instruments on non-discrimination into play on this and other issues (they already have). In interpreting the reference to individual and collective property rights in the Convention on Racial Discrimination, a UN Special Rapporteur observed that:

> A government's failure to protect indigenous peoples' collective rights to their heritage may be discriminatory, if justified by the argument that indigenous peoples have a lesser right than the State, or museums and academic institutions.[107]

There is another way of looking at this in view of the Swedish observation: namely that the Convention also mandates 'when the circumstances so

[103] A/56/18, pp. 18–21 (Argentina), A/56/18, pp. 21–4 (Bangladesh), A/56/18, pp. 34–8 (Japan) and A/56/18, pp. 40–2 (Sudan).

[104] 'The Committee recommends the State party to take steps to further promote the rights of the Ainu, as indigenous people. In this regard the Committee draws the attention of the State party to its General Recommendation XXIII (51) . . . that calls, *inter alia*, for the recognition and protection of land rights as well as restitution and compensation for loss. The State party is also encouraged to ratify and or use as guidance the ILO Convention 169 on Indigenous and Tribal Peoples' (A/56/18, para. 175). The report is contained in CERD/C/350/Add.2; the principal references to Ainu are made in paras. 10–19.

[105] Article 5(d)(v).

[106] E/CN.4/Sub.2/1993/28, para. 32.

[107] E/CN.4/Sub.2/1993/28, para. 119.

warrant . . . in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms'.[108] There is no substantial objection to promotion of the case of indigenous peoples in this respect.

Information on indigenous peoples/indigenous women

CERD constantly asks for further and better particulars of population composition in order better to calibrate the real issues of the enjoyment of rights. Thus, in the case of Colombia,[109] the Committee expressed its concern that the

> lack of reliable statistical and qualitative data on the demographic composition of the Colombian population and on the enjoyment of . . . rights by the indigenous and the Afro-Colombian people makes it difficult to evaluate the results of different measures and policies.[110]

CERD also criticised the lack of information on indicators to evaluate the impact of policies on the above communities, 'including the land use and ownership policies'.[111] The lack of information is in some cases tied to a particular reading of which groups are covered by the Convention. The view maintained by India on the race issue led, *inter alia*, to a lack of information in the report on the National Commission on the Scheduled Castes and Scheduled Tribes and the National Commission on Minorities. Egregious omissions – such as the lack of any reference to the San/Bushmen in the report of Namibia – will also elicit CERD comment.[112] Part one of the general guidelines concerning the form and content of reports provides – in common with the other treaty bodies – that reports should contain general information on, *inter alia*, the land and people. Information is prepared in line with UN consolidated guidelines,[113] which request information about

[108] Article 2.2.

[109] For the detailed CERD examination of the Sixth and Seventh Periodic Reports of Colombia, CERD/C/257/Add.1, see CERD/C/SR.1135–6.

[110] A/51/18, para. 43.

[111] *Ibid.*, para. 44. In concluding observations on the Eight and Ninth Periodic Reports of Colombia (CERD/C/332/Add.1) the Committee expressed its concern that 'development and resource exploration programmes on land subject to the property rights of indigenous and Afro-Colombian communities have been pursued without sufficient consultation with the representatives of these communities and without sufficient concern for the environmental and socio-economic impact of these activities' (A/54/18, para. 469).

[112] Fourth, Fifth, Sixth and Seventh Periodic Reports, CERD/C/275/Add.1, commented upon in A/51/18, para. 499.

[113] Contained in Doc. HRI/CORE/1.

the reporting country's ethnic and demographic characteristics.[114] A revised version of the guidelines notes that some States object to recording ethnic characteristics in censuses; in such cases, information on the basis of mother tongues, or information derived from social surveys may function as a substitute, and 'a qualitative description of ethnic characteristics' should be supplied in the absence of quantitative measurements.[115] CERD appreciates the recognition by the State of ethnicity in a factual, 'tell it how it is' approach, and credits a State for drawing up such a narrative.[116] The Committee has also stressed the particular appropriateness of the Convention for any multicultural state with indigenous communities.[117]

Despite decades of CERD practice, States continue to deny the existence of relevant groups and/or the existence of racial discrimination. These are issues which CERD addresses, sometimes in forceful terms, otherwise the application and efficacy of the Convention would be undermined. Two recent cases are those of Mexico and El Salvador. On Mexico, CERD criticised the reluctance to link the treatment of its fifty-six indigenous groups to the definition of racial discrimination.[118] The Committee has noted the persistence of differences of interpretation with Mexico on the scope of obligations under the Convention.[119] On the report of El Salvador,[120] in 1995, CERD stated that the

> assertion of the State party that, because there are no physical distinctions between the indigenous population and the population as a whole, and because the number of indigenous persons is insignificant, no racial discrimination exists, is not acceptable.[121]

General Recommendation XXIV seeks to address the reporting 'of persons belonging to different races, national/ethnic groups, or indigenous peoples'.[122] The Committee stresses that the Convention relates to 'all persons who belong to different races, national or ethnic groups or to indigenous peoples', observing that 'a number of States parties recognize the presence on their territory of some . . . groups or indigenous peoples, while disregarding

[114] See *Manual on Human Rights Reporting*, pp. 59–61.
[115] HRI/GEN/2, 14 April 2000, p. 32.
[116] Thus, for the Twelfth Periodic Report of Sweden, CERD/C/280/Add.4, the Committee observed: 'The statement to the effect that the State party has in just a few decades developed from a relatively homogeneous society into a multicultural society . . . has been noted with great interest and appreciation' (A/52/18, para. 494).
[117] See the remarks on Guyana in A/52/18, para. 485: 'The multiethnic composition of the population and the existence of indigenous communities in Guyana make the implementation of the Convention particularly important'.
[118] A/50/18, para. 382.
[119] A/52/18, para. 303.
[120] See also the remarks on Mexico, A/50/18, para. 382.
[121] A/50/18, cited in Banton, *International Action*, p. 234.
[122] 27.08.99, A/54/18, annex V.

others'.[123] The Committee considers that certain criteria 'should be applied uniformly to all groups' in relation to the number and characteristics of the persons concerned.[124] Other States fail to collect data but 'decide at their own discretion which groups constitute ethnic groups or indigenous peoples': the Committee 'believes that there is an international standard concerning the specific rights of people belonging to such groups, together with generally recognized norms concerning equal rights for all and non-discrimination'. The recognition of some and refusal to recognise others may give rise to differing treatment for various groups'.[125] The Committee's warning is clear enough: that lack of attention to the facts of the case can easily lead to discriminatory policies. It is instructive that indigenous peoples are explicitly included in General Recommendation XXIV.

CERD General Recommendation XXV on 'gender-related aspects of racial discrimination',[126] amplifies further the information requirements. The Committee observes that certain forms of racial discrimination are gender-specific, including 'sexual violence committed against women members of particular racial or ethnic groups . . . the coerced sterilization of indigenous women'.[127] The Committee promises an enhancement of efforts to integrate gender perspectives into its work, and seeks further disaggregation of ethnic, etc., data 'by gender within those racial or ethnic groups', which may reveal 'forms of racial discrimination against women that may otherwise go unnoticed or unaddressed'.[128]

Land rights and general discrimination

Land rights are another indigenous issue regularly engaging the Committee. The Committee has addressed this issue in both concrete and abstract terms. In the case of Guatemala, CERD stressed 'the importance that land holds for indigenous peoples and their cultural and spiritual identity, including the fact that they have a different concept of land use and ownership'.[129] The Committee has often been concerned with specific threats to indigenous lands, though such interferences as invasions, evictions, displacements and the denial by force of a right to return to lands,[130] mining activities and tourism,[131] as well as failure to deliver expeditiously an appropriate or promised legal

[123] Para. 2.
[124] *Ibid.*
[125] *Ibid.*, para. 3.
[126] 56th Session, 2000.
[127] Para. 2.
[128] *Ibid.*, para. 6.
[129] A/52/18, para. 93.
[130] In the case of the Philippines, A/52/18, para. 425.
[131] Panama, A/52/18, paras. 338 and 350.

regime including the demarcation of lands.[132] CERD has also drawn attention to indigenous own language or[133] bilingual education,[134] legislation on the use of indigenous languages before legal and administrative authorities,[135] the translation of the Convention into indigenous languages,[136] political participation,[137] as well as vulnerability and general discrimination in a variety of social spheres. In the case of Sweden, the Committee expressed concern about the effect on land rights, including hunting and fishing rights, resulting from privatisation of Saami lands,[138] recommending ratification of ILO Convention 169.[139]

In concluding observations on the Tenth–Twelfth Periodic Reports of Australia,[140] the Committee was highly critical of the government response to the 'National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families (the 'stolen children'), expressing its concern at the absence of a formal apology for the practices and recommending that the State party 'consider the need to address appropriately the extraordinary harm inflicted by these racially discriminatory practices'.[141] The Committee also seriously questioned the compatibility with the Convention of Australian mandatory sentencing laws 'which appear to target offences that are committed disproportionately by indigenous Australians'.[142] The observations also pointed to 'the continuing discrimination faced by indigenous Australians in the enjoyment of their economic, social and cultural rights' and 'the extent of the dramatic inequality still experienced by an indigenous population that represents only 2.1 per cent of the total population of a highly developed industrialized State'.[143]

[132] See the observations on the Tenth, Eleventh, Twelfth and Thirteenth reports of Brazil, CERD/C/263/Add.10, in A/51/18, especially para. 303.

[133] Russian Federation, A/51/18, para. 138; Mexico, A/52/18, paras. 312, 313, 314, 320.

[134] Guatemala, A/52/18, para. 94. Cf. the concluding observations on Estonia, A/55/18, para. 82.

[135] 'While the Committee notes the new legislation which gives individuals the right to use the Saami language in legal and administrative proceedings, it stresses that this right is recognized only in respect of some geographic regions. It is recommended that the State party consider the extension of these rights to all Saami territory' (A/55/18, Concluding Observations on the Thirteenth and Fourteenth reports of Sweden, 22 August 2000, para. 337).

[136] Concluding Observations on the Fourteenth Periodic report of Denmark, A/55/18, para. 69.

[137] Brazil, A/51/18, para. 302.

[138] A/55/18, para. 338.

[139] Similarly, the Committee regretted that Finland had not ratified Convention 169: A/55/18, para. 214.

[140] Reports submitted as one document – CERD/C/335/Add.2, discussed in CERD/C/SR. 1393, 1394, and 1395, 21–22 March 2000.

[141] CERD/C/304/Add.101, 24 March 2000, para. 13.

[142] *Ibid*., para. 16.

[143] *Ibid.*, para. 18.

Self-determination

One Recommendation stands out as particularly relevant to indigenous claims, in the light of indigenous appropriation of the vocabulary of self-determination. However, General Recommendation XXI (48)[144] takes as its point of departure the claims of 'ethnic or religious groups or minorities' to secession. This is not a burning issue for many indigenous peoples, though State resistance to claims of self-determination often raises secession as a spectre. The Recommendation is notable for its recognition of a concrete link between self-determination and human rights, including by implication the rights of ethnic groups in virtue of a reference to the UN Declaration on Minorities.[145] A second feature is the clear delineation of external and internal aspects of self-determination. In the latter context,

> Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the government of the country of which they are citizens. Also, governments should consider . . . vesting persons belonging to ethnic or linguistic groups . . . with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.[146]

A third feature is the re-evoking of the Declaration on Principles of International Law,[147] and the conclusion that 'international law has not recognized a general right of peoples unilaterally to declare secession from a State'. This does not rule out 'the possibility of arrangements reached by free agreements of all concerned'.[148]

The General Recommendation on indigenous peoples

The rising tide of indigenous issues in the Convention prompted the Committee to issue a specific General Recommendation on the question. In General Recommendation XXIII (51),[149] the Committee noted that in its practice, 'the situation of indigenous peoples has always been a matter of close attention and concern',[150] and that 'discrimination against indigenous peoples falls under the scope of the Convention',[151] a point which is later

[144] A/51/18, 125–6; CERD/C/365, 15–17.
[145] Para. 8 – substantive para. 3 of Recommendation XXI, but the number sequence for paragraphs also includes Recommendation XX.
[146] Para. 10.
[147] General Assembly resolution 2625 (XXV), 1970.
[148] Para. 11.
[149] HRI/GEN/1/Rev. 5, 18 August 1997; also CERD/C/365 – a compilation of General Recommendations, 11 February 1999.
[150] Para. 1.
[151] *Ibid.*

reaffirmed.[152] CERD proceeds to relate the forms of discrimination suffered by the indigenous, observing in particular that 'they have lost their land and resources to colonists, commercial companies and state enterprises', and that 'consequently the preservation of their culture and their historical identity has been and still is jeopardized'.[153] The Committee calls in particular upon States parties to 'recognize and respect indigenous culture, history, language[154] and way of life as an enrichment of the State's cultural identity and . . . promote its preservation'.[155] States are also urged to ensure freedom from discrimination, to provide conditions 'allowing for a sustainable economic and social development compatible with their [the indigenous peoples'] cultural characteristics',[156] to ensure participation in public life and 'that no decisions directly relating to [indigenous] rights and interests are taken without their informed consent'.[157] The point on 'consent' occasioned considerable discussion of the terms 'participation', 'consultation' and 'consent', with argument focusing on the danger of giving a right of veto to indigenous peoples: 'there were many . . . cases where a small community could hinder the taking of decisions that would be of benefit to citizens. The Committee should be careful not to innovate'.[158] The consensus formula distinguishes between the general right of effective participation in public life, and the narrower issue of decisions directly affecting those indigenous groups. In the latter case, the sense of the Committee's deliberations appears to be that the peoples do have a right of veto.[159] The linguistic form of the Recommendation is in part collective – referring to the rights of indigenous peoples and of indigenous communities: States are called to ensure that 'indigenous communities can exercise their rights'.[160] In other cases, the reference is to 'members of indigenous peoples' – in relation to equality and non-discrimination,[161] and to effective participation. Bearing in mind the limited text of the Convention, the Recommendation as a whole is a significant elaboration of

[152] Para. 2.

[153] Para. 3.

[154] One CERD member, Ahmadu, cautioned the Committee 'against taking the issue of indigenous languages too far because it could prevent indigenous peoples from becoming integrated' (CERD/C/SR.1235, para. 65).

[155] Para. 3.a.

[156] Para. 3.c.

[157] Para. 3.d.

[158] Diaconu, SR.1235, para. 69.

[159] 'the two terms "consent" and "participation" meant entirely different things. If indigenous peoples were to give their "consent", they must agree to the proposal; they could "participate" and express their approval or disapproval, without having any power over the final decision' (Garvalov, para. 82).

[160] Para. 4.e.

[161] Members of indigenous peoples should be free from discrimination, 'in particular that based on indigenous origin or identity' (para. 4.b).

norms,[162] including the denouement, which outlines a variety of desiderata without formal reference points in the text of the treaty:

> The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only where this is for factual reasons not possible, [should] the right to restitution . . . be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[163]

The Recommendation's account of remedies was placed in context by a former member of the Committee to the effect that 'when collective rights were involved, the lodging of individual claims with a view to obtaining reparation appeared to be of limited utility. More effective results were possible through taking special measures to provide opportunities for self-development by groups which, following a long period of persistent racial discrimination, had been denied such opportunities'.[164] The Committee calls upon States to include full information in their reports on the situation of indigenous peoples.[165] Given that the provisions of the Convention apply to indigenous peoples, it is axiomatic that all other General Recommendations apply to the indigenous as they do to other groups suffering discrimination.

Application of the Convention – native title in Australia

Aspects of indigenous rights in Australia are covered elsewhere in this work, including the importance of *Mabo v Queensland*,[166] which in its rejection of the application of *terra nullius* to Australia, affirmed that pre-existing land rights of the Aboriginal peoples survived the extension of British sovereignty over the country. Aboriginal issues have been a matter of concern to CERD, though judgments of Australia's implementation of the Convention had been broadly favourable. On the report of Australia after *Mabo*, CERD noted 'the attention paid by the judiciary to the implementation of the

[162] Although, as one member pointed out, 'the text under discussion was a general recommendation which did not have the legal implications of a treaty or convention' (Diaconu, SR.1235, para. 77).

[163] Para. 5.

[164] T. van Boven, in *Report of the Expert Seminar on Remedies available to the Victims of Racial Discrimination, Xenophobia and Related Intolerance and on Good National Practices*, UN Doc. A/CONF.189/PC.1/8, 26 April 2000, para. 57.

[165] Para. 6.

[166] *Mabo v Queensland (No. 2)* (1992) – see ch. 2 of the present work.

Convention' which was 'particularly appreciated'.[167] The Committee regarded the *Mabo* case as 'a very significant development', noting 'with satisfaction' the rejection of *terra nullius* doctrine.[168] The CERD reading of the Native Title Act 1993 (NTA 1993) was also favourable.[169] The Committee none the less expressed concern with State–federal relations in the field of human rights, Aboriginal deaths in custody, and Aboriginal disadvantages in education, employment, housing and health services.[170] On the immediate post-*Mabo* situation, CERD was critical of the protracted legal proceedings for the recognition of native title, the stringent conditions on proof of connection with land, and the position of those who identified as Aboriginal but all of whose ancestors were not.[171] The Committee recommended, *inter alia*, that Australia 'pursue an energetic policy of recognizing aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past'.[172]

Proposed changes to the native title legislation prompted CERD to act under its early-warning procedures.[173] The list of procedural manoeuvres by the committee includes the activation of the power under Article 9(1) to request further information from the States parties. In a decision adopted at its 53rd Session, the Committee requested the government of Australia to provide it with information on changes projected or introduced to the NTA 1993 as well as any changes in State policy on Aboriginal land rights and in the functions of the Aboriginal and Torres Strait Social Justice Commissioner.[174] The issues were considered at the 54th Session of the Committee,[175] following receipt of an explanatory document from the Australian government.[176] In a later decision,[177] the Committee expressed concern 'over the compatibility of the Native Title Act, as currently amended, with the State party's international obligations under the Convention'.[178] The Committee

[167] Ninth Periodic Report of Australia, CERD/C/223/Add.1, CERD report in A/49/18, paras. 512–51, para. 540.

[168] Para. 540.

[169] Para. 540.

[170] *Ibid*., paras. 542–6.

[171] Para. 544.

[172] Para. 547.

[173] G. Triggs, 'Australia's indigenous peoples and international law: validity of the Native Title Amendment Act 1998', *Melbourne University Law Review* 23/2 (1999), 372–415.

[174] Decision 1 (53), A/53/18, para. 22.

[175] Discussed with the State party at the 1,323rd and 1,324th meetings of CERD.

[176] CERD/C/347.

[177] Decision 2 (54), CERD/C/54/Misc.40/Rev.2. In Decision 2 (55) of August 1999, the Committee reaffirmed its position and decided to continue consideration of the matter together with the State party's Twelfth Report: see pp. 222–3 in this volume for discussion of the Twelfth Report.

[178] Para. 6.

called upon Australia to address the concerns as a matter of the utmost urgency and to suspend implementation of the 1998 amendments and open discussions with Aboriginal representatives.[179] CERD decided to keep the issue on its agenda under early-warning and urgent action procedures.[180]

How such a highly regarded piece of domestic legislation in the sphere of indigenous rights fell foul of the Racial Discrimination Convention deserves explanation. Despite its revolutionary recognition of Aboriginal title, *Mabo* had left native title as 'a vulnerable property right . . . other land titles were better protected against interference or forced alienation'.[181] The NTA 1993 was passed to integrate this species of title into Australian law through the mechanism of a Native Title Tribunal. The original Act allowed validation of prior land dealings that would have been invalid under Australia's Racial Discrimination Act,[182] but despite this, and in the light of key protection for future land dealings, CERD had accepted the NTA 1993 as compatible with the Convention.[183] The Country Rapporteur for Australia later observed that

> in 1994 the Committee had deemed the Native Title Act 1993 acceptable because there seemed to be sufficient evidence that it was he product of genuine negotiations with the indigenous population, and not because it was discriminatory or because the Committee accepted 200 years of white settlement as a *fait accompli* . . . the question of negotiations was . . . essential . . . since any deviation from the rights prescribed by the Convention in the area of land rights for indigenous peoples must be arrived at by informed consent.[184]

The remarks point to the delicacy of special arrangements for indigenous peoples from an ICEARD perspective, and the dangers of 'tripping over the line' into discriminatory arrangements, even with the best of intentions. Notable features of the 1993 Act from its coming into force was the protection afforded to native title by the 'freehold test' – governments could not do acts on native title land if they could not do these acts on freehold land.[185] From the discrimination viewpoint, this establishment of a rough equivalence between species of title was significant. Further, native title

[179] Para. 11.

[180] Para. 12.

[181] CERD/C/SR.1323, para. 26 – McDougall. According to the summary prepared by the Australian government in response to CERD, 'in common law native title was susceptible to extinguishment by inconsistent grants' (*Additional Information from State Party*, CERD/C/347, para. 16).

[182] Subject to compensation for native title-holders.

[183] SR.1323, para. 27.

[184] CERD/C/SR.1395, 3 April 2000, para. 9. Cf. the remarks of CERD member Yutzis that 'in taking steps to protect minorities, the Government had to be careful not to Institutionalize differences between its Aboriginal population and the population as a whole' (*ibid.* para. 7).

[185] *Additional Information*, para. 12.

was only vulnerable to extinguishment by agreement with title-holders or by non-discriminatory compulsory acquisition. A statutory 'right to negotiate' was also part of the Act, even if it did not amount to an absolute veto over development.[186] It was generally understood after *Mabo* that the grant of a freehold or leasehold (including pastoral leases) interest in land extinguished native title. In the *Wik* case,[187] matters moved on, the High Court of Australia deciding that a government grant of a pastoral lease did not necessarily extinguish native title over the same area, and that the two could co-exist, but that, to the extent of any inconsistency, the pastoral lease prevailed. In the government's view, however, 'the Wik decision . . . created considerable confusion regarding the rights of pastoral lessees and native title-holders where the two co-existed'.[188] According to the government, the pre-Wik understanding of pastoral–native title relationship was factored into the NTA. There was therefore no mechanism in the NTA for managing the relationship, governments had carried out acts on the assumption that no native title existed, and the freehold test would not always be appropriate in cases of co-existing titles.[189] Hence, after extensive debates and controversies, the Native Title Amendment Act (NTAA) was passed in 1998.

According to CERD's Country Rapporteur (Committee member McDougall), the central question was whether the amendments 'had unsettled the compromise between the rights of native title-holders and non-native title-holders, giving greater weight to non-native title even with respect to future land uses'.[190] Four aspects of the NTAA 1998 were of particular concern to the Committee. First, the new Act's 'validation provisions appeared to adopt a 'blanket validation' approach[191] to acts which would have been invalid under both the NTA 1993 and *Wik* – the *Wik* decision was read as requiring a case-by-case analysis rather than blanket validation.[192] Second, the amended Act listed 'previous exclusive possession acts', deemed to extinguish all native title claims. These appeared to include tenures which would not have the same effect in common law,[193] and to deny the possibility of reversion to native title-holders where the non-native title discontinued. Third, pastoral leaseholders were allowed to upgrade the range of primary

[186] *Ibid.*
[187] *Wik Peoples v Queensland* (1996), 187 CLR 1.
[188] SR.1323, para. 64.
[189] *Additional Information*, para. 24.
[190] CERD/C/SR.1323, para. 30.
[191] Native Title Amendment Act, Schedule 4.
[192] CERD/C/SR.1323, McDougall.
[193] Aside from the question of whether common law was itself discriminatory, the Country Rapporteur noted recent cases where a federal court in Western Australia found that many titles listed in the schedule to the amended Act did not have an extinguishment effect at common law: SR.1323, para. 33.

production activities[194] regardless of the effect on co-existing native title and without consent of its holders.[195] Fourth, the new Act restricted (removed) the right to negotiate in some cases, and allowed States and Territories to replace it with a right of consultation and objection.

The Committee's conclusion was that the amended Act 'appears to create legal certainty for governments and third parties at the expense of indigenous title [and] cannot be considered to be a special measure within the meanings of Articles 1(4) and 2(2) of the Convention and raises concerns about the State party's compliance with Articles 2 and 5'.[196] The lack of effective participation by indigenous communities in the formulation of the amendments raised a specific issue on Article 5(c) of the Convention, read in the light of Recommendation XXIII.[197] The conclusion of the Committee are forceful and condemnatory. The Racial Discrimination Convention is incorporated in Australian law through the Racial Discrimination Act, but at the time of the Committee's decision, the legal position appeared to the Committee to be that the Racial Discrimination Act did not control the application of native title legislation.[198]

The Twelfth Periodic Report of Australia was presented on 14 December 1999,[199] with government representatives disagreeing with members of the committee that Australia was still under the early-warning and urgent action procedures. They challenged the perception that the NTAA 1998 represented a regression or a winding back of 1993 protections.[200] The 'four provisions' noted in decision 2 (54) as discriminating against native title holders 'had been justifiable and proportional in the particular circumstances and were not inconsistent with the Convention'.[201] Representatives stressed the extensive evidence taken from indigenous representatives leading up to the 1998 Act, which 'emphasised a non-adversarial, practical approach to resolving native title issues',[202] and 'had encouraged the conclusion of indigenous land use agreements as an alternative to the statutory regime'.[203] The Country Rapporteur questioned the claimed improvements, noting the

[194] Uses of land such as logging or quarrying which were more intensive than pastoral activities.

[195] The Country Rapporteur noted that consent to such activities would be required from non-native title-holders: SR.1323, para. 34.

[196] Decision (2) 54 on Australia, paras. 6 and 8.

[197] Para. 9.

[198] Section 7 of the amended Act provides that the Act was to be read and construed subject to the Racial Discrimination Act. The Committee's attention was drawn to case law which appeared to invert that relationship: SR.1323, paras. 38 and 39.

[199] CERD/C/335/Add.2.

[200] SR.1393, paras. 14, 25.

[201] *Ibid.*, para. 28.

[202] *Ibid.*, para. 31.

[203] SR.1393, para. 32.

emergence of legislation at state level not covered by the Racial Discrimination Act, and the replacement of rights to negotiate with lesser rights of notification and consultation through delegation of powers to State or territorial authorities.[204]

The Committee as a whole continued its critique in the Concluding Observations,[205] expressing concern at the 'unsatisfactory response' to its 1999 decisions and 'the continuing risk of further impairment of the rights of Australia's indigenous communities'.[206] The Committee stressed the importance of participation by indigenous communities in decisions affecting their land rights and the need for 'informed consent'.[207] In particular, it addressed the question of proposed changes to the Aboriginal and Torres Strait Islander Commission and other indigenous-supportive organisations, recommending that Australia carefully consider the changes 'so that these institutions preserve their capacity to address the full range of issues regarding the indigenous community'.[208] The Committee reaffirmed its earlier decisions at its 55th Session, stating that, 'in adopting those decisions, the Committee was prompted by its serious concern that, after having observed and welcomed over a period of time a progressive implementation of the Convention in relation to the land rights of indigenous peoples in Australia, the envisaged changes of policy as to the exercise of these rights risked creating an acute impairment of the rights thus recognized to the Australian indigenous communities'.[209]

Comment

On the face of it, there is so much material in the *œuvre* of CERD on indigenous peoples to suggest that the Committee has engaged in a process of normative expansion – bearing in mind that the term 'indigenous' appears nowhere in the Convention. On the other hand, the plethora of terms describing the practice of racial discrimination (race, colour, descent, national or ethnic origin) incorporates descriptors which suggest that the inclusion of indigenous groups is no more than a logical implication of the text. None the less, the recognition of the particular case of indigenous peoples emphasises the normative potential of the instrument to cope with new forms of racism. It is noteworthy that recognition of the groups has come about from the reporting system rather than the procedure for

[204] SR.1393, para. 50.
[205] CERD/C/304/Add.101, 19 April 2000 (observations adopted on 24 March 2000).
[206] Para. 9.
[207] *Ibid.*
[208] Para. 11.
[209] Decision 2 (55), A/54/18, 10.

individual communications.[210] The institutional history of CERD on indigenous questions was taken into account in preparation for the World Conference against Racism.[211] As evidenced by the variety of preparatory work, CERD and individual Committee members have made significant contributions to the intellectual stream of the Conference.[212] A vital question for indigenous groups is to what extent the Convention militates against the assertion of distinct identities. The considerable stress in the text on the removal of barriers, the normative limits of special measures, etc., suggests a strongly integrative philosophy. However, the grain of Committee work goes against any superficial assumption that CERD is 'against difference': on the contrary, the recognition of indigenous peoples, the stress on their identity and entitlement to lands, and the focus on reparation for wrongs done to them, demonstrates clearly that CERD respects the unique qualities of the peoples. The treatment of native title in Australia suggests that the Convention is comfortable with diversity, but not where 'diversity' masks inferior treatment of a particular group. This is in essence a continuation of the approach of he international community to the notion of 'separate development' publicly espoused in apartheid-era South Africa. The interpretation of the Convention negotiates the borderland between 'difference' on the one hand and inferiority and arbitrary treatment, on the other. The thrust of CERD action is towards respect for individuals and communities are they self-define, and against their exogamous determination as inferior and dangerous 'others'. Taken in this light, the range of human rights covered by the text suggests that it is capable of addressing, through its elaborated anti-discrimination language, holistic attacks on the existence and flourishing of indigenous groups.

[210] This is not to negate Steiner's appreciation of the importance of human rights case law for 'expounding' the meaning of human rights treaties; it does however, suggest, that reporting systems have their own validity, and that holistic violations of rights are not always best addressed through individual communications: H. J. Steiner, 'Individual claims in a world of massive violations: what role for the Human Rights Committee?', in Alston and Crawford (eds.), *Future of UN Human Rights*, pp. 15–53.

[211] As indicated in the introductory chapter to the present work, regional meetings for the World Conference – notably that in Santiago de Chile, have elaborated a raft of recommendations relating to indigenous groups. The initial specific contribution of CERD to the World Conference – A/CONF.189/PC.2/13 – also makes significant reference to indigenous peoples. See also the *Working Paper on Discrimination against Indigenous Peoples Submitted by Mrs Erica-Irene Daes*, E/CN.4/Sub.2/2001/2.

[212] Contributions of the Committee are summarised in A/CONF.189/PC.1/12, 25 February 2000.

9

The UN Convention on the Rights of the Child: in particular Article 30

The Convention on the Rights of the Child (CRC) is the latest of the major UN treaties on human rights. The Convention follows a 1959 UN Declaration on the Rights of the Child,[1] and was adopted by the General Assembly of the UN in 1989,[2] coming into force in 1990 after the twentieth ratification.[3] It is the most widely ratified human rights treaty emanating from the UN[4] – only two States have not become parties.[5] The Convention is extensive, with fifty-four articles in total; the substantive provisions are set out in Articles 1 to 41.[6] The text contains a mix of general human rights and humanitarian law principles which are adapted to the special circumstances of children such as freedom of expression,[7] freedom of thought, conscience and religion,[8] and the right to education,[9] and new rights including as those relating to fostering and adoption[10] and rights to protection from sexual and other exploitation.[11] The Guidelines for periodic

[1] Adopted by General Assembly resolution 1386(XIV), 20 November 1959.

[2] Adopted without a vote on 20 November 1989, UN Doc. A/44/25.

[3] Article 49(1).

[4] 191 States are parties to the Convention. On the other hand, there are many reservations, some couched in the most general terms: see Reservations, Declarations and Objections Relating to the Convention on the Rights of the Child, *Note by the Secretary-General*, CRC/2/Rev.8, 7 December 1999.

[5] Somalia and the USA.

[6] The text of the Convention is supplemented by two Optional Protocols: *On the Involvement of Children in Armed Conflict*, and *On the Sale of Children, Child Prostitution and Child Pornography*. For the list of States which have signed or ratified the Protocols, see CRC/C/103 (Report on the 26th Session of the Committee on the Rights of the Child), 22 March 2001, annexes II and III.

[7] Article 13.

[8] Article 14.

[9] Article 28.

[10] Articles 20–1.

[11] Articles 32–6.

reports[12] divide the substantive provisions of the Convention into eight sections or clusters: General Measures of Implementation,[13] Definition of the Child,[14] General Principles,[15] Civil rights and freedoms,[16] Family Environment and Alternative Care,[17] Basic Health and Welfare,[18] Education, Leisure and Cultural Activities,[19] and Special Protection Measures.[20] For the purposes of the Convention, 'child' is defined in Article 1 as meaning every human being below the age of 18, 'unless, under the law applicable to the child, majority is attained earlier'. The basic obligation on States parties is to 'respect and ensure' the rights in the Convention to each child within their jurisdiction 'without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.[21] Accordingly, States are to undertake all appropriate measures for the implementation of the rights, while 'with regard to economic, social and cultural rights', they shall undertake such measures 'to the maximum of their available resources, and, where needed, within the framework of international co-operation'.[22] States' parties also undertake 'to make the principles and provisions of the Convention widely known'.[23] A key general principle of the Convention is set out in Article 3 which provides that, 'In all actions concerning children . . . the best interests of the child shall be a primary consideration'.[24] Such a principle appears eminently capable of cultural contextualisation: what is in the child's best interests will be appraised differently through a variety of cultures. Here,

[12] There are two sets of Guidelines: those for initial reports, and those for periodic reports. The Guidelines for initial reports are contained in UN Doc. CRC/C/5, and were adopted by the Committee on the Rights of the Child on 30 October 1991; those for periodic reports are contained in UN Doc. CRC/C/58, 11 October 1996. Extracts from the guidelines for initial reports are reproduced in R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child* (New York and Geneva, UNICEF, 1998); the full text of the guidelines for periodic reports are reproduced, *ibid*., pp. 604–18.

[13] Articles 4; 42 and 44.

[14] Article 1.

[15] Articles 2 (discrimination); 3 (best interests of the child); 6 (right to life, survival and development) and 12 (respect for the views of the child).

[16] Articles 7; 8; 13–17 and 37(a).

[17] Articles 5; 18, paras. 1–2; 9–11; 19–21; 25; 27, paras. 4 and 39.

[18] Articles 6; 18; paras. 3; 23; 24; 26; 27, paras. 1–3.

[19] Articles 28; 29; and 31.

[20] Articles 22; 38; 39; 30; 37, (b)–(d); 32–6.

[21] Article 2.1. See also Article 2.2.

[22] Article 4.

[23] Article 42.

[24] For a discussion which relates to concerns of the present work, see P. Alston (ed.), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford, Clarendon Press, 1994).

one is reminded of Kymlicka's reworking of liberalism and his prescription of 'culture as a context for choice'.[25] Articles 42 to 45 deal with implementation, providing for the creation of a Committee on the Rights of the Child,[26] comprising ten independent experts elected by the States' parties.[27] The Committee considers reports[28] of States' parties[29] – there is no provision for inter-State claims or individual applications. Again, as elsewhere in the UN system, the Committee adopts concluding observations on the country reports, holds days of general discussion,[30] undertakes country missions, and has developed an early-warning procedure.[31] The Committee is relatively open to NGOs, which have made a major contribution to the development of the Convention as a whole.[32] *Inter alia*, the Convention refers to 'other competent bodies' (in addition to the United Nations Children's Fund, UN Specialised Agencies, etc.) as capable of providing expert advice and assistance to foster the effective implementation of the Convention.[33] The Committee on the Rights of the Child adopted its first General Comment in 2001.[34]

[25] W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Clarendon Press, 1995).

[26] Article 43.

[27] In accordance with Article 50, para. 1 of the Convention, the government of Costa Rica on 17 April 1995 proposed that the number of experts should be raised from ten to eighteen, a proposal adopted by consensus of the States' parties on 12 December 1995. The amendment requires approval by the GA of the UN (approval received by resolution 50/155, 21 December 1995) and a two-thirds majority of States' parties. At the time of writing, the amendment was not yet in force – CRC/SP/30, 17 November 2000.

[28] Under Article 44.1, a State party is required to submit a report within two years of the Convention coming into force for that country, and thereafter every five years.

[29] Article 44, under which States' parties are required (para. 6) to 'make their reports widely available to the public in their own countries'. The reporting process is discussed in G. Lansdown, 'The reporting process under the Convention on the Rights of the Child', in Alston and Crawford (eds.), *Future of UN Human Rights*, pp. 113–28.

[30] The first day of discussion in 1992 on children in armed conflict led to the development of a draft Optional Protocol to the Convention on involvement of children in armed conflict – see Committee on the Rights of the Child, *Report on the Twentieth Session*, CRC/C/84, p. 46.

[31] M. Santos Pais, 'The Convention on the Rights of the Child', in *Manual on Human Rights Reporting* (Geneva, United Nations, 1977), pp. 393–504.

[32] An NGO Group for the Convention on the Rights of the Child is in permanent contact with the Committee on the Rights of the Child, functioning 'as an effective interface between the treaty body and . . . non-governmental organizations at large' (*Manual on Human Rights Reporting*, p. 495).

[33] See Article 45(a) and (b). Thus, 'the Convention is the single human rights treaty clearly identifying [NGOs] . . . in the process of implementation' (*Manual on Human Rights Reporting*, p. 425).

[34] The aims of Education, CRC/GC/2001/1, 17 April 2001.

The Convention and indigenous peoples

While neither of the original draft models of the Convention[35] included any reference to indigenous children, the final text incorporates three specific references[36] – Articles 17 (the mass media and the child), 29 (purposes of education) and 30 (minority and indigenous rights in culture, language and religion). Of course, as with the other general instruments of human rights discussed in the present work, all Convention rights apply to the indigenous child, and while Article 30 is the key specific right on indigenous identity, many identity/cultural issues are raised by the wording of other articles, commencing with the preamble, which, in its twelfth paragraph, takes 'due account' of 'the importance of the traditions and cultural values of each people for the protection and harmonious development of the child'. A number of articles also suggest questions on the relationship between the child and the family and community. Article 5 requires that States shall respect the rights, etc., of parents 'or, where applicable, the members of the extended family or community as provided for by local custom' to provide 'appropriate direction and guidance' in the exercise by the child of Convention rights. The Committee has observed that the Convention reflects different family structures arising from 'various cultural patterns and emerging familial relationships'.[37] In the article's expression of the relationship between the community and the child, the child remains the subject of rights[38] but their exercise is placed in a community context. In the face of reservations[39] and reports to the effect that the rights of the child are to be exercised with respect for parental authority, customs and traditions, etc.,

[35] UN Docs E/1978/34 (1978), E/CN.4/1349 (1979). The drafting history of the Convention is the subject of S. Detrick (ed.), *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (The Hague, Martinus Nijhoff, 1992). See also the useful reflections on, *inter alios*, the drafting process in C. P. Cohen, 'International protection of the rights of indigenous children', in C. P. Cohen (ed.), *Human Rights of Indigenous Peoples* (Ardsley, NY, Transnational Publishers, 1998), pp. 37–62.

[36] Discussed below at pp. 231–40.

[37] Day of discussion, cited in the *Handbook*, p. 78.

[38] The Committee on the Rights of the Child expressed doubts as to whether a reservation to Article 5 by the Holy See (CRC/C/2/Rev.5, p. 20) safeguarding 'the primary and inalienable rights of parents' was compatible 'with respect . . . [for] . . . the full recognition of the child as a subject of rights' (CRC/C/15/Add.46, para. 7).

[39] See for example, the declarations and reservations in CRC/C/2/Rev.5, by Djibouti, p. 17 (not to be bound by any provisions or articles that are incompatible with its religion and its traditional values); Kiribati, p. 23 (Kiribati customs and traditions regarding the place of the child within and outside the family); Myanmar, p. 26 (traditional values, etc., in relation to Article 37); Pakistan, p. 29 (all provisions to be interpreted in the light of the principles of Islamic laws and values); Singapore, pp. 30–1 (customs, values and religions of Singapore's multiracial and multireligious society).

the Committee has repeatedly stressed that the child is a subject of rights and not simply an object of protection.[40] The Committee's thesis is that, by upholding the rights of the child this strengthens the rights of the family, and perhaps by extension the rights of the community,[41] but the Committee is nevertheless strenuous in its refusal to accept customary practices which, in its view, militate against respect for the rights conceived as true human rights. In some cases, the tension between cultural integrity and 'minority rights' is clearly signalled: thus, in the case of South Africa, the Committee noted

> The State party's intention to establish a Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities as a first step in guaranteeing greater protection to minorities. However, the Committee is concerned that customary law and traditional practice continue to threaten the full realization of the rights guaranteed to children belonging to minority groups. The Committee recommends that the State party undertake all appropriate measures to ensure that the rights of children belonging to minority groups, including the Khoi-Khoi and San, are guaranteed, particularly those rights concerning culture, religion, language and access to information.[42]

The family is often described as crucial for the development of awareness of human rights and the inculcation of values. The Committee has spoken of 'balance' between parental authority and rights and observed – in a manner which is translatable into general principles for individual–community relations – that 'Dialogue, negotiation, participation have come to the forefront of common action for children'.[43] Following a special commemorative meeting to celebrate the tenth anniversary of the adoption of the Convention, the Committee concluded in similar vein that 'dissemination and awareness-raising about the rights of the child are most effective when conceived as a process of social change, of interaction and dialogue rather than lecturing. Raising awareness should involve all sectors of society'.[44]

Article 8 specifically refers to 'the right of the child to preserve his or her own identity, including nationality, name and family relations'. In cases of illegal deprivation of identity, the State is obliged to provide appropriate assistance and protection with a view to re-establishing it. The *UNICEF*

[40] See for example the concluding observations on Mexico, CRC/C/15/Add.13, para. 8; Nicaragua, CRC/C/15/Add.36, para. 9; and China, CRC/C/15/Add.56, para. 33. The Committee frequently envisages a programme of action to deal with recalcitrant local attitudes and practices. Thus, concluding observations on Nicaragua, the Committee stated that 'Awareness-raising among the public at large, including communities and religious leaders as well as educational programmes . . . should be reinforced in order to change traditional perceptions regarding children as objects and not as subjects of rights' (A/55/41, para. 788).

[41] *Handbook*, p. 79.

[42] A/55/41, para. 1472.

[43] Day of discussion on the role of the family in the promotion of the rights of the child, report of the 7th Session, CRC/C/34, paras. 183 ff.

[44] A/55/41, para. 1558 (k).

Handbook on the implementation of the Convention opens up the discussion of identity in this context, suggesting that unlawful interference with cultural religious and linguistic aspects of the child's identity could include

> suppression of minority languages in the education system, state information and the media; state persecution or proscription of the practice of a religion; failure to give adopted . . . children the opportunity to enjoy their ethnic, cultural, linguistic or religious heritage.[45]

The principle embodied in Article 8 was proposed by Argentina as a means of addressing 'disappearances' of children that had taken place there under a previous political regime.[46] States have sometimes taken a narrow view of 'identity' under the Article, relating it largely to the documentation and other proofs of identity. Among the exceptions is Paraguay which related the article to the problems of speakers of Guarani, citing the Constitution of Paraguay which is explicit on this point.[47] Article 14 provides for respect for 'the right of the child to freedom of thought, conscience and religion'.[48] The article incorporates another aspect of the child–parent/guardian relationship in that the parents, etc., will 'provide direction to the child' in the exercise of the right. The Guidelines require information on how the right is recognised by law specifically in relation to children.[49] They also require information on the measures adopted to ensure freedom to manifest the child's religion or beliefs, 'including with regard to minorities or indigenous groups'.[50] The provision in Article 14 is interpreted by some States to equate with comparable international standards.[51] However, it is forceful on the essential right of the child and less so for parents, who have rights and duties 'to provide direction' in the exercise of the right, but not a 'liberty . . . to ensure' religious and moral education, etc.[52]

[45] Detrick, *Travaux*, pp. 291–6.

[46] *Handbook*, p. 111.

[47] Initial Report of Paraguay, CRC/C/3/Add.22, 12 October 1993, para. 84 of which cites Article 62 of the Constitution: 'The right of indigenous peoples to preserve and develop their ethnic identity within their habitat is hereby recognized and guaranteed. They shall also be entitled to practise freely their systems of political, social and economic, cultural and religious organization, and to observe freely their customary practices in regulating their domestic affairs, provided they do not violate fundamental rights laid down in this Constitution'.

[48] Article 14 is the subject of many reservations from religious perspectives: CRC/C/2/Rev.5, the Holy See, p. 20; Jordan, p. 23; Malaysia, p. 24; Maldives, p. 25; Morocco, *ibid.*, Syria, p. 32, as well as general reservations on the ground of incompatibility of Convention articles with the Shariah, etc., which presumably include the article.

[49] Guidelines for periodic reports, *Handbook*, p. 607.

[50] *Ibid.*, p. 608.

[51] Declaration by The Netherlands, CRC/C/2/Rev.5, p. 27, relating Article 14 of the Convention to Article 18 of the ICCPR.

[52] Article 18.4 ICCPR.

Article 17(d) contains a second specific reference to the indigenous child, providing that States shall encourage the mass media 'to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous'. Periodic report Guidelines request information on 'production and dissemination of children's books, and the dissemination of material of social and cultural benefit for the child' with particular regard to the linguistic needs adverted to in the article.[53] Of the many different texts proposed for Article 17 in the drafting process, only those from the Bahai'[54] and the Ukraine[55] considered the indigenous child. The article occasioned debates on the rival merits of indigenous *groups*,[56] indigenous *populations*,[57] indigenous *peoples*,[58] indigenous *people*,[59] indigenous *child*,[60] and *the child who is indigenous*.[61] Continuing the identity theme in the context of adoption, fostering and analogous systems of care placement for children, Article 20 provides that 'due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'. This is a relevant provision to address allegations such as those relating to 'stolen children' in Australia.[62] While Article 28 on the right to education does not make explicit reference to minority or indigenous issues, Committee guidelines request information on, *inter alia*, 'measures adopted to ensure that children may be taught in local, indigenous or minority languages'.[63] As with other rights, the Guidelines call for a spectrum of disaggregated data on multiple aspects of education processes. Article 29 on the purposes of education is replete with references to identity and ethnicity, and provides that education should be directed to, *inter alia*:

> (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.

[53] *Handbook*, p. 212.
[54] UN Doc. E/CN.4/1983/WG.1/WP.2 (1983).
[55] Cohen, 'International protection', p. 43.
[56] The Baha'i proposal.
[57] Commission Working Group, 1994.
[58] The Ukraine.
[59] Cohen, 'International protection', p. 44.
[60] *Ibid.*
[61] *Ibid.*, pp. 44–5.
[62] The *Handbook* (p. 264) makes the point without specifying cases: 'unfortunately a number of countries have histories of violating this right, compulsorily removing children from indigenous and minority groups and settling them with well-off childless parents. Though well-intentioned, such actions reveal a crude racism and have caused damage to many children and adults'.
[63] *Handbook*, p. 370.

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and *persons of indigenous origin*.[64]

The text balances respect for minority values and those of the national community. The purpose of education is cosmopolitan and particular: human beings can be simultaneously members of an ethnic group, citizens of a State, and members of a global community. Equal weight is to be accorded to all of these aspects. The provisions of Article 29 were built up gradually from a working document which recognised the relevance of education 'in the spirit of understanding, tolerance and friendship among all peoples, ethnic and religious groups'.[65] No proposal individuating the case of indigenous groups had been presented in the drafting process as late as 1988.[66] A drafting party including UNESCO and the ILO recommended a version of the article which employed the term 'indigenous groups'.[67] In a welter of proposals, it was considered deleting the phrase 'indigenous origin', which would have left untouched general references to ethnicity, etc.[68] However, Canada stated that, in Canada and elsewhere, indigenous peoples were not considered to be members of ethnic groups, so the reference to indigenousness was necessary.[69] The Committee on the Rights of the Child has made many observations on Article 29 – sometimes in conjunction with Article 30 (below) – only samples are indicated here. Concern has been expressed about discrimination against indigenous or minority children[70] – overrepresented in the ranks of school absentees,[71] the necessity of teaching tolerance,[72] the insufficient numbers of teachers working with the children,[73] the general lack of resources for children of minorities and other vulnerable groups,[74] the general lack of attention to the aims of education,[75] the need to combat prejudice and negative

[64] Present author's emphasis.

[65] Basic working text adopted by the 1980 Working Group of the Human Rights Commission, UN Doc. E/CN.4/1349, draft Article 17.

[66] Cohen, 'International protection', p. 46.

[67] UN Doc. E/CN.4/1989/WG.1/WP.60 (1989).

[68] Cohen, 'International protection', p. 47.

[69] UN Doc. E/CN.4/1989/48, para. 487. See also para. 488.

[70] Observations on Indonesia, CRC/C/15/Add.25, 24 October 1994, para. 22; on Paraguay, CRC/C/15/Add.27, 24 October 1994, para. 8; on Federal republic of Yugoslavia (Serbia and Montenegro), CRC/C/15/Add.49, 13 February 1996, para. 10.

[71] Observations on Bolivia, CRC/C/15/Add.1, 18 February 1993, para. 10; on Romania, CRC/C/15/Add.16, 7 February 1994, para. 10.

[72] Observations on Croatia, CRC/C/15/Add.52, 13 February 1996, paras. 19 and 20; on Jordan, CRC/C/15/Add.21, 25 April 1994, para. 24; on Lebanon, CRC/C/15/Add.54, 7 June 1996, para. 33.

[73] Observations on Finland, CRC/C/15/Add.53, 13 February 1996, para. 18.

[74] Indonesia, *ibid*., para. 21.

[75] Observations on Korea, CRC/C/15/Add.51, 13 February 1996, para. 16.

attitudes to minority children in the education system and elsewhere,[76] the need to develop a bilingual education system,[77] State interference in minority religious education,[78] and so on. In the last case, that of China, the Committee doubted the efficacy of a system devoted to teaching only in the mother tongue, expressing concerns that, in the Tibet Autonomous Region,

> the quality of education is inferior, and . . . insufficient efforts have been made to develop a bilingual education system which would include adequate teaching in Chinese. These shortcomings may disadvantage Tibetan and other minority pupils applying to secondary and higher level schools.[79]

Accordingly, the Tibetan children should be 'guaranteed full opportunities to develop knowledge about their own language and culture as well as to learn the Chinese language'.[80] In 2001, the Committee made 'The aims of education' the subject of its first General Comment.[81] Indigenous rights are not addressed in a specific section, though paragraph 4 of the Comment is highly pertinent in the light of the above remarks:

> At first sight, some of the diverse values . . . in Article 29(1) might be thought to be in conflict with one another in certain situations. Thus, efforts to promote understanding, tolerance and friendship among all peoples . . . might not always be automatically compatible with policies designed . . . to develop respect for the child's own cultural identity, language and values . . . But in fact, the importance of the provision lies precisely in the recognition of the need for a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference.

The paragraph goes on to make the point that 'children are capable of playing a unique role on bridging the differences that have historically separated groups of people from one another'. The Comment attempts to answer unspecified criticisms of the Convention by pointing out that children's rights do not exist in a vacuum and the need 'to view rights within their broader ethical, moral, spiritual, cultural or social framework, and of the fact that most children's rights, far from being externally imposed, are embedded within the values of local communities'.[82] Perhaps this is a Committee response to those who would regard the Convention as being Western-centred and hegemonic in its readings of human rights as they relate to traditional communities? The Comment suggests possibilities of negotiation between the cosmopolitanisms of human rights and 'embedded'

[76] Observations on Romania, *ibid.*
[77] Observations on China, CRC/C/15/Add.56, 7 June 1996, para. 19.
[78] *Ibid.*, para. 20.
[79] *Observations*, para. 19.
[80] *Ibid.*, para. 40.
[81] CRC/C/GC/2001/1, 17 April 2001.
[82] *Ibid.*, para. 7.

local values. The Committee hints that the ethical framework of human rights is only partly accounted for by the bare recital of human rights texts, and that local values inform and complete our ethical frame.

Article 30

The CRC is the only general UN human rights treaty to devote a specific article to indigenous rights, coupling them with rights of minorities in what is essentially a development of Article 27 of the ICCPR.[83] Article 30 of the CRC provides:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with the other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

The UN *Manual on Human Rights Reporting* assesses the difference between the ICCPR reference to 'persons belonging to minorities' and the CRC reference to 'the child' as emphasising 'the individual nature of the rights' in Article 30, even if they are to be enjoyed 'in community', etc.[84] This is a subtle point. If there is a stronger sense of the collective in the ICCPR use of 'persons' than the CRC's 'the child', it will not be forgotten that on the one hand Article 27 of the ICCPR is still an article on individual rights and on the other that the CRC as a whole is full of respect for communities, heritage and the family. On any spectrum of individual–collective – and leaving aside the self-determination aspect of rights in Article 1 of the ICCPR – the CRC can be seen as elaborating the essential communal dimensions of human rights more thoroughly than the ICCPR.[85]

Reporting requirements for Article 30 are stringent. In addition to responding to the general sense of the wording – which are interpreted to require that States provide information on the measures adopted, 'including at the legislative, administrative, educational, budgetary and social levels' by which children can enjoy their culture, etc., the reports should indicate *inter alia*:

> The ethnic, religious or linguistic minorities or indigenous groups existing within the State Party's jurisdiction;
> The measures adopted to ensure the identity of the minority or indigenous group to which the child belongs;
> . . . to recognize and ensure the enjoyment of the rights . . . by children belonging to a minority or who are indigenous;

[83] See ch. 6 in this volume.
[84] *Manual on Human Rights Reporting*, p. 489.
[85] For a different perspective, see Cohen, 'International protection'.

> . . . to prevent any form of discrimination and combat prejudice against those children, as well as those designed to ensure that they benefit from equal opportunities, including in relation to health care and education;
> . . . to ensure respect for the general principles of the Convention . . .
> . . . to ensure that in the implementation of the rights recognized in Article 30 due consideration is taken of other provisions of the convention . . .
> Relevant disaggregated data on the children concerned, including by age, gender, language, religion, and social and ethnic origin;
> The progress achieved and the difficulties encountered in the implementation of this article, as well as any targets for the future.[86]

A number of States have made reservations and interpretative statements with respect to Article 30. The statement made by France adapts the French declaration/reservation on Article 27 of the ICCPR, and Turkey proposes to apply the 'letter and spirit of the Constitution . . . and of the Treaty of Lausanne' to Articles 17, 29 and 30.[87] Venezuela apparently considers that Article 30 rights are to be subsumed under the non-discrimination provisions of Article 2.[88] Only Canada has made specific points on indigenous peoples. Canada has stated that, in the exercise of responsibilities under Article 4, the provisions of Article 30 must be taken into account.[89] There is also a specific Canadian reservation to Article 21[90] in relation to Article 30, allowing aboriginal practices in adoption which might not be compatible with the former article. The Committee on the Rights of the Child has 'noted with concern' the Canadian statement.[91] In explanation, the representative of Canada stated that the need for a reservation had arisen during the ratification process: 'Article 21(a) according to which adoption should be authorized only by competent authorities, might have prevented custom adoption among certain indigenous communities . . . Custom adoption was an uncommon practice, and normally took place in certain indigenous communities within extended families'.[92] Members of the Committee were

[86] Guidelines for periodic reports, *Handbook*, p. 408.

[87] The Turkish stance on Article 30 is not unexpected in view of its historical restriction of the term 'minority' to groups contemplated by the Treaty of Lausanne 1923 (Greece has taken the same view). The position on Articles 17 (children and the media) and 29 (purposes of education) is not as clear. The *Handbook* (p. 410) notes that Turkey has not yet explained its position to the Committee on the Rights of the Child.

[88] 'The Government of Venezuela takes the position that Article 30 must be interpreted as a case in which Article 2 of the Convention applies' (CRC/C.2/Rev.5, p. 35).

[89] CRC/C.2/Rev.5, p. 15.

[90] The chapeau to the article reads: 'States Parties which recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration'.

[91] Concluding Observations on the Initial Report of Canada, CRC/C/2/Rev.1, 24 July 1992, para. 10. The nature of the concern is not elaborated in the Observations.

[92] CRC/C/SR.214, para. 59.

sceptical on the necessity for such a reservation.[93] The minority rights elements adapted from Article 27 of the ICCPR can be interpreted, *mutatis mutandis*, to apply to Article 30. The article passed through the Working Group of the Commission largely because it was close to existing law on minorities,[94] and thus might be expected to be read in line with Article 27. However, the first responsibility of the Committee on the Rights of the Child – as with other treaty bodies – is to interpret the instrument entrusted to it. Nuances of difference are prone to appear – see the Committee's reference in concluding observations on Ethiopia to the 'minority within the minority',[95] which contrasts with the HRC's reading of Article 27 in *Ballantyne*.[96]

The original proposal for Article 30 by the Four Directions Council referred only to indigenous children, but the Working Group agreed that it should embrace all 'minority' children.[97] In an effort to be responsive to concerns of indigenous groups, the term 'indigenous populations', which appeared in texts proposed by a drafting party[98] and by Norway,[99] was dropped. The Committee has not issued a general comment on the Article, and no 'day of discussion' has been devoted to minority or indigenous children. However, for indigenous children, there are possibilities of developing contemporary understandings of indigenous life which exist only to a lesser extent in treaties without a specific indigenous component. Despite the potential, many statements have a familiar ring in this new context, and many reports have omitted or made only scant reference to Article 30.[100] A number of States have offered views on whether and how Article 30 applies to them. The Initial Report of China made the following observation:

> China understands an 'indigenous people' to be one that did not originate elsewhere . . . all 56 nationalities are aboriginal, there is no distinction between indigenous nationalities and recent arrivals, and the question of indigenous children does not arise.[101]

[93] *Ibid*., paras. 61 – Santos Pais, and 62 – Hammarberg – who took the view that 'Canada's reservation was not necessary. A declaration, followed by an explanation of how Canada planned to implement the Convention, would have sufficed'.

[94] See the reflections of the 1987 Working Group, UN Doc. E/CN.4/1987/25, paras. 54–70.

[95] 'The Committee recommends that the State party make appropriate additional efforts to strengthen implementation of the non-discrimination provisions of the Constitution, giving particular attention to the situation of children from ethnic groups which are a minority within a particular province' (CRC/C/103, para. 147).

[96] Supra, ch. 5.

[97] UN Doc. E/CN.4/1986/39, p. 13; Detrick, *Travaux*, p. 408.

[98] UN Doc. E/CN.4/1987/25.

[99] UN Doc. E/CN.4/1989/48.

[100] Including States where one would expect to see a reference to indigenous groups, whatever local terminology may be employed to describe them: see for example the reports of Pakistan, CRC/C/3/Add.13 and Sri Lanka, CRC/C/8/Add.13.

[101] CRC/C/11/Add.7, para. 266.

In the view of the government of Jamaica, 'there is no group that can really be described as "indigenous"'.[102] A diametrically opposite view was taken by Jordan: 'The majority of Jordan's population (98 per cent) are of Arab, that is to say indigenous origin'.[103] Mexico purported to resist population categorisation in its statement that the Constitution provided a legal base for 'the protection of the multicultural differences of indigenous peoples, but at the same time . . . creates no privileges and no different category among Mexicans'.[104] As with other treaties, States also claim they have no ethnic problems,[105] or that national homogeneity makes Article 30 irrelevant.[106] Some States soften the general claim to homogeneity through admitting the existence of one or other exceptions.[107] South Africa has attempted to contextualise the application of Article 30 through arguing that, since apartheid disadvantaged the majority of South Africans, it is 'the majority group in South Africa that must be the focus of the government's greatest concern'.[108] However, this assertion is followed by a series of reflections on language, culture, and the relationship between customary law and the principles of the Convention.[109]

Concluding observations of the Committee have made reasonable use of Article 30, though not all points made on indigenous and minority groups individuate references to this article. The Committee has often recommended that States take into consideration 'the holistic approach of the Convention' in order to guarantee the complete realisation of all the rights enshrined therein.[110] The guidelines on Article 30 (above) also make the point on the interrelatedness of Convention articles. In many observations, the general nature of discriminatory practices against minority and indigenous children implicating most of the rights in the Convention is the subject of

[102] CRC/C/8/Add.12, para. 94.

[103] Initial report, CRC/C/8/Add.4, para. 189.

[104] CRC/C/3/Add.11, para. 309. On the other hand, one aim of education was the 'elimination of differences between religious and ethnic groups': *ibid*., para. 195.

[105] According to the report of Senegal, the population 'constitutes a homogeneous whole that is rich in its diversity. It therefore has no problems of indigenous peoples or ethnic minorities' (CRC/C/3/Add.31, para. 149).

[106] 'Tunisian society is characterised by its cultural, linguistic and ethnic homogeneity. Thus, the situation of children belonging to a minority or an indigenous group does not arise' (CRC/C/11/Add.2, para. 289).

[107] The initial report of Burundi, CRC/C/3/Add.58 states (paras. 254–5) that 'Unusually for Africa, Burundi's population is characterised by cultural and linguistic homogeneity . . . This needs to be qualified, however, with reference to the Batwa people'.

[108] CRC/C/51/Add.2, para. 592.

[109] *Ibid*., paras. 593–603.

[110] See for example, the concluding observations on the Initial Report of Guinea (CRC/C/3/Add.48) in the Report on the Twentieth Session, CRC/C/84, paras. 91–127, at para. 99.

comment.[111] The rights of indigenous children are also undermined by uneven intercommunal distribution of wealth,[112] uneven distribution of land[113] and environmental degradation.[114] The Committee has recommended public campaigns to reduce discrimination[115] and enforceable legislation to the same end.[116] In the areas of language and religion, the Committee has made sweeping criticisms of China's policy in Tibet, describing 'State intervention in religious principles and procedures' as 'most unfortunate for the whole generation of boys and girls among the Tibetan population'.[117] It has also challenged the official recognition of only certain religions as potentially giving rise to discrimination.[118] The Committee on the Rights of the Child has been explicit on the importance of translating the Convention into the languages of children of minority and indigenous groups, and generally promoting awareness of the Convention among the groups. These points are perhaps the most frequently represented among the recommendations.[119]

[111] Concluding observations on the Initial Report of Nicaragua, CRC/C/3/Add.25: 'The Committee suggests that the government develop public campaigns on the rights of the child with a view to effectively addressing the problem of persisting discriminatory attitudes and practices against particular groups of children such as girl children, children belonging to a minority or indigenous group and poor children. It also suggests that further proactive measures be developed to improve the status of these groups of children' (CRC/C/15/Add.36, para. 31). See also observations for the initial report of Senegal, CRC/C/3/Add.31, in CRC/C/15/Add.44, paras. 15 and 29 and for Guatemala, CRC/C/3/Add.33, at CRC/C/15/Add.58, para. 31.

[112] Concluding observations on the Initial Report of Mexico, CRC/C/3/Add.11, 10 February 1993, CRC/C/15/Add.13, 7 February 1994.

[113] 'The Committee notes that widespread poverty, longstanding socio-economic disparities and uneven land distribution within the State party affect the most vulnerable groups' (Concluding Observations on the Initial Report of Ecuador, A/55/41, para. 280).

[114] *Ibid.*, para. 293.

[115] For example in the case of Nicaragua.

[116] The Committee recommended to Mexico (Initial Report CRC/C/3/Add.11) that non-discrimination principles should be incorporated into domestic law and be capable of invocation before the courts: CRC/C/15/Add.15, para. 15.

[117] Initial Report of China, CRC/C/11/Add.7; Concluding Observations in CRC/C/15/Add.56, paras. 20 and 41.

[118] Initial Report of Indonesia, CRC/C/3/Add.10 and 26; Concluding Observations in CRC/C/15/Add.25, para. 13.

[119] For some recent examples in the area of indigenous groups, see the Initial Report of Australia, CRC/C/8/Add.31, observations in CRC/C/15/Add.79, para. 27; Belize, CRC/C/3/Add.46, observations in CRC/C/15/Add.99, para. 13; China, Initial Report CRC/C/11/Add.7, observations in CRC/C/15/Add.56, para. 29; Fiji, CRC/C/28/Add.7, observations in CRC/C/15/Add.89, para. 11; Guatemala, CRC/C/3/Add.33, observations in CRC/C/15/Add.58, para. 29; Honduras, CRC/C/3/Add.17; observations in CRC/C/14/Add.24, para. 23; Japan, CRC/C/41/Add.1, observations in CRC/C/15/Add.90, paras. 11, 33; Myanmar, CRC/C/8/Add.9, observations in CRC/C/15/Add.67, para. 15; Panama, CRC/C/8/Add.28; observations in CRC/C/15/Add.68, para. 26; Uganda, CRC/C/3/Add.40, observations in CRC/C/15/Add.80, para. 11

The injunction to render the Convention into indigenous languages may be fortified by recommendations to take the knowledge of the Convention even to remote communities;[120] and it goes without saying that specific principles of the Convention, such as registration of births, are to be applied without regard to geographical barriers.[121]

While the interpretation placed by the Committee on Article 30 remains broadly in line with Article 27 of the ICCPR, there are differences of emphasis as well as the interpretative point as to what constitutes a minority. In its general concern for the preservation of the cultural environment of indigenous and minority children, the Committee has not always appreciated distinctions between assimilation and integration which appear in other international instruments,[122] and appears to have taken a more assimilationist stance, even if not by name. There is also a tendency to link indigenous and minority children with other vulnerable groups, which does not necessarily make for clarity on indigenous questions. On the other hand, the Committee is robust in its suggestions for dissemination of Convention principles in indigenous languages and for sensitising national educational curricula to the specific needs of indigenous peoples. One aspect which has been elaborated to a greater extent than elsewhere is that of 'traditional practices' harmful to health under Article 24(3). Such practices are not exemplified by indigenous or minority groups to a greater extent than others. However, since Committee appraisal of such practices is an element of a wider interface between custom and human rights, their appraisals have broad implications. The relationship between law and custom is the focus of the Article 30 section in the initial report of South Africa,[123] which regards as essential the harmonisation of customary law with children's rights.[124] At the same time,

[120] 'Special emphasis should be placed on the dissemination of the Convention among indigenous and ethnic groups as well as in rural and remote areas' (Concluding Observations on the Second Periodic Report of Honduras, A/55/41, para. 668).

[121] 'In light of Article 7 of the Convention, the Committee recommends that the State party continue with its measures to ensure the immediate registration of the birth of all children, especially of those living in rural and remote areas and belonging to indigenous groups' (Concluding Observations on the Second Periodic Report of Peru, A/55/41, para. 1387). Compare the observations of the Committee in the case of the Second Periodic Report of Nicaragua, A55/41, para. 789.

[122] See the mildly critical note to this effect in the *Handbook*, p. 412, noting that the Committee's observations on the Initial Report of Italy called for 'the fullest possible integration into Italian society' of, *inter alios*, Roma and foreign children: CRC/C/15/Add.41, para. 17. The *Handbook* comments that 'Roma and immigrant children are, under the terms of Article 30, entitled to expect to integrate into the dominant Italian culture on their own terms, with their cultural identity preserved, rather than to be assimilated into the majority culture'. The present author supports the comment.

[123] Observations of the Committee on p. 229 of the present work.

[124] *Ibid.*, para. 601.

'there is a need to ensure that traditional practices, particularly where they affect the girl-child' comply with the Convention, and 'neither law nor custom nor centuries of tradition can be changed overnight'.[125] The Committee has made a significant number of observations on traditional practices, regularly in the context of female genital mutilation, early marriage, teenage pregnancies, discrimination in inheritance, etc. – many of the traditions assessed relate to the girl-child.[126] The elimination of female genital mutilation is regarded as a priority by the Committee. On such issues generally, the Committee view is that the practices should be abolished. Efforts to this end should be pursued in cooperation with community and religious leaders, NGOs,[127] 'the involvement of all sectors of society'[128] with a view to changing attitudes.[129] In some cases, States may be encouraged to look to the experience of others in reconciling religious law with the requirements of the Convention.[130]

Comment

The CRC enjoys the highest number of ratifications among the UN human rights conventions discussed in the present work. The text ranges over a broad spectrum of human rights in a detailed manner. Concluding observations of the Committee on the Rights of the Child are in general more extensive than those of other treaty bodies, as befits the complexity and richness of the text. Various 'communities' surround the subject child. The communities are formally addressed and function as a context for the enjoyment of rights, and may direct and guide the application of rights. Key elements such as 'the best interests of the child' are to be illuminated through community practices. A premise of the Convention is that respect for the rights of the child flows from local values. However, the evocations of 'community' do not disguise the fact that many 'communities' on whose behalf the governments speak, are evidently not persuaded by the principles of the

[125] *Ibid.*, para. 602.

[126] Not all – see the observations on the report of Guinea with its reference to corporal punishment, in Report of the Twentieth Session of the Committee, CRC/C/84, paras. 91–127, at para. 110. Food taboos were among the traditional practices referred to by Burkina Faso – CRC/C/3/Add.19, para. 59.

[127] See the observations on the Initial Report of Ethiopia, CRC/C/8/Add.27, in CRC/C/15/Add.66, para. 23.

[128] Observations on the Report of Nigeria, CRC/C/15/Add.61, para. 36.

[129] *Ibid.* Cultural complexity is an issue – CRC/C/111, para. 333.

[130] 'the Committee encourages the State party to consider the practice of other States that have been successful in reconciling fundamental rights with Islamic texts' (Concluding Observations (2001) on the Initial Report of Saudi Arabia, CRC/C/103, para. 398).

Convention, and cling to their own values: they have difficulty with the notion of the child as the subject of rights. In hard cases, Alston takes the view that 'it must be accepted that cultural considerations will have to yield whenever a clear conflict with human rights norms becomes apparent'.[131] Committee practice is broadly in line with this, while hallowing a space for dialogue and involvement of community groups. There is also space to argue about when exactly this clash of values cannot be finessed away – as observed, notions such as 'the best interests of the child' rank high on any scale of indeterminacy and, 'culture' can assist in illuminating its meaning in a particular instance.[132] The end problem for the Convention is not that this or that specific concept or principle may be difficult to fit into an indigenous or other world-view, but that the essential principle of the Convention – the child as subject of rights – may not. On the whole, the CRC appears to address culture as instrumental – as a means to deliver up rights of the child. The problem arises where culture is a thicker, more encompassing concept that reaches out to frame and condition notions of individual and collective identity, social respect, religion, aesthetics and moral value in ways which do not easily cohere with the Convention's prescriptions.

[131] P. Alston, 'The best interests principle: towards a reconciliation of culture and human rights', in Alston (ed.), *The Best Interests of the Child*, pp. 1–25, at p. 21.

[132] See the perceptive article by A. Belembaogo, 'The best interests of the child: the case of Burkina Faso', in Alston (ed.), *Best Interests*, pp. 202–26.

Part III

Regional human rights protection and indigenous groups

10

The African Charter on Human and Peoples' Rights; African perspectives on indigenous peoples

The strictures of Special Rapporteur Alfonso Martinez concerning the concept of indigenous peoples in Africa and Asia will be recalled. His comments flag up the possibility that indigenousness raises difficult questions for African States, most of which are relatively recent beneficiaries of the decolonisation movement, and governed by indigenous political élites. African States, according to one author, represent a mixture of pre-colonial and Western structures.[1] In the former – political societies rather than States – the emphasis has supposedly been on community; a feature which produces the claim that 'The vast majority of the people still exhibit unflinching loyalty to an organic whole, be it a family, a clan, a lineage or an ethnic group. They therefore still think largely in terms of collective rights'.[2] On the other hand, the structures imposed by colonialism tended to ignore existing social and political patterns, and impose the pattern of the incomers. Allowing for the element of reductionism in such strongly drawn contrasts, the proposition that the 'crisis of the [African] State'[3] arises from a collision between community-based systems of political and social organisation and the more impersonal structures of the 'modern' Western-derived State receives wide support in the literature.[4]

[1] R. Murray, *The African Commission on Human and Peoples' Rights and International Law* (Oxford and Portland, Oregon, 2000), ch. 3.

[2] O. Ojo, 'Understanding human rights in Africa', in J. Berting (ed.), *Human Rights in a Pluralist World; Individuals and Collectivities*, p. 120 – cited in Murray, *African Commission*, p. 35.

[3] Y. Ghai, 'Constitutions and governance in Africa: a prolegomenon', in S. Adelman and A. Paliwala (eds.), *Law and Crisis in the Third World* (London, Zell Publishers, 1993), pp. 51–75.

[4] Many citations in Murray, *African Commission*, ch. 3.

African States are richly diversified in ethnicity, religion and language.[5] Many groups are divided by colonial demarcations,[6] erected into the 'immutable' boundary fences of the new conglomerate polities[7] – an African version of the principle of *uti possidetis* developed in the Americas.[8] Some effects of this on African conceptions of self-determination are elaborated in *Frontier Dispute (Burkina Faso/Republic of Mali)*,[9] where the ICJ made the pronouncement that

> the Chamber cannot disregard the principle of *uti possidetis juris, the application of which gives rise to . . . respect for the intangibility of frontiers* . . . It is a principle of general scope logically connected with the phenomenon of the obtaining of independence . . . Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers . . . Its primary aim is to secure respect for the territorial boundaries which existed at the time when independence was achieved . . . This principle . . . appears to conflict outright with the right of peoples to self-determination . . . the maintenance of the territorial status quo in Africa is often seen as the wisest course.[10]

Legal principle has not prevented a rash of cases of international and internal strife, and attempts at secession, successful or otherwise.[11] The continent

[5] For example, Nigeria contains some 250 ethnic groups. In relation to Uganda, 'the present day national borders of Uganda cut across ethnic and language boundaries and place together over 40 ethnic groups which formerly had little in common, and which even today may not understand each others' languages': *Uganda and Sudan* (London, Minority Rights Group, 1984), p. 4. Statistics and accounts of major ethnic groups are found in Minority Rights Group (ed.), *World Directory of Minorities* (London, 1997). For a reflection on ethnicity, see T. Ranger, 'The nature of ethnicity: lessons from Africa', in E. Mortimer (ed.) with R. Fine, *People, Nation and State: The Meaning of Ethnicity and Nationalism* (London and New York, I. B. Tauris publishers, 1999), pp. 12–27.

[6] As a former head of Mali's government (Modibo Keita) asked: 'But do we not have Songhai, who have found their way to Niger and elsewhere . . . do we not have Fulbe of all colours . . . in Guinea . . . in Cameroun and in Nigeria . . . if it were necessary to insist that the Republic of Mali, on the basis of a definition of a nation, should be composed essentially of Mandingo, or Fulbe, or Songhai, then we should have problems': cited in Thornberry, *Minorities and Human Rights Law*, p. 22.

[7] The Charter of the OAU 1963 outlines purposes and aims of the OAU, including 'to defend the States' sovereignty, their territorial integrity and independence'; principles to which members adhere include 'respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence'. This reverse an earlier policy of abolition or adjustment of colonial frontiers: Thornberry, *Minorities and Human Rights Law*, p. 22.

[8] Thornberry, *Minorities and Human Rights Law*, pp. 20–3.

[9] ICJ reports [1986], 554.

[10] Paras. 20–6.

[11] Notable the achievement of independence by Eritrea from Ethiopian rule, when 'for the first time an African State attained sovereign statehood at the expense of another African State and against both an international and African consensus on

has suffered incommensurately from natural and human disasters and has been riven by ethnic and tribal hatreds.[12] The flowering of political life has been inhibited by authoritarian governments showing scant respect for human rights. Despite and because of the travails, a positive and distinctive African human rights 'fingerprint' or accent has emerged.[13] The cadences of the African language of human rights are considered below mainly in relation to the African Charter on Human and Peoples' Rights.

The African emphasis in the era of human rights has been on nation-building, against racial discrimination and the domination by white minority populations, against the system of Apartheid, pro-decolonisation and economic justice. The Colonial Declaration captured the essence of the African approach to self-determination – rejecting the Belgian thesis which drew on African examples along with others.[14] None of this looks propitious for an indigenous politics in Africa. Indigenous rights may be submerged under post-colonial imperatives of development and poverty reduction.[15] In the light of statements of national unity and the ethnic, etc., indivisibility of their populations,[16] African governments may have as much difficulty with

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the sanctity of African territorial boundaries': D. Pool, *Eritrea: Towards Unity in Diversity* (London, Minority Rights Group, 1997), p. 5. Perhaps surprisingly, the 1995 Constitution of Ethiopia permits the secession of ethnically based regions from the Federation: Minority Rights Group (ed.), *World Directory*, pp. 412–17.

[12] The reaction to which has, *inter alia*, included the setting up of the International Criminal Tribunal for Rwanda.

[13] Makau wa Mutua, 'The Banjul Charter and the African cultural fingerprint: an evaluation of the language of duties', *Virginia Journal of International Law 35* (1995), 339–80.

[14] See ch. 4 of this volume.

[15] S. Saugestad, *The Inconvenient Indigenous. Remote Area Development in Botswana, Donor Assistance and the First People of the Kalahari* (Tromso, Faculty of Social Science, 1998).

[16] The Rwanda Tribunal has grappled with notions of national and ethnic groups in the African context. In *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, decision of 2 September 1998, evidence was taken to the effect that 'The primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group. It is a sense which can shift over time . . . Rwandans currently, and for the last generation at least, have defined themselves in terms of . . . three ethnic groups [Hutu, Tutsi and Twa] . . . reality is an interplay between the actual conditions and peoples' subjective perception of those conditions. In Rwanda, the categorisation was shaped by the colonial experience which imposed a categorisation which was probably more fixed, and not completely appropriate to the scene . . . The categorisation imposed at that time is what people of the current generation have grown up with' (evidence of Alison Desforges, expert witness to the Tribunal, para. 172). See also paras. 492ff.: attempt to fix the elements of genocide as it applies to a 'national, ethnical, racial or religious group' (Article 2 of the Genocide Convention 1948). In the opinion of the Tribunal, the definition of genocide went beyond the four categories to include (para. 516) 'any stable and permanent group', 'constituted in a permanent fashion and membership of which is determined by birth' (para. 511).

notions of indigenousness as they have with notions of minorities – though the principled rejection of the latter is doubtless compounded by the memory of dominant European colonisers.[17] No African State is a party to ILO Convention 169, though a number of African States remain parties to Convention 107.[18] None the less, ratification of 169 has been under consideration, which may be a sign of the times, as the heaviness of nation-building lifts off, and increasing attention is paid to sub-national groups.[19]

The African Charter on Human and Peoples' Rights

Philosophy

In the African Charter, OAU governments devised a human rights instrument to reflect their culture and concerns. The Charter is a singular and complex amalgam of categories or generations of human rights, of 'domains of discourse', acclimatising basic principles to the African context.[20] A major interest for present concerns is the Charter's elaboration of peoples' rights: the Charter extends the reach of peoples' rights beyond the self-determination of the Covenants to issues highly pertinent to indigenous concerns, including environment and development.[21] The preamble highlights the ambition

[17] The advance of the doctrine of apartheid made the defence of minority rights in Africa difficult – apartheid was an example of a (white) minority dominating a (black) majority; this negative example retarded official recognition of cultural diversity in African States.

[18] Parties include Angola, Egypt, Ghana, Guinea-Bissau, Malawi and Tunisia: International Labour Conference, 88th Session 2000, Report III (Part 2), *Lists of Ratifications by Convention and By Country* (Geneva, International Labour Office, 2000), p. 127.

[19] International Labour Office, *Indigenous Peoples of South Africa: Current Trends* (Geneva, 1999). See remarks of the representative of South Africa to the WGIP – E/CN.4/Sub.2/2000/24, paras. 105–6. In the 1999 Drafting Group for the declaration of indigenous rights, indigenous representatives noted the absence of African governments (E/CN.4/2000/84, para. 41): only Libya, Morocco and Sudan participated in the session.

[20] Comprehensive reflections on the Charter, its African context, and general significance for international law, are set out in Murray, *African Commission*. See also U. O. Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague, Martinus Nijhoff, 1997); E. Ankumah, *The African Commission on Human and Peoples' Rights: Practices and Procedures* (The Hague, Martinus Nijhoff Publishers, 1996); E. Bello, 'The African Charter on Human and Peoples' Rights', *Hague Recueil 194* (1985/6), 13–268; R. Gittleman, 'The African Charter on Human and Peoples' Rights: a legal analysis', *Virginia Journal of International Law* 22 (1981–82), 667–714.

[21] For early comment on the significance of linking human rights and rights of peoples, see T. van Boven, 'The relationship between peoples' rights and human rights in the African Charter', *HRLJ* 7 (1986), 183–94.

of the peoples of Africa to eliminate colonialism, etc., in all its forms in order to achieve 'the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence'. The Charter recites that the African States take into consideration 'the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights'. The preamble makes two significant conceptual assertions: that 'the reality and respect of peoples' rights should necessarily guarantee human rights'; and that 'the enjoyment of rights and freedoms . . . implies the performance of duties on the part of everyone'. Both of these can be read in a communitarian sense, as expressing a strong sense of the collective in African affairs, and thus of the local. In context, however, they are ambiguous: it depends on whether 'peoples' is understood on the level of the local community or the State – as one writer observes, 'The notion of individual responsibility to the community is firmly engrained in the African tradition . . . It is an open question, however, as to whether "community"[22] equals "State" '.[23] Article 2 provides that the rights and freedoms recognised in the Charter are to be enjoyed 'without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'. While the proscription of discrimination is limited to the rights in the Charter, this is not very restrictive in view of the range or rights contained therein.[24] Further, the grounds of non-discrimination are generous on ethnicity and related characteristics, more than sufficient to cover the cases of indigenous groups, and the Commission interprets its mandate on racial discrimination very broadly.[25]

[22] There is also the danger that 'imposing duties in a human rights instrument could be interpreted as setting prerequisites for the enjoyment of rights which are supposedly inalienable': C. Flinterman and C. Henderson, 'The African Charter, [etc.]', in R. Hanski and M. Suksi (eds.), *An Introduction to the International Protection of Human Rights: A Textbook* (Abo Akademi, 2nd edn, 1999), pp. 387–96, p. 390.

[23] U. O. Umozurike, 'The African Charter on Human and Peoples' Rights', AJIL 77 (1983), 902–12, at 911.

[24] According to the *Guidelines for National Periodic Reports*, V.1, para. 1, 'the general tone of the Charter abhors racial discrimination'. Extensive guidelines on racial discrimination have been elaborated by the Commission despite the paucity of reference in the text. The *Guidelines* are set out in *Second Activity Report of the African Commission on Human and Peoples' Rights* (adopted June 1989), annex XII.

[25] Thus, according to the *Guidelines*, information is to be provided in the racial discrimination section of the national report on curricula, etc., 'which would lead to better understanding, tolerance and friendship among nations and racial or ethnic groups' (V.14), and on the role of institutions 'working to develop national culture and traditions, to combat racial prejudices and to promote intranational and intracultural understanding, tolerance and friendship among nations and racial or ethnic groups' (V.17).

The Commission

Implementation of the Charter is entrusted to the African Commission on Human and Peoples' Rights,[26] which has a broad mandate to promote human and peoples' rights, ensure their protection, interpret the provisions of the Charter at the request of a State party or the OAU or OAU-recognised African organisation, and perform any other tasks which may be entrusted to it by the (OAU) Assembly of Heads of State and Government.[27] The Commission utilises special rapporteurs on particular issues, including the rights of women,[28] and, as noted, indigenous questions are now under discussion. Appropriate interconnections between the general human rights system and work on the Charter are mandated by Article 60 which provides that

> The Commission shall draw inspiration from international law on human rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the present Charter are members.

Article 61 includes in its list of subsidiary measures to determine principles of law, 'African practices consistent with international norms of human and peoples' rights'. Murray observes that the Charter is 'unusual in its inclusion of non-binding concepts and the jurisprudence of other bodies'.[29] These explicit systemic provisions are potentially of considerable assistance to

[26] The procedures are set out in detail by Murray, *African Commission*, ch. 2. A Protocol of 1998 provides for the establishment of an African Court on Human and Peoples' Rights, designed, according to its preamble, to complement and reinforce the functions of the African Commission: OAU/LEG/AFCHPR/PROT (III), adopted at the Assembly of Heads of State and Government, 34th session, June 1998. The jurisdiction of the Court will extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol, or any other relevant human rights instrument ratified by the States concerned (Article 3.1); the Court may also offer advisory opinions which do not trespass on the work of the Commission (Article 4). Court cases will be open to States, African intergovernmental organisations, relevant NGOs with observer status before the Commission, and individuals (Article 5.3): NGO and individual cases require a supporting declaration from the State concerned in accordance with Article 34.6. Entry into force of the Protocol requires fifteen instruments of ratification. For an account of debates on the role of NGOs in Court procedures, see Murray, *African Commission*, p. 30.

[27] The Commission's current *modus operandi* includes missions to States – some results of the Missions to Mauritania and Senegal are considered below.

[28] *Ninth Annual Activity Report*, para. 11.

[29] p. 25. The Guidelines for National Periodic Reports take many interpretations of articles directly from – particularly – UN sources, including the ICESCR, the UDHR, ICEARD, CEDAW, etc.

self-identifying African indigenous groups. They open the door to developing legal ideas nurtured in the indigenous-friendly environment of the ICEARD and ICCPR, as well as the work of the ILO: the Article 60 reference to specialised agencies does not *ex facie* require that an African State or States be parties to particular instruments such as ILO 169 in order for the Commission to draw its inspiration from the same.[30]

The procedures envisaged for implementation include communications from States, State reports, and 'other communications'.[31] Communications in this last category must respect the usual international criteria relating to exhaustion of domestic remedies, etc.[32] Specific responses are envisaged by Article 58, when 'one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of . . . rights'; in these cases, in-depth studies, with findings, recommendations and reports may ensue.[33] Doubts on whether the Commission has powers to deal with communications on an individual basis appear to have been resolved in favour of such an activity. A notable feature of the Commission's *modus operandi* is that individuals and NGOs can petition the Commission on their own or another's behalf.[34] NGOs play a considerable role in the

[30] The reporting *Guidelines* take text directly from a range of human rights sources outside the Charter.

[31] The powers of the Commission to deal with individual communications are the subject of an extensive literature. See for example Murray, *African Commission*, pp. 17ff; Bello, 'African Charter'; O. Ojo and A. Sesay, 'The OAU and human rights: prospects for the 1980s and beyond', *Human Rights Quarterly* 8(1) (1989), 89–103; S. Ropke, *The African Commission on Human and Peoples' Rights: A Case Study* (Copenhagen, Danish Centre for Human Rights, 1995).

[32] In particular, 'The treatment of the . . . applicant who tries to use several procedures simultaneously is unusually generous, as the Charter only prevents the Commission from considering cases which have actually been settled by another procedure': J. Merrills, *Human Rights in the World* (Manchester and New York, Manchester University Press, 4th edn, 1996), p. 262.

[33] The Commission has established procedures for dealing with individual communications, and has considered over 200, taking decisions on the merits of a number of these: the Annual Activity Reports of the Commission incorporate the relevant information: see Institute for Human Rights and Development (the Gambia), *Compilation of Decisions on Communications of the . . . Commission . . . Extracted from the Commission's Activity Reports 1994–99*. For the first six years of its existence, the Commission did not include information on individual communications; the information commences with the *Seventh Annual Activity Report* in 1994. For a history of the Commission's informational activity, see *Compilation*, pp. 3–7. See also R. Murray, 'Serious or massive violations under the African Charter . . . a comparison with the inter-American and European mechanisms', *Netherlands Human Rights Quarterly* 17(2) (1999), 109–33.

[34] There is no requirement that the petitioner be a victim of the violation: the question of who can be a victim has dogged a range of international procedures discussed in the present work and, on balance, works to the detriment of indigenous claims.

work of the Commission, which is liberally open to such inputs. Indigenous groups can potentially profit from general NGO practice in this respect.[35]

Civil and political rights

A standard range of civil and political rights follows the non-discrimination clause including equality and inviolability of human beings, rights of liberty and security, freedom of conscience and religion, rights to information, free association and assembly, freedom of movement, and rights to participation. Formulations are generally terse. Some rights are subject to vague qualifications. Thus, while profession and free practice of religion is guaranteed, it may be restricted 'subject to law, and order', an undemanding limitation on State authorities, and out of line with analogous provisions elsewhere. Similarly, Article 9(2) provides that 'Every individual shall have the right to express and disseminate his opinions within the law', and the right to free association is guaranteed 'provided he abides by the law'. Logically, the effect of these qualifications could be to remove the right altogether. What is required is some provision that the level of rights in the Charter should not be lower than comparable standards elsewhere: that the Charter complements and adapts but does not subvert international and domestic human rights. Taking the text as a whole, the ambit of limitations is restricted by the preambular reaffirmation of – *inter alia* – UN human rights standards, and the provisions of Articles 60 and 61.[36]

Economic and social rights

Economic and social rights are set out in Articles 14–17 – rights to property, work, health, and education. In practice, the African Commission has been prepared to intervene in areas such as health and sexuality,[37] work and education,[38] including human rights education.[39] Reporting *Guidelines* require

[35] See *Rules of procedure of the African Commission on Human and Peoples' Rights*, adopted on 6 October 1995, Chapter XVII.

[36] The reporting *Guidelines* are very brief on civil and political rights; much greater space is devoted to economic, social and cultural rights.

[37] Communication 136/94, *William A. Courson v Zimbabwe*, concerned the legal status of homosexuals in Zimbabwe, where domestic law criminalises private male homosexual conduct. The communication, which alleged violation of a range of Charter articles, including Article 16 (health), was withdrawn by the author: text in *Compilation*, p. 64. A note of interest is that the complainant invoked Article 60, recalling the views of the HRC in *Toonen v Australia*.

[38] For example, States are required to report on 'Measures adopted in the public and private sectors including those relating to working conditions, salaries, social security, career possibilities and continuing education for teaching staff': *Guidelines*, II.8.

[39] *Sixth Annual Activity Report of the African Commission* (1992–93), ACHPR/RPT/6th.

information from States on measures taken towards 'the promotion of understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups', and on special provisions for special groups in the field of primary education including 'children belonging to linguistic, racial, religious or other minorities, and children belonging to indigenous sectors of the population, where applicable'.[40] 'Communities' are referred to in Articles 14 – as a limitation on the property right – and Article 17, according to which the 'promotion and protection of morals and traditional values recognized by the community shall be the duty of the State'. The Commission's view is that the Article 17 provision on the right to take part in cultural life implies 'measures and programmes aimed at promoting awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population'.[41] Traditional values are again referred to in the context of recognition of the family as 'the natural unit and basis of society': the State has 'the duty to assist the family which is the custodian of morals and traditional values recognized by the community'. Family responsibilities are more weighty than in other human rights instruments, a feature of the Charter which is said to reflect the importance of family in the African context. Murray observes that, in its work on the Charter, the Commission

> illustrates a move away from a State-centred approach to the promotion and protection of human rights towards viewing an increase in the number of actors and . . . entities with rights and responsibilities on the international plane as a desirable objective.[42]

On one view, the individual–community relationship in the African context implies dialogue and equilibrium between the individual and his/her social group.[43] The work of the African Commission may be described as solidarist, implying the cooperation of individuals, States and social organs working together for human rights. Solidarity with sundry groups has its limits – Murray again:

> the African Commission has in effect taken any margin of appreciation away from States, even on issues of custom. In this sense, this is unlike the European organs, which . . . left such issues to the States to decide, particularly where it relates to public morals.[44]

The particular example highlighted by the author relates to extreme forms of punishment in the Sudan, but the limits on custom are presumptively

[40] *Guidelines*, II.47, and II.48. The Commission also requires information on opportunities to attend schools where teaching is in the native language: *Guidelines*, II.55.
[41] *Guidelines*, III.14(iv).
[42] Murray, *African Commission*, p. 41.
[43] Bello, 'African Charter', p. 25.
[44] Murray, *African Commission*, p. 45.

wider, and have implicated in particular a range of women's rights. The Dakar draft Protocol of June 1999[45] is blunt in its approach to polygamy, which 'shall be prohibited'.[46] The real question is: how wide is the scope of the implied antipathy to custom, and how does it sit with the strenuous insistence on the African character of the Charter?

Duties

The individual has duties towards family and society, and various forms of community (the State and other legally recognised communities and the international community) in Article 27; this is coupled with the general proviso that the rights and freedoms of each individual 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'. The Commission has commented that personal and private rights 'shall not be selfishly insisted upon at the expense of family', etc.[47] Article 28 requires mutual respect and tolerance; this is followed by the portmanteau Article 29, specifying the duties of the individual to family, national community, the State, 'social and national solidarity', national independence and territorial integrity, to work and pay taxes, and

> to preserve and strengthen positive African cultural values in . . . relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society.

The individual is also enjoined to contribute to the promotion and achievement of African unity. The African Commission has been prepared to tackle the question of duties, including inter-individual duties, imparting a certain horizontal quality to its appreciation of human rights law.[48] This aspect of its work may have particular relevance in the situation where a weak State experiences difficulties in delivering the full spectrum of human rights in practice. The approach to duties attempts to mitigate an overemphasis on rights: in the opinion of the Commission, 'Personal and private rights shall not be selfishly insisted upon at the expense of family, society, State, other legally recognized communities' and international community's interests'.[49] The reporting *Guidelines* poignantly recall that some 'valuable traditional duties might have been treated lightly in some African countries because of the overwhelming Western influence in the past colonial days'.[50]

[45] Draft protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, DOC/OS/34c (XXIII).
[46] Article 6.
[47] *Guidelines*, para. IV.4.
[48] *Guidelines*, para. IV.4.
[49] *Guidelines*, IV.4.
[50] IV.8. The statement should be accounted for in estimating the Commission's approach to custom.

Rights of peoples

Rights of peoples appear in Articles 19–24, commencing with a statement of the equality of peoples and non-domination of a people by another. Article 20 contains existence and self-determination rights:

> All peoples have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and freely pursue their economic and social development according to the policy they have freely chosen.

This is linked with a right of colonised or oppressed peoples 'to free themselves from the bonds of domination by resorting to any means recognized by the international community' and a right to assistance with liberation struggles. Self-determination is followed by another right – free disposal of wealth an natural resources, which 'shall be exercised in the exclusive interest of the people'; in cases of spoliation, 'the dispossessed people shall have the right of lawful recovery of its property as well as to an adequate compensation'.[51] Globalisation is adverted to in a provision which antedates the current ferment about the term: the parties undertake 'to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources'. Article 22 provides for a peoples' right to 'economic, social and cultural development with due regard to their freedom and identity'. The conjunction of culture and identity in this case is significant for indigenous groups and others: the concept of development is many sided, not simply economistic, and is coupled with the duty of the State to ensure its exercise. Article 23 sets out a right 'to national and international peace and security' – a right tragically denied to many peoples of Africa, whether the term is interpreted as referring to national or local communities. According to Article 24, all peoples also have the right to 'a general satisfactory environment favourable to their development'. According to one commentator, the Charter

> has provided a framework for opposition to the exploitation of natural resources without regard to the environmental impact on peoples in Africa . . . In Article 24, the concept of development is recognized as an essential criterion. But, Article 24 requires that the development be both environmentally safe and respect peoples' right to be safe.[52]

[51] Article 21.2.

[52] A.K. Dias, 'International standard-setting on the rights of indigenous peoples, etc., CEPMLP website 2.11.00', p. 8. Reporting *Guidelines* are brief on Article 24, and commence (III.11.) ambiguously with the statement that the main purpose of the article 'is to protect the environment and keep it favourable for development'.

The treatment of peoples' rights in the Charter is the most extensive of any instrument of a general rights nature, though it does not approach the level of specificity of the UN or American draft declarations or of ILO Convention 169.

Which peoples?

The concept of people employed in the Charter is for obvious reasons crucial for self-identifying indigenous groups. The dichotomy between 'the whole people of the State' perceived as a monolithic entity, and a more differentiated conception recognising a diversity of groups has troubled commentators. Robertson and Merrills suggest that:

> The emphasis which the African States have given to the maintenance of stable frontiers in the continent, and their equally strong anxiety to maintain the integrity of existing States despite the fissiparous tendencies of tribalism, makes it likely that for most . . . parties to the Charter the concept of 'a people' is identified with the African nation State. If, however, 'peoples' and States came to be thought of as identical in all respects, the concept of peoples' rights will fail to achieve its objective.[53]

Their first proposition flows naturally from a certain conception of self-determination associated with decolonisation practice; the second hints at the possibility of more diversified concepts and that peoples' rights are not there with the sole objective of shoring up national unity. Another perspective is offered by Pityana:

> Given the context in which the Charter was written, it can be assumed that the Charter was designed to balance the individualism that had come to be associated with the western elaboration of human rights with the collective ideas of African anthropology. On this understanding, 'peoples' could simply be a way of referring to the nation-State. This, however, is hardly African. What must have been in the minds of the drafters surely, were the tribal communities who are an essential element of African society. If the latter is true, then 'peoples' must be construed as referring to identifiable ethnic communities which owe allegiance to a sovereign State.[54]

In practice, the usage of 'peoples' employed by the Commission has been fairly elastic:[55] *inter alia*, it has referred to the people of Rwanda,[56] South Africa[57]

[53] Robertson and Merrills, *Human Rights*, p. 256.

[54] W. Barney Pityana, *Situation of Indigenous People in Africa*, DOC/OS(XXVI)/130, para. 9.

[55] The Commission's 'lack of clear statement on the definition of a people is evidenced by referring to trade unions as a people' (Murray, *African Commission*, pp. 105–6).

[56] *Seventh Annual Activity Report*, annex XIII.

[57] *Third Annual Activity Report*, para. 14.

and others, and to the peoples of the continent as a whole.[58] It would not be accurate to suggest that the Commission regards people and State as identical notions, though it does appear to distinguish between minority or ethnic groups and peoples. The Commission's *Guidelines for National Periodic Reports* regard the provisions of the Charter as protecting 'the different sections of the national community'.[59] The guideline for Article 20 suggests that it requires that

> All communities are allowed full participation in political activities and are allowed equal opportunities in the economic activities of the country both of which should be according to the choices they have made independently.[60]

Two cases are particularly instructive as to the Commission's approach. In *Katangese Peoples' Congress v Zaire*,[61] the communication requested the Commission to recognise the Congress as a liberation movement entitled to support in the achievement of independence for Katanga, to recognise the independence of Katanga, and to help secure the evacuation of Zaire from Katanga. The claim was brought under Article 20(1) of the Charter, without allegations of breaches of rights apart from the denial of self-determination. The Commission recognised that there may be controversy about the definition of peoples and the content of the right of self-determination, noting that the issue in the case was not self-determination for all Zaireoise but specifically for the Katangese. No evidence had been adduced on whether the Katangese consisted in one or more ethnic groups, so the point was immaterial. The Commission developed a notion of the content of self-determination, observing that it may be exercised through independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people, though fully cognisant of other recognised principles such as sovereignty and territorial integrity. Acknowledging that the Commission was obligated to uphold the sovereignty and territorial integrity of Zaire, and dismissing the case as having no merit under the Charter, it stated that

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the . . . Charter, the Commission holds . . . that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

[58] Murray, *African Commission*, p. 105.

[59] *Guidelines*, III.2. The paragraph also requires information on precautions taken 'to proscribe any tendencies of some people dominating another as feared by the Article [19]'.

[60] *Guidelines*, III.4.

[61] Communication No. 75/92: *Compilation*, pp. 50–1.

The disposition of the case points to the thesis that massive violations of human rights could trigger a right of external self-determination – an opinion often associated with exegesis of General Assembly resolution 2625(XXV).[62] The paragraph also incorporates a view on internal self-determination, linking it with the right of participation; it is also clear that in the absence of grave human rights denials, internal self-determination is the 'normal' manner of exercising the right. Pityana interprets the case to mean that

> The Commission clearly pronounced that autonomy, as a variant of self-determination, could be recognised to be exercised within the territorial borders of the country in which the group is claiming it. This may be extended to indigenous communities and . . . interpreted to suit their situation. The decision does not undermine the OAU Charter which recognises and respects he colonial borders which exist in Africa.[63]

The Commission's willingness to recognise a group (or communities) within a State as 'a people' is highly significant and moves the interpretation of the Charter away from support for the homogenising nation-state towards perceptions of diversity more suitable in the African context. The flexible approach coheres with the other flexibilities exemplified in the approach of the Commission on participants in the human rights venture, etc.

The Commission's *Mission to Senegal* to look at the situation of the Casamance is also instructive.[64] Casamance is a small area of Senegal between Gambia and Guinea-Bissau, comprising Ziguinchor and Kolda, two of the eight administrative regions of Senegal; the area is almost completely separated from Senegal by Gambia. Several movements for the independence of Casamance arose from the 1960s onwards, the conflicts with the central government causing, *inter alia*, large refugee movements.[65] The African Commission was seized of the Casamance issue in October 1992 through a communication alleging grave and massive violations of human rights following clashes between the Senegalese army and rebels.[66] The Commission's mission of good offices to Senegal[67] established the facts and compared the arguments of government and separatists, noting in the first place the distinct cultural identity and subsistence agriculture of the Casamance, the evolution of the conflict, and the desire to resolve it through negotiation. Government arguments emphasising national unity and territorial integrity, the claim that the

[62] See the collection of essays, including one by the present author, in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, Martinus Nijhoff, 1993); also A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Grotius, Cambridge University Press, 1995), ch. 5.

[63] W. Barney Pityana, *Situation*, para. 11.

[64] *Report on Mission of Good Offices to Senegal*, in *Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights (1996–67)*, annex VIII.

[65] Entry for Senegal, in Minority Rights Group (ed.), *World Directory*, pp. 449–51.

[66] Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO).

[67] To Dakar and Ziguinchor.

rebels did not speak for all Casamancais,[68] and the Republic's respect for the principle of non-discrimination for all its citizens and all national communities, were contrasted with separatist arguments on historical legitimacy,[69] on being rejects in a State whose sovereignty they contested, and

> Feelings of frustration for having been deprived of their lands, being governed by outsiders not truly sharing their cultural traditions or their aspirations (the example of a hotel constructed on the site of a former cemetery, which was destroyed for this purpose, was given).[70]

While the sum of arguments advanced by the separatists were found to lack pertinence and could not justify violations of human rights, some cultural dimensions of the conflict were recognised – the privatisation of lands, the superimposition of the market on a subsistence economy, and the effect of inward migrations on the Casamance. The government position did not receive a warmer appreciation: critical points were made concerning 'a mechanical and static conception of national unity', on non-consultation of concerned populations in perpetuating arbitrary demarcations of the colonial powers, and that equality meant 'not a mathematical equality, but above all an equality of participation in the administration of public affairs'. The Commission's conclusions and recommendations did not integrate all the above points, but emphasised the importance of dialogue and good faith in establishing the peace, proposed investment, the posting of officials native to the region, and a joint committee to supervise the realisation of objectives. The Mission concluded with a striking reference in the light of discussions of who constitutes a people, expressing its hope that its work would 'contribute to reestablish peace, justice and well-being of the populations of Senegal in general *and of the people of Casamance in particular*'.[71]

Comment

The above summary of the African Charter and the work of the African Commission suggests a high degree of flexibility and adaptation of basic human rights concepts in the deployment of individual rights of various kinds, in the area of duties and community, and above all in the concept of peoples' rights.[72] The input of collective rights into the text as a whole has clearly influenced its operation. Indigenous groups can mobilise around terms

[68] Mouvement des Forces Démocratiques de la Casamance.
[69] Separatist claims to historical autonomy were contested by the government.
[70] Compare *Hopu and Bessert v France*, in ch. 5.
[71] Present author's emphasis.
[72] For an account of the (limited) effect of the Charter on the domestic law of selected African jurisdictions, see F. Viljoen, 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa', *Journal of African Law* 43, 1–17.

such as family and community, processes of dialogue and negotiation between individual and community, and in engaging the cooperation of a variety of actors in the shared enterprise of securing individual and collective rights. Guidelines for reporting already make specific reference to minorities and indigenous peoples as well as other communities. The flexibility of 'peoples' opens the way to arguments for groups to secure their continuing physical existence or presence in their traditional territories, to their cultural development, to group participation and co-determination in development processes, in securing safe environments, and in influencing governments in the area of peace and security. All of the above also imply active States committed to the welfare of their peoples and proud of their diversity and traditions. On the other hand, some of the cultural imperatives implied by this reading of the Charter will sit uneasily with some of the modernist elements, particularly in the area of customary law and rights of women.[73] It is noticeable that, despite the stress on African character in the work of the Commission, there is some intolerance with aspects of customary law.[74] The stress on African character has not enabled the Commission to escape general dilemmas about cultural integrity and specific practices found in the general law of human rights. Commission practice may be compared with that of other treaty bodies, though traditions of negotiation exemplified in that same practice point to a possible methodology of intervention consonant with respect for culture. The observations of An-Na'im are pertinent:

> the objective is to bring religious and customary laws into conformity with international human rights law, not to extinguish religious or customary laws themselves or transform their jurisprudential character. In any case, whether, and to what extent, and how indigenous perceptions about religious and customary laws should and can be challenged, changed, or modified should be left to the process of internal discourse . . . An external effort to impose change would probably be perceived as an exercise in cultural imperialism.[75]

The statement begs the question of what precisely does international human rights law say about indigenous custom – a question which is part of the burden of the present work, though the methodological guidance is worth keeping in mind.[76] In practice, as the present work demonstrates, some treaty bodies are more heavily interventionist than others.

[73] The *Guidelines* make scant reference to customary law: State reporting on family law (II.28(b)) should indicate, *inter alia*, 'measures taken to abolish such customs, ancient laws and practices as may affect the freedom of choice of a spouse'.

[74] Indigenous representatives have also argued for re-interpretation of customary law – see pp. 260–4 in this volume on Arusha 1999.

[75] A. A. An-Na'im, 'State responsibility under international human rights law to change religious and customary law', in R. Cook (ed.), *Human Rights of Women*, p. 167.

[76] See the conclusions to the present work, pp. 421–6. In *Magaya v Magaya*, before the Supreme court of Zimbabwe, Judge Muchechetere observed that 'While I

Indigenous peoples and Africa: a comment

A process of consciousness-raising by self-identifying African indigenous groups is underway at the level of the UN treaty bodies. Indigenous peoples have presented themselves to the WGIP and other fora.[77] Internal and international discussion on indigenous rights in Africa is likely to be stimulated further by the Martinez 'denial'. At the 25th Ordinary Session of the African Commission on Human and Peoples' Rights, Commissioner N. Barney Pityana of South Africa presented the report of the First Conference of Indigenous Peoples from Central, Eastern and Southern Africa held in Arusha, Tanzania in January 1999 (Arusha 1999),[78] which, *inter alia*, proposed to send a letter to Special Rapporteur Martinez 'in which we confirm that there are indigenous peoples within African States', and criticised the African Commission.[79] Further seminars on minorities and indigenous peoples in Africa [80] are a likely result from proposals to do so emanating from the UN Working Group on Minorities and the WGIP, endorsed by resolution 1999/20 of the Sub-Commission on the Promotion and Protection of Human Rights.[81] At its 25th ordinary session, the African Commission resolved that

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am in total agreement that there is a need to advance gender equality in all spheres of society, I am of the view that great care must be taken when African customary law is under consideration . . . customary law has long directed the way African people conducted their lives . . . I consider it prudent to pursue a pragmatic and gradual change which would win long term acceptance rather than legal revolution initiated by the courts' – Supreme Court of Zimbabwe 1999, Judgment No. S.C. 210/98, [1999] 3 LRC 35. Cf. *Ephrahim v Pastory* [1990] LRC (Const) 757, where customary law forbidding the sale of clan land by females was declared inconsistent with Tanzania's Bill of Rights by the High Court of Tanzania – the prohibition of discrimination in the African Charter on grounds of sex assisted the Court's decision.

[77] For example, at the 1999 WGIP, organisations representing such diverse groups as the Barabaig, Batwa, Berbers, Hadza, Khoisan, Maasai, Ogoni and Touareg, presented themselves, as well as indigenous umbrella organisations for Africa as a whole or its regions.

[78] The Arusha resolutions and proceedings are reported in *Indigenous Affairs 2/99* (Copenhagen, International Work Group for Indigenous Affairs, 1999). Fifty indigenous peoples from thirty groups (eight African countries) attended the Conference: *ibid.*, p. 2.

[79] *Ibid.*, p. 54. The Arusha Resolutions regretted that the African Commission had not to date addressed indigenous rights in Africa, and observed that failure to do so was neglect of the Commission's mandate: *ibid.*, p. 53.

[80] See report of the seminar on *Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations involving Minorities and Indigenous Peoples*, held in Arusha, 13–15 May 2000, E/CN.4/Sub.2/AC.5/2000/WP.3, 18 May 2000 (Arusha 2000). A further relevant seminar was held in Kidal, Mali in January 2001: E/CN.4/Sub.2/AC.5/2001/3 (Kidal, 2001).

[81] The resolution (para. 7) requests the UN High Commissioner for Human Rights 'in consultation with interested governments, to make efforts to organize meetings on indigenous issues in different parts of the world, in particular in Africa, Asia and

a study be undertaken on the rights of indigenous peoples in Africa and that a report be submitted for consideration by the 26th session,[82] where a Working Group of three commissioners was constituted.[83] Following discussions at the 28th session of the Commission, a *Resolution on Rights of Indigenous People/Communities in Africa* decided to establish a Working Group of Experts which would examine the concept,[84] and study the implications of the African charter.[85] According to one Commissioner, the initiative could result in an optional protocol to the African Charter.[86]

African groups see virtue in mobilising around the indigenous concept despite the difficulties.[87] There is enough in the African Charter to justify this, and Martinez-type arguments of the 'we are all indigenous here' variety are rebuttable.[88] Groups have discovered common characteristics, common problems and common experience.[89] Indigenous women have also discovered

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Latin America, to provide greater opportunity for participation of peoples from these regions and to raise public awareness about indigenous peoples' (E/CN.4/2000/2; E/CN.4/Sub.2/1999/54, pp. 61–3, at p. 62).

[82] Report by Commissioner N. Barney Pityana, *Situation of Indigenous Peoples in Africa*, DOC/OS(XXVI)/130, pp. 2–7.

[83] Commissioners Pityana, Ben-Salem and Rezzag-Bara.

[84] Consisting of two Commissioners, and two experts on indigenous peoples.

[85] 23 October–6 November 2000. The resolution drew particular attention to the possible implications of Charter provisions on equality (Articles 2/3); dignity (Article 5); protection against domination (Article 19); self-determination (Article 20), and cultural development and identity (Article 22). At the session, at least one Commissioner (Nguema) suggested that new terminology was needed for Africa to replace the terminology of minorities and indigenous peoples: informal session notes provided to the author by Dr Rachel Murray.

[86] Statement at the Kidal 2001 seminar by Commissioner Kamel Rezag Bara, E/CN.4/Sub.2/AC.5/2001/0, para. 9 (unedited version).

[87] One writer observes that 'in most cases, the practices regarding indigenous peoples are the opposite extremes of [the] spirit of tolerance, dialogue and consultation: not only are they not recognized as indigenous peoples but they are excluded from political power and from the administration of public matters. Either they are dispossessed of their ancestral lands and thrown on the path of exodus or they are the victims of every kind of assimilation. The final goal seems to be to absorb these communities into a . . ."national melting pot"' (A. G. Kouevi, 'The right to self-determination of indigenous peoples: natural or granted? An African perspective', in P. Aikio and M. Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku/Åbo, Åbo Akademi University, 2000), pp. 143–53, at pp. 149–50).

[88] See ch. 2 of this volume. See also S. Saugestad, 'Contested images: indigenous peoples in Africa', *Indigenous Affairs* 2/99: 6–9; Kouevi, 'Right to self-determination', esp. at pp. 144–7.

[89] 'The concept of indigenous people, as applied to the African setting, is a complicated and much debated one. But this is mostly so from the perspective of the decision-makers and those dealing with international human rights issues, and less so when seen by those who themselves claim to be indigenous . . . presentations made . . . testified to the discriminatory treatment accorded indigenous people by the

commonalties and are moving to concrete forms of self-organisation.[90] In some cases, self-definition and the search for an effective human rights strategy has involved switching from minority to indigenous rights.[91]At Arusha 1999, hunter-gatherers and pastoralists found that they experienced

> profound discrimination and marginalization; land alienation; forced displacement as a result of agricultural schemes, mining, dam construction, creation of national parks, wildlife reserves, etc.; cultural losses; poor coverage and poor quality of social services; lack of education and development opportunities; and often the same violent human rights abuses, collective punishment and genocide.[92]

An extensive set of Arusha 1999 resolutions dealt with land, natural resources, and rights of indigenous peoples.[93] At Arusha 2000, participants agreed that both indigenous and minorities were disadvantaged, marginalised and discriminated against in Africa. There was also an outside perception that the groups were backward,[94] and/or bad neighbours.[95] Claiming indigenous

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dominating populations in the countries, not as a result of attempts to set themselves apart socially or politically – but because indigenous peoples looked different, dressed differently, behaved differently or otherwise were perceived to be different . . . Indigenous identity was an experienced social reality' (H. Veber, J. Dahl, F. Wilson and E. Waehle (eds.), *Proceedings of the Conference on Indigenous Peoples in Africa* (Copenhagen, IWGIA, 1993), pp. 14–15).

[90] L. Mulenkei, 'A voice at last for the African indigenous women', *Indigenous Affairs* 2/99: 10–11. See also 'First African indigenous women's conference: sharing knowledge, experience and strength', *The Indigenous World 1997–98* (Copenhagen, IWGIA 1998), pp. 319–25.

[91] In relation to the Berber or Amazigh of Morocco, a representative observed that previously their work had centred on Article 27 of the ICCPR, but from 1993 (the World Conference on Human Rights), 'the Amazigh groups looked for the protection of their collective rights and recognition as peoples . . . They had adopted the UN Declaration on the Rights of Indigenous Peoples as the framework for their work' (Arusha 2000, para. 8).

[92] M. Jensen and J. Dahl, Editorial, *Indigenous Affairs 2/99*: 2–3. Disharmonies between groups were also explored: 'Hunter-gatherers have always been integrated into a social system with agriculturalists, but most often as vassals or in other kinds of inferior positions. This is still . . . obvious in the naming practices whereby the names used for groups of hunter-gatherers are often derogatory names used by the pastoralists or agriculturalists' (*ibid*).

[93] Regarding indigenous women, it was recommended (Resolutions, para. 19) that practical gender needs be taken into account in every sector and that legal instruments be created to allow indigenous women to own property/land. At Arusha 2000, points on the need to interpret and practice customary law in ways compatible with human rights standards were discussed (para. 20) but not taken into the seminar's conclusions and recommendations.

[94] 'Many groups tended to be portrayed as primitive, backward and otherwise socially underdeveloped . . . In some cases the press demonized indigenous peoples and minorities' (*ibid.*, para. 19).

[95] Representative of Pokot people of Kenya: Arusha 2000, para. 10.

rights often evoked accusations of tribalism.[96] They did not agree with suggestions that the terms 'indigenous' and 'minority' threatened the integrity of the State. A particularly poignant note was struck by participants on the impact of AIDS upon the vulnerable Hadzabe people of Tanzania – yet another historical disease produced through contact with outsiders.[97] Three quotations from the seminar conclusions go to the heart of present deliberations:

> The concepts of indigenous peoples and minorities were discussed. It was felt that the terms were useful in Africa . . . The terms were acknowledged to be complex and misunderstood in the region, often being seen as threatening the integrity of States. It was suggested that indigenous peoples and minorities could be understood to be peoples with specific identities, histories and cultures. Such people could be characterized as non-dominant, vulnerable and disadvantaged. [98]

> In differentiating between indigenous peoples and minorities it was suggested that indigenous peoples had an attachment to a particular land or territory and/or a way of life (e.g., pastoralists, hunter gatherers, nomadic or other) which was threatened by current State policy and affected by the shrinking of their traditional resource base.[99]

> Participants recommended that African States recognize all indigenous and minority peoples. This should include a recognition in the constitution of the dignity and diversity of peoples within the State. Recognition of indigenous or minority identity was considered a first step in the protection of . . . rights.[100]

For the rest there were requests to modify the African Charter on Human and Peoples' Rights to allow greater intervention in internal conflict, demands for education and health services, participation in projects which affect the peoples, and a call for African States to consider ratification of ILO Convention 169.[101] At Kidal 2001, participants concluded by recognising 'the

[96] Arusha 2000, para. 16.

[97] Paras. 23, 33 and 34.

[98] Para. 28. While there was reflection on the legacies of colonialism, this was not incorporated into definition and description of relevant groups. Cf. the remark of Pityana, *Situation of Indigenous People*, para. 10, that 'On the African continent, to link the term "indigenous" with a colonial situation leaves us with no suitable concept for analysing the same type of internal relationships that have persisted after liberation from colonial dominance'.

[99] Para. 29.

[100] Para. 31.

[101] Democracy and the rule of law are only possible 'if African states reconcile themselves with indigenous peoples and agree to follow new international norms . . . I am thinking specifically about the most important if not the only constraining international legal instrument existing to this day: ILO Convention (No. 169)' (Kouevi, 'Right to self-determination', pp. 151–2). See also *Report of the Working Group on Indigenous Populations at its Eighteenth Session*, E/CN.4/Sub.2/2000/24, para. 103.

complexity of the concepts of indigenous peoples and minorities in Africa, noting that some participants identified themselves as "indigenous peoples", some as "minorities", and some by another term and encouraged further dialogue among different peoples of the continent on this issue'.[102] This sentiment may well stand the test of time as a report, a prediction and an aspiration.

[102] E/CN.4/Sub.2/AC.5/2001/3, p. 17 (unedited version).

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The Inter-American system and indigenous peoples

The OAS

The importance of the Americas in historical discourses on indigenous peoples[1] and for the contemporary growth of indigenous consciousness in international law has been commented upon above.[2] Many of the world's indigenous peoples are found within the jurisdictions of the member States of the Organisation of American States (OAS).[3] The OAS is the latest of a succession of American organisations,[4] and was established at the Ninth International Conference of American States, held in Bogota in 1948.[5] The OAS accomplishes its purposes through: the GA which meets annually and in special sessions; the Meeting of Consultation of Ministers of Foreign

[1] R. A. Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York and Oxford, Oxford University Press, 1990).

[2] See ch. 1 of this volume.

[3] The thirty-five States members include Argentina, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, United States of America and Venezuela. In relation to Uruguay, 'The indigenous inhabitants of Uruguay were deliberately exterminated after having played a valuable part in the Army of Independence. As a result Uruguay has not had an indigenous population, but since the beginning of the 1980s several nuclear families of Guarani Mbya hunter gatherers, whose ancestral lands extend from the Paraguayan jungle to the Atlantic Coast, have begun to settle in . . . Uruguay' (Minority Rights Group (ed.), *World Directory*, p. 118).

[4] Dating back to the International Union of American Republics, established by the First International Conference of American States held in Washington, DC, from October 1889 to April 1890.

[5] The Charter entered into force in December 1951. For the text, as amended by the Protocol of Buenos Aires in 1967, by the protocol of Cartagena de Indias in 1985, by the Protocol of Washington 1992 and by the Protocol of Managua in 1993, see D. Harris and S. Livingstone (eds.), *The Inter-American System of Human Rights* (Oxford, Clarendon Press, 1998), appendix I.

Affairs; the Councils (the Permanent Council, the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture); the Inter-American Juridical Committee; the inter-American Commission on Human Rights;[6] the General Secretariat; the Specialised Conferences; the Specialised Organisations and other entities established by the GA. Specialised agencies of the OAS include the Inter-American Indian Institute which,[7] *inter alia*, organises periodic Inter-American Indian Congresses and provides advisory services and technical assistance to American States. The Institute was among the institutions which cooperated in framing the provisions of ILO Convention 169,[8] and has played a role in the preparation of the Proposed Inter-American Declaration on Rights of Indigenous peoples.[9] The OAS Charter makes limited but significant allusion to human rights, couched in strongly individualist terms. Initial references to human rights are of a general nature. Thus, the preamble looks forward to the consolidation, 'within a framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man'; in Article 3l the American States 'proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex'; and according to Article 17, development of cultural, political and economic life requires respect for 'the rights of the individual and the principles of universal morality'. Article 45a provides more substantively that 'All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security'.[10] There is considerable emphasis throughout the Charter on the achievement of democracy, the elimination of extreme poverty, social justice, and on economic development, regional integration

[6] Article 106 of the Charter.

[7] Created before the UN period: see Convention Providing for the creation of an Inter-American Indian Institute, Patzcuaro, Nov. 1, 1940, T. S. No. 978. The Eleventh Inter-American Indian Congress in 1993 established a special State–indigenous committee to amend the Patzcuaro Convention in order to enhance its role within the inter-American system. For the early activities of the Institute and its input into inter-American policies, see *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries* (Geneva, ILO, 1953), ch. XII, pp. 569–77.

[8] Preamble to the Convention. There is no recitation of any similar role for the Institute in connection with ILO Convention 107.

[9] Approved by the Inter-American Commission on Human Rights, 26 February 1997 at its 1,333rd session.

[10] See also the references to an Inter-American Commission and an Inter-American Convention in Article 106 and Article 145. The former article was inserted as an amendment in the Protocol of Buenos Aires of 1967; pending the appearance of the Convention, the Commission was charged by the latter article to 'keep vigilance over the observance of human rights'.

and trade. Indigenous peoples are not specifically mentioned.[11] For such peoples, disparate directions are signposted by the Charter. On the one hand, the cultural values of the American countries are to be cherished,[12] and the member States 'will consider themselves individually and jointly bound to preserve and enrich the cultural heritage of the American peoples'.[13] Such prescriptions are broad enough to encompass respect for indigenous culture and society. Other provisions such as those promoting forms of integration, are double-edged – with the potential to undermine or sustain indigenous cultures, depending upon how text meanings are quarried and policies pursued.[14]

The American Declaration

The Bogota Conference of 1948 also adopted the American Declaration on the Rights and Duties of Man and the Inter-American Charter of Social Guarantees. The latter instrument contains a provision on indigenous groups in the paternalist, protective and integrationist language that characterises early post-1945 approaches towards indigenous rights:

> In countries where the problem of an indigenous population exists, the necessary measures shall be adopted to give protection and assistance to the Indians, safeguarding their life, liberty and property, preventing their extermination, shielding them from oppression and exploitation, protecting them from want and furnishing them an adequate education. The State shall exercise its guardianship in order to preserve, maintain and develop the patrimony of the Indians or their tribes; and it shall foster the exploitation of the natural, industrial or extractive resources or any other sources of income proceeding from or related to the aforesaid patrimony, in order to ensure in due time the economic emancipation of the indigenous groups. Institutions shall be created for the protection of Indians, particularly in order to ensure respect for their lands, to legalize their possession thereof, and to prevent encroachment upon such lands by outsiders.[15]

[11] In the original instrument adopted in 1948, Article 74 stipulated that one of the principal functions of the Inter-American Cultural Council shall be 'to promote . . . the adoption of special programmes of training, education and culture for the indigenous groups of the American countries' (*Vol. I Annals of the Organization of American States* (1949), p. 83).

[12] Article 3m.

[13] Article 48.

[14] See for example Article 45f, by which Member States dedicate themselves to incorporate and increase the participation of 'the marginal sectors of the population, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community'.

[15] Final Act of the Ninth International Conference, resolution XXIX, *Annals*, p. 129.

References to extermination and dispossession characterised the life and death of indigenous groups in the Americas better than the protections, which were largely non-existent. It is not clear from the above who or what created the 'problem' of indigenous populations, nor if the 'Indians' are assumed to have any rights as opposed to living under the guardianship of the State. The Charter on Guarantees accurately identifies the nature of the threats to indigenous existence but almost defeats itself by encouraging the exploitation of resources on indigenous peoples' territories in order to 'emancipate' them. The American Declaration on the Rights and Duties of Man does not carry a specific indigenous imprint. The text incorporates separate chapters on rights and duties. The rights are civil and political, as well as economic, social and cultural. Persons are equal before the law, and 'have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor'[16] – a provision which simultaneously limits the non-discrimination–distinction principle to the rights in the declaration, while opening up the possibility of extending the list of prohibited grounds of discrimination. Other rights include rights to: life, liberty and personal security;[17] religious freedom and worship;[18] freedom of expression and opinion,[19] assembly and association;[20] protection of honour and privacy;[21] participation in government;[22] family and protection for mothers and children;[23] residence and movement;[24] health and well-being and education;[25] to take part in the cultural life of the community;[26] work, leisure and social security;[27] due process and protection from arbitrary arrest;[28] asylum and nationality;[29] petition and property.[30] The protection of property in Article XXIII relates to 'such private property as meets the needs of decent living and helps to maintain the dignity of the individual and the home'. This differs from the formula in the UDHR which stresses that property can be owned 'alone as well as in association with others' – the American instrument confines itself to private, in contrast to collective ownership. The duties in the Declaration are capable of exerting some pressures

[16] Article II.
[17] Article I.
[18] Article III.
[19] Article IV.
[20] Articles XXI and XXII.
[21] Articles V, IX and X.
[22] Article XX.
[23] Articles VI and VII.
[24] Article VII.
[25] Articles XI and XII.
[26] Article XIII.
[27] Articles XIV, XV, XVI.
[28] Articles XVIII, XXV and XXVI.
[29] Articles XXVII and XIX.
[30] Articles XXIV and XXIII.

on indigenous groups, notably the duties to render civil and military service,[31] and 'to obey the law and other legitimate commands of the authorities'.[32] The former can degenerate into an engine of oppression, and the scope of extra-legal 'legitimate authority' could be dangerously open-ended. The provisions of the Declaration have acquired enhanced normative force in a complex and evolved Inter-American system which normatively interrelates an Inter-American Commission, Inter-American Convention and Inter-American Court of Human Rights. The Inter-American Court of Human Rights has taken the view that the Declaration 'is the text that defines the human rights referred to in the [OAS] Charter'.[33] The interpretation is followed by the Inter-American Commission, so that the Declaration is applied in practice to States which are not parties to the Inter-American Convention. Ultimately, the human rights obligations of such States flow from membership in the OAS.[34] In as far as the Declaration – with such normative quality as it possesses – includes a range of economic, social and cultural rights extremely valuable for indigenous peoples, it is not clear how meaningfully they would be the subject of petition or if the obligation to put them into practice is immediate or progressive.[35]

The Inter-American Convention

The Inter-American Convention on Human Rights entered into force in 1978, and the Inter-American Court of Human Rights was inaugurated in 1979. Key absentees from the Convention include Canada and the USA, the indigenous communities and NGOs of which have contributed so much to raising international consciousness on indigenous issues.[36] The Convention lists regular civil and political rights and freedoms in the area of life, liberty, etc.,[37] freedoms of assembly and association,[38] thought and expression,[39] conscience and religion,[40] family,[41] privacy and nationality,[42] property,[43]

[31] Article XXXIV.
[32] Article XXXIII.
[33] Advisory Opinion No. 10 (1989), I/A Court H. R. Series A No. 10, para. 45.
[34] The Declaration is applied by the Commission 'as an indirectly binding legal text' (D. Harris, 'Regional protection of human rights: the Inter-American achievement', in Harris and Livingstone (eds.), *Inter-American System*, pp. 1–29, at p. 6).
[35] Harris, 'Regional protection', p. 9.
[36] Of which only the USA has signed the Convention.
[37] Articles 4, 5, 6, 7 and 8.
[38] Articles 15 and 16.
[39] Article 13.
[40] Article 12.
[41] Article 17.
[42] Articles 11 and 20.
[43] Article 21.

participation,[44] movement,[45] and so on, and some less usual rights in the area of compensation for miscarriages of justice,[46] right of reply,[47] to a name,[48] and judicial protection.[49] Under the heading 'progressive development', the Convention makes glancing reference to economic, social, educational, scientific and cultural standards.[50] There is also a nod to duties in Article 32, which recalls the responsibilities of every person to family, community, and mankind. The basic State obligation to respect and ensure Convention rights and freedoms was elaborated in connection with 'disappearances' in *Vélasquez Rodríguez v Honduras*.[51] The duty to *respect* implies that violations of rights by State organs, officials, etc., whether or not acts are *intra vires* are in breach of this requirement.[52] On the duty to *ensure* rights, the State has a legal duty 'to take reasonable steps to prevent human rights violations', to investigate them, to identify and punish those responsible and ensure adequate compensation.[53] In the case of private actors, they also can engage the responsibility if the State fails to show 'due diligence to prevent the violation or to respond to it'.[54] While the language of the judgment is tailored to a specific and prevalent evil – disappearances – it is general in import, and would apply in principle to official inaction, connivance or condonation of invasion of indigenous territories by prospectors and others, assuming that their actions are covered by Convention norms. The obligation not to discriminate in Article 1.1 relates to Convention rights but is complemented by Article 24 which is a freestanding clause on equality and equal protection – 'which prohibits discrimination . . . by legislation or other

[44] Article 23.
[45] Article 22.
[46] Article 10.
[47] Article 14.
[48] Article 18.
[49] Article 25.
[50] Article 26 – the standards, the full realisation of which States' parties commit themselves to achieve 'progressively, by legislation or other appropriate means' are those implicit in the OAS Charter as amended by the Protocol of Buenos Aires. Article 26 is something of a *lex imperfecta* as far as human rights are concerned, leading one commentator to surmise that economic, social and cultural rights 'are to be treated as objectives of social and economic development rather than individual rights in any real sense' (M. Craven, 'The protection of economic, social and cultural rights under the inter-American system, [etc.]', in Harris and Livingstone (eds.), *Inter-American System*, pp. 289–321, at p. 299). On the other hand, in addition to any argument on the content of the OAS Charter in the matter of economic, etc. rights, the reference to other conventions to which States may be parties in Convention Article 29(b) brings into play the ICESCR, where rights are rights and not mere objectives.
[51] Judgment of 29 July 1988, I/A, Court H. R. Ser. C No. 4.
[52] Para. 172. Thus persons who use their position of authority for wrongful ends engage State responsibility.
[53] *Ibid.*, para. 174.
[54] Para. 172.

State action in any subject area'.[55] Chapter IV of the Convention on 'Suspension of Guarantees, Interpretation, and Application' contains a basic derogation clause – non-derogable rights include those on freedom of conscience and religion, right to a name and to participation in government, in addition to the usual canon of such rights – life, freedom from slavery, etc. Article 29 protects the human rights *acquis* so that the interpretation of the Convention shall not restrict '(b) . . . any right or freedom recognized by virtue of the laws of any State Party or by virtue of another Convention' to which the State is a party. Additionally, Convention interpretations should not exclude or limit '(d) . . . the effect that the American Declaration . . . and other international acts of the same nature may have'. The provision raises the question as to what extent the Declaration's obligations subsist for those States that are parties to the Convention. There are essentially two views. The first proceeds from the assumption that the later instrument supersedes the earlier so that Convention obligations win out. One effect of this might be that 'surprisingly',[56] States' parties to the Convention would be released from obligations they previously had in the field of economic, social and cultural rights.[57] The second, supported by Article 29(d), supposes a complementary relationship. The position is complicated by the relationship between the OAS Charter and the Declaration. Harris argues for the legitimacy of applying the provisions of the Declaration even to States' parties to the Convention in view of, *inter alia*, the Declaration's derivation from the OAS Charter. While the complementarity view is not reflected in the Inter-American Commission's Statute,[58] the Inter-American court has stated that, in the light of Article 29(d), parties to the Convention 'cannot escape the obligations under the Declaration'.[59] Convention rights are protected by the Inter-American Commission and the Inter-American Court.[60] While the Convention sets out the organisation, functions, competence and procedure of the Commission, history adds its own complexities. Unlike the Court, the existence of the Commission precedes the Convention. Under a 1959 OAS resolution, the Permanent Council was required to establish an Inter-American Commission on Human Rights to promote respect for human rights.[61] Initially, the Commission held that it had competence to make

[55] Harris, 'Regional protection', p. 15 – cf. Article 26 of the ICCPR.

[56] Harris, 'Regional protection', p. 7.

[57] This would be subject to Article 26 of the Convention.

[58] Article 1(2) provides that the Commission is to treat human rights as those in the Convention for States party to it, and those in the Declaration for the other member States of the OAS – text in Harris and Livingstone (eds.), *Inter-American Systems*, appendix IV, p. 507. For a critique and contextualisation of the provision, see Harris, 'Regional protection', p. 8.

[59] Advisory Opinion No. 10, para. 46.

[60] Article 33.

[61] Fifth meeting of Consultation of Ministers of Foreign Affairs, Resolution VII, August 1959, OEA/Ser.C/II.5.

specific recommendations to OAS members, and write studies and reports in the context of large-scale violations of human rights.[62] Competence to handle individual communications was not formalised as a basis for separate decisions until 1965, subject to the principle of exhaustion of domestic remedies – not always easy to apply expeditiously in the American context,[63] and a mandate to take particular note of violations of certain rights. Besides handling individual petitions, the Commission undertook country studies, often conducting *in loco* visits to sites of alleged abuses of rights. The Commission was transformed into an organ of the OAS in 1970.[64] The present IACHR thus has a dual status: (1) as an organ of the OAS; and (2) as a creature of the Convention. In (1), the IACHR can deal with any OAS member State; in capacity (2), it deals with States' parties to the Convention. Under the Convention, the Commission is invested with a wide range of functions, including the power 'to request governments of the member States to supply it with information on the measures adopted by them in matters of human rights',[65] and 'to take action on petitions and other communications'.[66] The Convention further provides that: 'Any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention by a State party'.[67] There is no requirement that the complainant be a victim of a human rights violation.[68] While *in loco* visits and country reports remain important to the Commission's *modus operandi*, the petition procedure has played an increasing role in recent years. The organisation, jurisdiction, functions and procedures of the Inter-American Court of Human Rights are also set out in the Convention.[69] The Court has an advisory as well as a contentious jurisdiction; in terms of jurisprudential achievement, the balance

[62] IACHR, *Report on the First Session*, OEA/Ser.L/V.11.2, Doc. 32 (1960).

[63] Second Special Inter-American Conference, resolution XXII, OEA/Ser.C/I.13, pp. 32–4.

[64] Protocol of Buenos Aires amending the OAS Charter.

[65] Article 41(d).

[66] Article 41(f).

[67] Article 44. The regulations of the Commission are more elaborate and also indicate its additional powers *vis-à-vis* the American Declaration: 'Any person or group of persons or nongovernmental entity legally recognized in one or more of the member States of [the OAS] may submit petitions to the Commission . . . on one's own behalf or on behalf of third persons, with regard to alleged violations of a human right recognized . . . in the American Convention or . . . the American Declaration' (Regulations of the Inter-American Commission on Human Rights, Article 26.1, in Harris and Livingstone (eds.), *Inter-American System*, appendix V.

[68] The individual communication provision is mandatory. There is also an inter-State procedure which depends upon express recognition of the Commission's competence to receive and examine complaints.

[69] Ch. VIII.

thus far has been in favour of the advisory jurisdiction, which has moved more rapidly than its contentious counterpart.[70] The contentious procedure is restrictive in that only the Commission and States' parties have the right to submit a case to the Court.[71] In the advisory procedure, member States and listed OAS organs may consult the Court on the interpretation of the Convention 'or of other treaties concerning the protection of human rights in the American States'.[72] In the *Other Treaties* opinion, the Court held that, in principle, any human rights treaty to which American States are parties can be the subject of an advisory opinion – advisory jurisdiction is not confined to treaties within the inter-American system.[73]

Indigenous peoples

Petitions

Despite the pervasive presence of indigenous peoples in the Americas, there is no OAS contemporary standard-setting instrument – treaty or declaration in the human rights field – which deals specifically with indigenous peoples. There is however a draft declaration currently under review.[74] In step with the lack of specific texts, the Inter-American Commission does not have a specific mandate to deal with indigenous issues. Indigenous questions arise in the context of the regular procedures for reporting and handling individual complaints. The Commission none the less demonstrated early awareness of a specific issue through its resolution in 1972 that the protection of indigenous populations was a 'sacred commitment' of OAS member States.[75] Within the complaints procedure, extremely serious allegations have been made against governments, up to and including genocide. In view of the demographics of the Americas, surprisingly few cases have led to written conclusions by the Commission, and such early dispositions as have emerged were limited in scope.[76]

[70] See the assessment in Robertson and Merrills, *Human Rights in the World*, pp. 218–30.

[71] Article 61.1.

[72] Article 64.1. See also Article 64.2, which looks to determinations of the compatibility of domestic law with human rights obligations.

[73] Opinion No. OC-1/82, 24 September 1982. Farer adds however that the Court 'clearly saw these [other treaties] as supplementing hemispheric human rights norms': T. Farer, 'The rise of the inter-American Commission on Human Rights: no longer a unicorn, not yet an ox', in Harris and Livingstone (eds.), *Inter-American System*, pp. 31–64, at p. 40, n. 21.

[74] Commented upon in this volume, see ch. 16.

[75] H. Hannum, 'The protection of indigenous rights in the Inter-American system', in. Harris and Livingstone (eds.), *Inter-American System*, pp. 323–43, pp. 325–6.

[76] Hannum discerns an early tendency in the life of the Commission to accept the explanations of governments accused of violations: Hannum, 'Protection of indigenous

In the case of the *Aché Indians of Paraguay*,[77] the Commission considered complaints regarding the persecution of the Aché tribe – whose plight was widely publicised internationally.[78] The allegations against Paraguay included genocide, murder, torture, inhuman conditions of work, the sale of children and other violations of human rights. Paraguay did not respond to the request for information, so that the Commission presumed the facts to be established.[79] In a public resolution, the Commission denounced violations of rights including rights to life, liberty and security, rights to the protection of the family, to preservation of health and well-being, to work and fair remuneration, and the right to leisure time,[80] calling on the government of Paraguay to adopt vigorous measures to provide effective protection for the Aché.[81] On the other hand, in a rather anodyne observation, the Commission found that elimination of the Aché was not government policy – which was aimed at assimilation and providing protection[82] – 'thus casting some doubt as to the government's ultimate responsibility for the broad range of violations imputed to it'.[83] In assessing these early cases, critics have commented on the failure to address core issues of competing claims to land between indigenous and others, and the IACHR's lack of expertise on indigenous issues.[84] It is clear, however, that the IACHR was constrained by the limitations in the range of rights set out in the American instruments – the Declaration in the case of the Aché, and the Convention for States' parties.[85] In later cases, however, the Commission has recognised the existence of a wider normative world of ethnic rights. In the case of the *Yanomami of Brazil*,[86] the petition[87] concerned the invasion of Yanomami lands by

rights', at p. 326. See the author's comments (*ibid.*) on the case of the *Guahibo Indians* of Eastern Colombia, Case No. 1690, IACHR Annual Report 1973, pp. 21–3, in which no formal findings of fact were made. However, the Commission's eventual suspension of the case on receipt of information from the government was 'without prejudice to reopening examination . . . [of the case] . . . in the event that new evidence so requires'. The case involved armed conflict between indigenous and settlers: the State claimed to regard it as an Indian rebellion.

[77] Case 1802 (Paraguay), IACHR Annual Report 1977, pp. 30–44, 55–7.

[78] See R. Arens (ed.), *Genocide in Paraguay* (Philadelphia, Temple University Press, 1976).

[79] *Annual Report*, p. 37.

[80] Articles I, VI, XI, XIV and XV of the American Declaration.

[81] *Ibid.*, p. 37.

[82] *Ibid.*, p. 36.

[83] Hannum, 'Protection of indigenous rights', p. 327.

[84] Davis, *Land Rights and Indigenous Peoples* (Cambridge, MA, Cultural Survival, 1988), pp. 23, 24, 14–15.

[85] S. J. Anaya, *Indigenous Peoples in International Law* (New York, Oxford University Press, 1996), p. 168.

[86] Case No. 7615 (Brazil), IACHR Annual Report 1984–85.

[87] Brought by a group of concerned NGOs.

garimpeiros (gold prospectors) and others, prompted by highway construction and the discovery of mineral resources. Consequent pressures on the previously isolated forest-dwelling Yanomami resulted in widespread death and disease[88] and the uprooting of whole villages.[89] Employing the language of the American Declaration, the Commission found violations of rights to life, liberty, residence, movement and health, but also prayed in aid the provisions of Article 27 of the ICCPR,[90] interpreted as evidencing an international law group right to special protection 'in general, for all those characteristics necessary for the protection of their [ethnic groups including the Yanomami] cultural identity'.[91] Hannum observes that the Commission's observation represents 'a somewhat broader articulation of Article 27 than is found in the text itself' – which concentrates on rights of persons and not groups.[92] On the other hand, Anaya surmises that 'the Commission considered the principle to be one of customary or general international law'.[93] The Commission recognised the important measures already taken by Brazil to address the issue, and recommended that the government continue to protect the Yanomami and to demarcate the boundaries of a Yanomami Park.[94] The Commission continued to articulate a broader normative approach in its *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*,[95] which also developed from an individual complaint in the context of violent conflict in Nicaragua in the 1980s. Petitioners alleged massive violence, forced relocation (some 42 villages were relocated to camps in an attempt to clear areas for military operations) and ethnocide[96] alleged to have been committed by the government of Nicaragua against the Indian People – Miskito, Sumo and Rama – of Nicaragua's Atlantic Coast.[97] *Inter alia*, the Commission made an on-site

[88] Besides diseases brought in by prospectors, some 22 per cent of the Yanomami living near the area of highway construction (Brazil's Northern Perimeter Highway begun in 1973) died within a year of the commencement of operations: G. Goodwin Gomez, 'Indigenous rights and the case of the Yanomami Indians of Brazil', in Cohen, *Human Rights*, pp. 185–99, at p. 190.

[89] See also the chapters in the present work on the ILO.

[90] Despite the fact that Brazil was not, at that time, a party to the Covenant.

[91] IACHR Report, 1984–85, p. 31.

[92] Gomez, 'Indigenous rights', p. 328.

[93] Hannum, 'Protection of indigenous rights', p. 168.

[94] p. 33. On the origins of the idea for a Yanomami Park, see Gomez, 'Indigenous rights', pp. 190–1. For brief consideration of the immediate Brazilian response, see Anaya, *Indigenous Peoples*, p. 182, at n. 133.

[95] Docs. OEA/Ser.L/V/II.62, doc.10 rev.3 (29 November 1983); OEA/Ser.LV/II.62, doc.26 (16 May 1984).

[96] *Report*, p. 13; allegations of genocide also appear, *ibid.*, p. 39.

[97] Case No. 7964 – see *Report*, pp. 10ff. The Commission also notes 'other complaints and reports' which refer, with variations, to the facts in the original complaint – *ibid.*, p. 15.

investigation of the various complaints. Under the Altamirano–Harrison Treaty of 1905, the peoples had historic rights over their lands and to live according to their customs.[98] They 'maintained an ongoing claim to compliance' with the terms of the treaty.[99] Following decades of relative neglect of the Miskitos by central government, tensions rose after the rise to power of the Sandinista regime. Miskitos opposed attempts by the government to reform their way of life and tribal organisation. The peoples became embroiled in the conflict between the government and armed Somocista guerrillas infiltrating the State from neighbouring Honduras. Miskitos were accused of counter-revolutionary activities and of fomenting secession.[100] The catalogue of rights violations was placed in context by the Coordinator-General of Misurasata:[101]

> The principal reason for the Indian rights crisis in Nicaragua is the antagonism created by the Sandinista government policy which denies the ethnic identity of our Indian peoples. It follows that the recognition of Indian rights to their territory and their autonomy is also denied. The government's policy requires assimilation of minorities to the philosophy and culture of those who control the government in Managua, thus converting us into peasants and *mestizos* without definition and aboriginal rights.[102]

Inter alia, the Indian leadership claimed autonomy or self-determination, particularly in the matter of land rights, while stressing that 'the autonomy or self-determination which we sought did not mean separatism or complete independence'.[103] Following the failure of attempts to reach a friendly settlement, the report expressed itself in terms of the individual rights set out in the American Declaration including rights to life, personal liberty and personal security, to due process, to residence and movement, and to property. The Committee also deliberated on 'Special Protection of the Miskitos as an ethnic group',[104] noting that Nicaragua was party to the ICCPR, with its Article 27 'which reaffirmed the need to protect ethnic groups'.[105] But while

[98] The Treaty, signed by Great Britain and Nicaragua in 1905, annulled the earlier Treaty of Managua 1860, and recognised the sovereignty of Nicaragua over the former British-protected Miskito reserve. See *Report*, pp. 4 and 5.

[99] *Report*, p. 5.

[100] A Nicaraguan government delegation admitted house and crop burnings, relocations and slaughter of animals 'in order to leave no shelter or food for the armed insurgent groups that operate in the zone' (*Report*, p. 21).

[101] MISURASATA 'derives its name from the first syllables of the names of the ethnic groups: Miskito, Sumo, Rama, and Sandinista and the words "Asla Talanka" (which . . . means "united")' (*Report*, p. 6, n.1).

[102] *Report*, p. 22.

[103] *Ibid.*, p. 24.

[104] *Ibid.*, pp. 76–82.

[105] *Ibid.*, p. 76. The *Report*, pp. 77–78, referred to other ethnic group texts, including General Assembly resolutions 217 C (III) and 532 B (VI), the UNESCO Convention

the American Convention on Human Rights guaranteed only individual rights, it possessed great salience for ethnic groups: 'for an ethnic group to be able to preserve its cultural values, it is fundamental that its members be allowed to enjoy all of the rights set forth in the American Convention . . . since this guarantees their effective functioning as a group, which includes preservation of their own cultural identity'.[106] In the end, the IACHR declared that it was not in a position to decide 'on the strict legal validity'[107] of the claim to ancestral lands, but recommended a just solution which would respect the aspirations of the Indians and the territorial unity of Nicaragua.[108] In citations in the *Report*, Nicaraguan representatives tended to conflate special rights, including land rights, with secession[109] – and the IACHR's debate on self-determination was clouded by a focus on secession as the paradigmatic mode for its exercise. In a 'conservative'[110] disposition, the Commission commented that:

> The present status of international law . . . [recognizes] . . . the principle of self-determination of peoples, which it considers to be the right of a people to independently choose their form of political organization and to freely establish the means it deems appropriate to bring about their economic, social and cultural development. This does not mean, however, that it recognizes the right to self-determination of any ethnic group as such.[111]

Citing the Colonial Declaration and the Declaration of Principles of International Law, the Commission concluded that self-determination could never justify disrupting the territorial integrity of the State.[112] The Commission also noted that international law did not establish any relevant right to autonomy for the ethnic groups in question.[113] However, this did not mean

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against Discrimination in Education, and ILO Convention 107 – which had not however been ratified by Nicaragua. Examination of extraneous texts is justified by Article 29(b) of the American Convention, which, as noted, provides: 'No provision of this Convention shall be interpreted as . . . restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a Party'. The provision could go beyond the employment of provisions of treaties to include non-treaty instruments, depending on the extent to which the latter were recognised as part of domestic law; see also 29(d) above.

[106] *Report*, p. 81.

[107] *Ibid.*, p. 127.

[108] *Ibid.*

[109] *Ibid.*, p. 126: 'Territorial unity stands above any other consideration and is not subject to discussion of any kind. The imperialist dream is to separate the Atlantic Coast from the rest of Nicaragua. We will never permit this. Our Indians are as Nicaraguan as any other citizens, and they have the same rights as any one of us'.

[110] Hannum, 'Protection of indigenous rights', p. 320.

[111] *Report*, pp. 78–9.

[112] See the discussion of these Declarations in ch. 4 of this volume.

[113] p. 81.

that the government of Nicaragua had 'an unrestricted right to impose complete assimilation' on the Indian groups in question.[114] The IACHR called upon Nicaragua to establish an 'adequate institutional order' to preserve cultural identity, including 'aspects linked to productive organization' such as ancestral and communal lands. Such an order could only carry out its purposes 'to the extent that it is designed in the context of broad consultation, and carried out with the direct participation of the ethnic minorities of Nicaragua, through their freely chosen representatives'.[115] The Commission also called for the establishment of new conditions for coexistence between the ethnic groups and the government.[116] Hannum observes that, while the conclusions on self-determination may disappoint advocates of indigenous rights, they were 'amply supported by the state of international law in the mid-1980s and by the limited nature of the texts the Commission was called upon to interpret'.[117] This is a charitable conclusion not least for the reading given to the Declaration on Principles of International Law to state a 'simple' anti-secession position.[118] Whatever view is taken of the limited nature of that Declaration, it does not unequivocally support the conclusion that self-determination can 'never' justify the disruption of territorial integrity.[119] The Miskitos in the case formally advanced a view of self-determination which was not secessionist. Neither the IACHR nor the government of Nicaragua adequately addressed the Miskitos' concept. On a technical note on the effect of normative interdependence in the field of human rights, Anaya observes that the Yanomami and Miskito cases

> demonstrate that the complaint procedure involving the Inter-American Commission may be a conduit for implementing norms concerning indigenous peoples beyond those norms specifically articulated in the American Declaration . . . and Convention. For admissibility purposes, a complaint must allege facts constituting a violation of the declaration or Convention. But once the Commission proceeds to consider the merits of a case, international norms that are otherwise applicable may be invoked.[120]

As Davis notes, many indigenous cases were filed in the early life of the Commission without too many coming to formal resolution.[121] Important issues continue to be raised under the petition procedure.[122] *Inter alios*,

[114] p. 81.
[115] p. 82.
[116] *Report*, p. 81.
[117] Hannum, 'Protection of indigenous rights', p. 331.
[118] *Report*, p. 80.
[119] See ch. 4 of this volume.
[120] See ch. 4 of this volume.
[121] Davis, *Land Rights*, pp. 8–9.
[122] See Annual Report of the IACHR, 1998, ch. II, section 2D – friendly settlement in the case of the Enxet Communities of Paraguay – 11.713 – formalising the

petitions have been lodged concerning the Mopan and Ke'chi Maya people against Belize challenging the legality of logging and oil concessions granted by the government of Belize in the Toledo district.[123] The concessions allegedly threaten primary forests, soils and watersheds that the Maya depend upon for subsistence. The petitioners request the suspension of logging and oil exploration and resource development within lands traditionally used and occupied by Maya people in the Toledo district.[124]

Reports

Discussions of indigenous issues arising from communications to the IACHR highlight such issues only to a limited degree. The peoples in most cases have been caught up in larger-scale conflicts in which oppression of the indigenous was only one element. In the reporting system, there are references to indigenous groups. Indigenous issues appear in reports on Paraguay (1978; 1987), on Nicaragua (1978; 1981); Colombia (1981 and 1993),[125] Guatemala (1981; 1983; 1985; 1993); Bolivia (1981), Suriname (1983 and 1985). In the case of Guatemala, the Commission logged the human rights aspects of the civil war in a number of reports. In its third report (1985) while the commission noted that no other sector of society had suffered as much in the civil war as indigenous communities and farmers, the report is more of a catalogue of violations than an analysis of rights violations.[126] In the 1993 report,[127] the IACHR found that, in relation to the Maya-K'iché people, State actions reflected discriminatory cultural stereotypes. Mayan characteristics were scorned and those who bore them were excluded from positions of power and prestige in the nation.[128] Efforts on the part of indigenous advocates to further sensitise the OAS organs to indigenous issues continue and more critical reports have emerged. In a style broadly similar to previous cases,

transfer of lands to the community. The case is referred to in a UN study as 'the first agreement in the inter-American human rights system which restores land rights to an indigenous community' (Special Rapporteur E.-I. A. Daes, *Indigenous Peoples and their Relationship to Land*, E/CN.4/Sub.2/2001/21, para. 103). The settlement illustrates the potential uses of the Commission's friendly settlement procedure as a framework for negotiation of indigenous claims to land and other rights.

[123] Petition filed on 10 August 1998 by the Toledo Maya Cultural Council (TMCC): information supplied by the Indian Law Resource Centre.

[124] In this case the friendly settlement procedures did not succeed: Daes, *Indigenous Peoples*, para. 103.

[125] See pp. 284–5 in this volume on the 1999 report on Colombia, which subsumes some of the earlier information.

[126] Hannum, 'Protection of indigenous rights', p. 333.

[127] OEA/Ser.L/V/II.83, Doc. 31.

[128] *Report*, pp. 33–4.

the Commission's 1997 *Report on Ecuador*[129] is based on information compiled through monitoring developments, processing individual cases[130] and *in loco* visits.[131] Ecuador is 'a major indigenous population centre in Latin America'[132] – estimates range from 35 per cent to 45 per cent of the population as a whole.[133] The gravamen of the complaint was the effect of oil and mineral development in Oriente. The region has been the traditional home of indigenous peoples including the Quichwa, Shuar, Huaorani, Secoya, Siona, Shiwar and Cofan 'for hundreds of years', and also houses a newer settler population who arrived on the back of oil drilling and opening of roads.[134] The processes of oil and mineral development have led to a variety of ills, including deforestation, contamination of rivers and the soil, emission of toxic by-products, disappearance of fauna, etc.[135] In the petition which originally engaged the Commission's interest in Ecuador, the Huaorani[136] listed all the ills of the kind of 'development' to which they had been exposed, including colonisation, land speculation and dispossession, logging, disease epidemics and displacement from traditional territories.[137] The Commission assessed the effects in terms of: (1) the inhabitants of the interior of Ecuador;[138] and (2) the indigenous inhabitants of the country.[139] In the first case, recommendations were made on the basis of articles of the American Convention,[140] the underlying principle of which is 'respect for the inherent dignity of the person'.[141] Accordingly, conditions 'Conditions of severe environmental pollution, which may cause physical illness, impairment and

[129] *Report on the Situation of Human Rights in Ecuador* (1997), Doc. OEA/Ser. L/V/II.96.Doc.10 rev. 1, April 24, 1997.

[130] The IACHR refers to the petition of the Huaorani people in 1990 as the initial basis for its interest in the interior of Ecuador: for a note on this and its subsumption into a general review by the Commission, see *Report*, p. 77.

[131] *Report*, i.

[132] *Report*, p. 97.

[133] *Ibid.* See also the entry for Ecuador in Minority Rights Group (ed.), *World Directory*, pp. 86–8.

[134] *Report*, p. 77.

[135] *Report*, pp. 79–83.

[136] See also A. Fabra, 'Indigenous peoples, environmental degradation, and human rights: a case study', in A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press, paperback edn 1998), pp. 244–63. The petition of 1 June 1990, was filed by the Confederacion de Nacionalidades Indigenas de la Amazonia Ecuatoriana (CONFENIAE) on behalf of the Huaorani people.

[137] pp. 106ff.

[138] Ch. VIII.

[139] Ch. IX.

[140] Articles 4 (right to life), 5 (right to physical, mental and moral integrity), 13 (information), 23 (participation) and 25 (access to court).

[141] *Report*, p. 92.

suffering on the part of the local populace, are inconsistent with the right to be respected as a human being'.[142] Key rights at issue in the process of development in Ecuador were rights to life and physical integrity.[143] In its review of legal issues, the Commission stressed 'the critical connection between the sustenance of human life and the environment', referring to a range of instruments accepted or adopted by Ecuador.[144] Under American human rights instruments, Articles I and XI of the American Declaration and Articles 4 and 5 of the American Convention were highly pertinent. Accordingly, the Commission proclaimed that, under the American Convention:

> The right to have one's life respected is not . . . limited to protection against arbitrary killing. States parties are required to take certain positive measures to safeguard life and physical integrity. Severe environmental pollution may pose a threat to human life and health, and in the appropriate case give rise to an obligation . . . to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury'.[145]

The quest to guard against environmental conditions which threaten human health 'requires that individuals have access to: information, participation in relevant decision-making processes,[146] and judicial recourse' – Articles 13, 23 and 25 of the American Convention. In its conclusions on the interior of Ecuador, the Commission observed that the norms of the inter-American system 'neither prevent nor discourage development; rather, they require that development take place under conditions that respect and ensure the human rights of the individuals concerned'.[147] On the specific matter of indigenous peoples, the Commission stressed the utility of the American Convention provisions on equal protection and freedom from discrimination, on the right to an interpreter in cases where an accused does not understand the court language, on participation in public life and on the right to property. Additionally, provisions in a wide range of texts were brought into play – including (as before on ethnic issues) Article 27 of the ICCPR,[148]

[142] *Ibid*.

[143] These were 'necessarily related to and in some ways dependent upon one's physical environment' (*ibid*., p. 88).

[144] Including the ICCPR, the ICESCR, treaties and declarations for the protection of the Amazon, the World Charter for Nature and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, the Rio Declaration on Environment and Development, and the Convention on Biological Diversity: *ibid.*, pp. 87–8.

[145] *Ibid.*, p. 88.

[146] The Commission observed that 'environmental action requires the participation of all social sectors' – including minorities and indigenous peoples: the 'sectors' had been unable to participate for diverse historical reasons: *ibid*., p. 93.

[147] *Ibid.*, p. 94.

[148] *Ibid.*, p. 103.

as well as ILO Convention 107,[149] to both of which Ecuador was a party. In such cases, the Commission prayed in aid Article 29 of the American Convention – referred to above. Within a list of recommendations, the Commission urged Ecuador to adopt protective measures to restrict settlers to areas which did not infringe upon 'the ability of indigenous peoples to preserve their traditional culture', explaining that:

> Such protection further requires that the State take the measures necessary to ensure the meaningful and effective participation of indigenous representatives in the decision-making processes about development and other issues which affect them and their cultural survival. 'Meaningful' in this sense necessarily implies that indigenous representatives have full access to information which will facilitate their participation.[150]

Scheinin comments that the above passage 'may be understood as the establishment of a framework for assessing interference with indigenous cultures in future cases'.[151] In broad conclusions, the IACHR pointed out that for many indigenous cultures, 'continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being'.[152] They also made a general claim that international law generally and inter-American law specifically, accepted that special protection may be required for indigenous peoples in order for them to have the ability to exercise rights equally with the rest of the population – a conclusion which echoes that of the *Yanomami* case. Special rights also ensure the peoples' right to physical and cultural survival – 'a right protected in a range of international instruments and conventions'.[153] Finally, the Commission delicately adverted to a question of 'uncontacted' groups. Their message was not to go ahead and contact them – to bring to the Tagaeri-Taromenane and any remaining Onamenane the blessings of civilisation – but to establish some form of protection for the lands they inhabit 'as their very extinction as peoples is at issue'.[154] On the other hand, such uncontacted peoples present 'especially difficult and

[149] *Ibid.*, p. 100. Convention 107 was cited for the specific principle in Article 11 – the right of indigenous peoples to collectively or individually own the land they have traditionally occupied.

[150] *Ibid.*, p. 116.

[151] M. Scheinin, 'The right to enjoy a distinct culture: indigenous and competing uses of land', in T. S. Orlin, M. Scheinin and A. Rosas (eds.) *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*, p. 19 (provisional pagination).

[152] p. 115.

[153] p. 115. The Commission cited (p. 104) its resolution 'On the problem of special protection for indigenous populations', OEA/Ser.L/V/II.29, Doc. 38 rev., 1972, to the effect that 'for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the States'.

[154] *Report*, p. 116.

complex questions'.[155] Other recent reports with significant sections on indigenous rights include those on Brazil, Colombia and Mexico. The report on Brazil[156] is notable more for the melancholy narrative of indigenous travails than for jurisprudential innovation. The IACHR is particularly clear on the gap between a Constitution which is purposeful on indigenous rights – including rights over land regarded as 'original'[157] – and lower level legislation such as the Indian Statute of 1973 which contradicts many of the constitutional provisions.[158] The Brazilian story is the familiar one of invasion of indigenous lands by outsiders, including the *garimpeiros* referred to earlier. The report focuses on two indigenous groups – the Macuxi in Roraima and the Yanomami. In the former case, the drive towards demarcation of indigenous lands would result in the creation of discontinuous indigenous 'islands' surrounded by the non-indigenous.[159] The report updates the IACHR judgment on serious violations of rights in the *Yanomami* case[160] noting the thin improvements since that time in the face of continuing pressures. The Commission reiterated its support for special measures for indigenous groups – existing measures were proving insufficient in the face of 'the ever-continuing usurpation of their possessions and rights'.[161]

The 1998 *Report on Mexico*[162] contains a chapter entitled 'The situation of indigenous peoples and their rights',[163] which reflects on the general

[155] *Ibid.*, p. 114.

[156] OEA/Ser.L/V/II.97, Doc. 29 rev. 1, 29 September 1997.

[157] Indigenous areas in Brazil are the property of the Union and are thus subject to Federal jurisdiction. At the same time 'the Constitution itself recognizes the concept of "original domain" in the right of the indigenous peoples to the land which they traditionally occupy. In other words, those rights do not stem from an act or grant of the State, but from the historical status or occupancy and ancestral utilization of that land' (*Report*, p. 99, para. 25). Indigenous areas may be classified as 'those which are usufructuary ("occupied" areas and "reserved" areas) and those which are truly proprietary, the ones that are fully owned by the individual Indian or the indigenous community' (*ibid.*, para. 26).

[158] *Ibid.*, p. 97, para. 16. The report does not make an article-by-article comparison between Constitution and laws. However, it is instructive to note that Brazilian law still purports to distinguish between *silvicolas* (denizens of the forest) and *acculturated* Indians, 'depending on the extent to which the primitive culture has been modified by a more advanced one' (*ibid.*, p. 96, para. 11). Legal incapacities attaching to the former status are progressively reduced 'as the indigenous "forest people" become adapted to the civilization of the country' (*ibid.*). This is a living echo of Vitoria's characterisation of Indians as children, with nineteenth-century 'primitivist' inflections.

[159] *Ibid.*, pp. 104–7. The Commission recommended the completion of the demarcation process and the giving of legal sanction to ownership of the Macuxi lands 'with full respect for their property and ancestral institutions and customs' (*Report*, p. 112, para. d).

[160] 5 March 1985.

[161] *Report*, p. 111, para. c.

[162] OEA/Ser.L/V/II.100, Doc. 7 rev. 1, 24 September 1998.

[163] Ch. VII.

situation, the political rights of the peoples, the militarization of indigenous areas, and the particular situations in the mountains of Guerrero and in the State of Oaxaca. Critical notes include an assessment of the extreme disadvantages suffered by indigenous peoples in the area of access to State services, education, housing – the assessment includes the statement that 'Indigenous women are the most disadvantaged, since they have the highest rates of illiteracy and the least education and suffer most from malnutrition and health problems'.[164] The report notes that in an electoral process that was in general fairly conducted, this did not apply in the State of Chiapas in areas with a heavy indigenous presence. In the face of violence and intimidation, some thirty-eight municipalities declared elections based on Indian 'practices and customs' in opposition to the official elections.[165] Such indigenous elections, recognised in Oaxaca State and in the San Andres Accords, were not accepted in Chiapas.[166] The report paints a grim picture of the privations of the indigenous and peasant communities from militarisation, particularly in Chiapas, though targeting of indigenous and peasants was also prevalent in Guerrero and Oaxaca. The Commission's final recommendations are directed to such glaring abuses that include murder, torture and rape committed against indigenous and peasant alike.[167] Indigenous groups are also mentioned in connection with denial of economic, social and cultural rights. The 1999 *Report on the Situation of Human Rights in Colombia* noted various developments – many of them positive – in the situation of indigenous peoples in Colombia, despite continuing pressures.[168] In an instructive passage, the IACHR stated that the proposed Inter-American declaration on the Rights of Indigenous Peoples 'should be understood to provide guiding principles for inter-American progress in the area of indigenous rights'.[169] The Commission noted, without explicitly endorsing, the government of Colombia's interpretation of these rights in its legal regime to include: (1) the right to an identity as an indigenous people; (2) the right to territory 'understood as sufficient habitat and space to reproduce culturally as a people; (3) the right to autonomy in the various spheres of life as a people 'in order to regulate ethnic reproduction and cultural changes'; (4) the right to participation in national life, 'and the right to prior consultation on the measures, plans, programmes and projects that many affect their ethnic identity, their territories, or the natural resources situated therein'; (5) the right to development, 'in the sense of future development of their

[164] *Report*, para. 513.
[165] *Ibid.*, 520.
[166] *Ibid.*, 521.
[167] Specific recommendations on indigenous groups are set out, *ibid.*, paras. 744–8.
[168] *Ibid.*, ch. X, paras. 2–8.
[169] *Ibid.*, ch. X, para. 9.

social groups, their culture . . . in accordance with their cultural and social systems and the life plans they devise or carry out as peoples, and their . . . development in terms of their inter-cultural relationship with national development'.[170] In order to implement these principles, the government of Colombia created a Commission on Human Rights of the Indigenous Peoples – the IACHR expressed a strong interest in collaboration with the Colombian Commission.[171] The IACHR concluded its review of indigenous issues with a raft of recommendations, including various kinds of special measures for the life and physical integrity of the communities, for expediting processes of land demarcation without undue bureaucratic difficulties, for effective indigenous control over lands and territories, and to ensure that processes of development 'do not cause irreparable harm to the religious, economic or cultural identity and rights of indigenous communities'.[172]

Inter-American Court

The Inter-American Court of Human Rights has indirectly addressed indigenous issues in only a small number of cases,[173] without elaborating on indigenous rights. In the advisory jurisdiction, interest attaches to the opinion on *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*,[174] where one of the amendments would require that the applicant had the ability to speak, read and write Spanish in order to acquire citizenship. The Court elaborated on the principles of equality and non-discrimination, observing that equality 'springs directly from the oneness of the human family' and that because of this no group has a right to superior treatment over another.[175] On the other hand, citing jurisprudence of the ECHR,[176] the Court held that no discrimination exists 'if the difference in treatment has a legitimate purpose and it does not lead to situations which are contrary to justice, to reason or the nature of things'.[177] The Court found that it was not unreasonable, disproportionate or arbitrary to require persons desiring to acquire Costa Rican nationality to know the official language well enough to communicate in it. The specifics of the case are not

[170] *Ibid.*
[171] *Ibid.*, para. 11.
[172] *Ibid.*, ch. X, section J.
[173] *Chunima* case, reprinted in 1991 *Inter-American Yearbook of Human Rights*, p. 1104; *Aloeboetoe* case (reparations), I/A Ct. HR, Ser. C No. 15 (1993). See D. Shelton, 'The jurisprudence of the Inter-American Court of Human Rights', *Am.U.J. of International Law and Policy* 10 (1994): 333.
[174] IA Ct. HR, Advisory Opinion OC-4/84, 19 January 1984, Ser. A No. 4 (1984).
[175] Para. 55.
[176] The *Belgian Linguistics* case, Eur. Ct. HR, Ser. A, No. 2 (1968).
[177] European Court of Human Rights.

of primary concern to indigenous groups, though the principle of non-discrimination is. In a separate opinion, Judge Piza connected the principles with the situation of indigenous groups, noting that

> equality and non-discrimination cannot function in a vacuum not, therefore, without the specific conditions of the society in which peoples live. In this regard, my concern comes from the fact that there are among the country's own native-born people persons and substantial communities that do not know Spanish or that do not know it well . . . Indian communities that, although they are small and isolated, retain their ancestral languages and even resist learning or having to use the official one . . . the Costa Rican State, aware of the desirability and even the duty of preserving the native cultures and the rights of minorities in the country, is conducting programs of instruction and for promotion of the culture of the Indian languages.[178]

The observations suggest the basis of a critique of language policies of American – and other – States which effectively diminish the scope for participation in national affairs of indigenous peoples or cut away at community viability through burdensome language requirements. The opinion portrays a version of the non-discrimination/equality principle which respects the condition of indigenous groups, weighing against its mechanical application without regard to their circumstances.

The *Chunima*[179] case concerned alleged murders of indigenous activists in Guatemala, but was settled before a final judgment. Interesting issues concerning tribal law were raised in *Aloeboetoe v Surinam*,[180] where the focus was on reparations in view of the government's admission of responsibility for the kidnapping and killing of seven young men of the Saramaka tribe.[181] The Saramakas are descendants of African slaves who maintain a traditional culture displaying 'a strongly matriarchal familial configuration where polygamy frequently occurs'.[182] In view of the particular social structure of the tribe, the Inter-American Commission took the view that not only direct relatives of the victims suffered damage but also the Saramakas as a whole.[183] The Commission reasoned that under tribal law, 'a person is a member not

[178] Para. 23.

[179] 1991 *Inter-American Year Book of Human Rights*, p. 1104.

[180] I/A Ct. HR Ser. C No. 15 (1993). The case is discussed in S. Davidson, 'Remedies for violations of the American Convention on Human Rights', *ICLQ* 44 (1995): 405–14. See also D. Shelton, 'Reparations in the Inter-American System', in Harris and Livingstone (eds.), *Inter-American System*, pp. 151–72, at pp. 158–63.

[181] Six were killed in a round-up of 'subversives'; the seventh was shot, but survived to testify to the massacre before dying of his wounds. For background, see the entry for Suriname and 'Maroons', in Minority Rights Group (ed.), *World Directory*, pp. 114–15.

[182] Judgment, para. 59. Case explanatory notes suggest that 'matrilineal' would 'probably be a more precise anthropological term'.

[183] *Ibid.*, para. 19.

only of his or her own family group, but also of his or her own village community and tribal group'.[184] Suriname, on the other hand, asserted that tribal customary norms were irrelevant in fixing compensation under the American Convention.[185] The Inter-American Court determined that local law should be applied to determine the next of kin and the beneficiaries of the victims. Surinamese law was not effective in the region, in view of the substantial autonomy enjoyed by the tribe. However, there were human rights objections to a treaty underpinning the autonomy,[186] so that the Commission did not 'seek to portray the Saramakas as a community that currently enjoys international juridical status'.[187] Analogously, the Court did not try 'to determine whether the Saramakas enjoy legislative and jurisdictional autonomy within the region which they occupy'.[188] In effect the Court opted for a functional or negative approach to autonomy – Saramakas enjoyed autonomy to the extent that Surinamese law was not effective in their territory. The Court further observed that Surinam was not a party to ILO Convention 169 on Indigenous and Tribal Peoples,[189] and that under international law 'there is no conventional or customary rule that would indicate who the successors of a person are'.[190]

Accordingly, the Court was led to apply general principles of family law,[191] interpreted according to Saramakan law where it did not contradict the Convention – the Court ruled out part of the customary law relating to ascendants in view of its sexually discriminatory nature.[192] The Court did however recognise the multiple wives and children of the victims. Davidson comments on the 'incomplete' reasoning of the Court which 'seems to fall somewhere between the identification of beneficiaries by reference to a "value free" system of general principles . . . and partial recognition of a degree of cultural relativity, as modified by the American Convention'.[193]

[184] *Ibid.*

[185] *Ibid.*, para. 27.

[186] A Dutch–Saramaka treaty of 1762 provided a basis for the autonomy. The treaty included a clause on returning runaway slaves to the Dutch. The Court declared that, faced with such a violation of *ius cogens* norms, 'No treaty of that nature may be invoked before an international human rights tribunal' (*ibid.*, para. 57). Cf. Articles 53 and 64 of the Vienna Convention on the Law of Treaties; also Article 44 on separability and *jus cogens*.

[187] Judgment, para. 58.

[188] *Ibid.*

[189] The Treaty does not establish a precise rule on 'successors', although 'it does require regard for indigenous and tribal customs and customary law'.

[190] Judgment, para. 61.

[191] Cf. Article 28(1)(c) of the Statute of the ICJ.

[192] Para. 62. Shelton notes caustically that 'the all male Court refused to place the monetary compensation under the control of the female head of the family because this would involve gender discrimination' ('Reparations' in Harris and Livingstone (eds.), *Inter-American System*, p. 158, n. 28.

[193] Davidson, 'Remedies', 409.

The Commission view that the tribe as such had suffered compensatable damage was rejected by the Court[194] – it was too remote to give rise to legal liability. The Court observed that 'all persons, in addition to being members of their own families and citizens of a State, also generally belong to intermediate communities' – and the obligation to make moral compensation did not generally extend to the State or to such communities.[195] However, in Davidson's view, the Court's insistence that the community must have suffered direct damage opens the way to broader claims such as the loss of the tribe's economic viability on account of the deaths.[196] To which it may be added that not all 'intermediate communities' are identical, and that the phrase is inadequate to express the nature of an indigenous presence in Suriname or elsewhere, in terms of damages or rights. The Court ordered monetary and non-monetary compensation, requiring that the government reopen a school – to be staffed so as to make it a permanent fixture – and a health dispensary.[197] Other requests were not discussed.[198]

An opportunity to elaborate further on questions specific to indigenous communities should flow from *Awas Tingni Indigenous Community of Mayagna v the State of Nicaragua* referred by the IACHR to the Inter-American Court of Human Rights in 1998.[199] The complaint before the Court originated in a 1995 petition to the Commission alleging that Nicaragua had not met obligations under its Constitution[200] and international law[201] by

[194] 'According to the Commission, the villagers make up a family in the broad sense' (Judgment, para. 83).

[195] *Ibid.*

[196] Davidson, 'Remedies', 411. The Court observed that, if 'in some exceptional case such compensation has ever been granted, it would have been to a community that suffered direct damages' (Judgment, para. 83).

[197] Judgment, para. 96.

[198] They included an apology from the President and Congress, publication of the Court's decision and the naming of a park, square or street after the Saramaka tribe: Judgment, para. 20.

[199] *Annual Report 1998*, ch. II, section 3.

[200] The key provisions of domestic law include Articles 5 and 89 of the Political Constitution of Nicaragua, and Law no. 28, the Autonomy Statute of the Atlantic Coast regions of Nicaragua, Articles 35 and 36. Article 5 of the Constitution reads: 'The State recognizes the existence of indigenous peoples, who enjoy the rights, obligations and guarantees recognized in the Constitution, especially those that maintain and develop their identity and culture . . . so as to maintain the communal forms, enjoyment, use and benefit of their lands'. Article 89 incorporates recognition of 'the communal forms of property of the Atlantic Coast Communities' lands . . . [and] . . . the enjoyment, use and benefit of the waters and forests of their communal lands' (texts in *Amicus Curiae Brief* presented by Nicaraguan Indigenous Organisations, Communities and representatives in the *Awas Tingni* case).

[201] The obligation to demarcate lands is asserted on the basis of Article 21 of the American Convention (right to use and enjoyment of property), and Article 27 of the ICCPR; Nicaragua is a party to both conventions.

failing to recognise and safeguard the Community's rights to the lands that its members have traditionally occupied and used. A logging concession granted by the Nicaraguan Ministry of Environment and natural resources to a Korean timber company was denounced as a violation of territorial rights – the concession was declared unconstitutional by the Nicaraguan Supreme Court in 1977 but had not been revoked. The IACHR declared that Nicaragua had violated its obligations under the American Convention in not demarcating or otherwise guaranteeing the Community's land rights and for granting the concession without consultation. The Commission asked the Court to declare that Nicaragua has violated the American Convention in the above respects, to order demarcation and guarantee communal land rights, abstain from granting further concessions, and grant reparations and costs. *Awas Tingni* is the first case before the Court which directly addresses the territorial rights of indigenous communities.[202] The Court unanimously dismissed Nicaragua's preliminary objections in February 2000. The Court found against Nicaragua and affirmed the collective land rights of the peoples in its decision of 17 September 2001.[203]

Comment

There are innovations in the work of the American institutions in dealing with indigenous groups. The organs of the OAS have confronted indigenous issues in a more resolute manner than elsewhere, despite the limitations of the instruments at their disposal. Particular interest attaches to the notion that indigenous groups require an adequate institutional order, and that appropriate frameworks for the appraisal of threats to indigenous communities can be established. That said, the manner of addressing the potential impact of tribal structure on reparations leaves something to be desired, and the reflections on the contemporary effects of historic treaties only generate further questions. The American institutions are open to influences from outside, but that should not imply that all the intellectual motors of indigenous rights are located elsewhere; on the contrary, groups have gained considerably from the evolutionary interpretations of the American organs in the light of local conditions. The individual nature of the rights in the American Declaration and Convention of Human Rights is currently assumed to require supplementing, hence the project of the American Declaration of Indigenous Rights discussed in a later chapter. The threats to indigenous groups in the Americas and enormous and ongoing, though the 'level' of indigenous protection appears to be related to overall regional standards of respect for human rights.

[202] Press release, Indian Law Resource Centre, 13 July 1998.
[203] Court Press Release, 17 September 2001.

12

European instruments on human and minority rights

Emanating principally from the Council of Europe, key European instruments have considerable potential to advance human rights strategies of indigenous groups. The Council of Europe was founded in 1949 as a European organisation for intergovernmental and parliamentary cooperation. The central motive for the creation of the Council was the need to secure democracy in the light of recent and actual totalitarianism and to prevent the recurrence of the gross violations of human rights which took place under Nazi instigation. According to its Statute, the aim of the Council is to 'achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress'.[1] The Council of Europe's statutory principles are pluralist democracy, respect for human rights and the rule of law. Two major texts are accounted for in this chapter, neither of which address specific rights to indigenous groups: the European Convention on Human Rights 1950 (ECHR) and the Framework Convention for the Protection of National Minorities (FCNM) 1995. Other texts, including those emanating from the OSCE are discussed in the overall narrative of the chapter. A characteristic of European human rights law is its preoccupation with minority rights as well as general human rights. The concern with minorities is historically embedded, even if the texts on minorities are recent products. As with UN instruments, indigenous groups have employed the individual rights mechanisms of the ECHR, and figure in the reporting mechanism of the newer FCNM. Indigenous groups in Europe have been adverted to from time to time in the present study, notably the Saami of Northern Europe. The accession of Eastern European and former USSR States to the European organisations considerably increased the potential range of indigenous groups subject to European instruments and

[1] Article 1(a).

mechanisms. Additionally, ILO Convention 169 enjoys participation by European States: Denmark, The Netherlands and Norway are parties, and other States may follow. States without indigenous groups on their territory may decide to ratify the Convention as a guide to their development policies and a gesture of solidarity with indigenous peoples.[2] As with other regions of the world, European consciousness of the indigenous dimensions of human rights questions appears to be increasing: recently, the European Conference against Racism has recognised the presence of indigenous peoples in Europe and the discrimination against them, as does a Political Declaration adopted by Ministers of Council of Europe States.[3] By an extension of the notions in the present work, reference is also made to the situation of the Roma – some of whom could, in any case count as 'tribal' if not 'indigenous' in the context of ILO 169. The situation of the Roma figures prominently in virtually all reports of States under the FCNM, and in the jurisprudence of the ECHR. Landmark documents emanating from the Council of Europe include Recommendation 1203 (1993) of the Parliamentary Assembly and General Recommendation No. 3 (1998) of the European Commission against Racism and Intolerance – on Combating Racism and Intolerance against Roma/Gypsies. Treatment of the Roma may be taken as a rough test of European willingness to address ethnic, including indigenous, issues.

The European Convention on Human Rights and some ethnic issues

Self-identification and ethnic identity

The jurisprudence of the ECHR does not distil definitions of ethnic groups. None the less, issues of belonging and membership have come forward here as elsewhere in human rights. Examples include *Ahmet Sadiq v Greece*,[4] where the applicant was imprisoned following an election campaign in which he published a series of communiques referring, *inter alia*, to the 'Turkish minority' instead of 'the Greek minority of Muslim faith', as described in the Treaty of Lausanne 1923.[5] The Greek Court of Cassation averred that 'there was no Turkish minority in Western Thrace'.[6] The case was lost before the European Court on the ground of non-exhaustion of domestic remedies. In a strong dissent, Judge Martens, joined by Judge Foighel, considered that the essence of the case was the extent of the rights of ethnic

[2] This appears to be true of the ratification of Convention 169 by The Netherlands.
[3] EUROCONF (2000) 1 final, 13 October 2000, p. 4.
[4] No. 18877/91, Judgment of 15 November 1996.
[5] Which 'recognised only the existence in that region of a Muslim (religious) minority, not a Turkish minority': Court of Cassation, cited in Judgment, para. 18.
[6] *Ibid.*

minorities in a democratic society[7] – suggesting that in such cases 'there is no room for relying on the judgments of the national courts nor for a margin of appreciation': this leads the way to ECHR recognition of the principle that minority – or indigenous – existence is not simply in the gift of the State. In *Sidiropoulos et al. v Greece*,[8] the applicants claimed to be of Macedonian ethnic origin, and to have a Macedonian national consciousness, applied to register a non-profit-making association under the name of 'Home of Macedonian Civilisation'.[9] The application was refused. The Court found a violation of Article 11 (freedom of association), and observed that 'the existence of minorities and different cultures in a country was a historical fact that a "democratic society" had to tolerate and even protect and support according to the principles of international law'.[10]

Self-determination and democracy

Recognition of a pluralism of communities does not necessarily lead to the affirmation of a right of self-determination, an international law right which is not explicitly mentioned in the Convention.[11] Accordingly, claims to self-determination by indigenous ethnic groups of Suriname,[12] have been declared inadmissible. The issue has been carefully handled by Commission and Court on the basis of a distinction (roughly) between argument and advocacy on the one hand, and incitement to violence on the other.[13] In *United Communist Party of Turkey and Others v Turkey*,[14] the applicant Party (the TBKP) contested the party's dissolution by the Turkish Constitutional Court. The State's application to the Constitutional Court claimed that the TBKP has, *inter alia*, carried on activities likely to undermine the territorial integrity of the State and the unity of the nation. The Constitutional Court rejected the State Prosecutor's submissions on the first issue, but upheld the others on the grounds that Turkey was unitary, indivisible and that there was only one nation. The Court averred that by asserting the existence of two nations in

[7] Dissent, para. 1.

[8] 57/1997/841/1047, Judgment of 10 July 1998.

[9] Judgment, paras. 8 and 9.

[10] *Ibid.*

[11] For a contrary view, constructed on the basis of Article 53 of the ECHR, see G. Gilbert, *Jurisprudence of the European Court and Commission of Human Rights in 1999 and Minority Groups*, E/CN.4.Sub.2/AC.5/2000/CRP.1.

[12] *X v Netherlands*, No. 7230/75, DR 7 (1976), 109.

[13] Inflammatory remarks can legitimately be subject to restrictions 'where such remarks incite to violence against an individual, a public official or a sector of the population . . . [in such cases] the national authorities enjoy a wider margin of appreciation' (*Öztürk v Turkey*, No. 22479/93, Judgment of 28 September 1999, para. 66). Cf. *Zana v Turkey*, 69/1996/688/880, Judgment of 25 November 1997, paras. 58–60.

[14] No. 19392/92, Judgment of 30 January 1998.

Turkey – Turks and Kurds, the TBKP's programme 'was intended to create minorities, to the detriment of the unity of the Turkish nation'. The European Court unanimously upheld the claim under Article 11 (freedom of association), agreeing with the Commission that political parties were within its protection even if their activities 'are regarded by the national authorities as undermining the constitutional structures of the State'. In *Freedom and Democracy Party (OZDEP) v Turkey*,[15] the applicant Party was dissolved because is was alleged to have promoted terrorism and advocated the creation of a Kurdish State. The programme of the Party made a number of references to the right of 'our peoples' (Turks and Kurds) to self-determination, to 'oppressed peoples', etc., stating that it 'will fully respect the Kurdish people's right to self-determination so that a democratic solution [to Turkey's difficulties] based on the self-determination and equality of peoples can be found'.[16] In finding a violation of Article 11, the Court read OZDEP's programme to reflect something of a concept of internal self-determination,[17] in line with developments elsewhere in international law. The overriding *principle* preferred by the Court is the protection and advancement of democracy, and that the preferred *form* of democracy is that which offers participatory structures to relevant groups or peoples. Elsewhere, the Court has stated that democracy is 'the only political model contemplated by the Convention',[18] and that the preferred *form* of democracy is pluralistic,[19] and deliberative.

Non-discrimination

Article 14 provides that 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. In the *Belgian Linguistics* case,[20] the Court explained that in the context of different treatment of linguistic groups

> the principle of equality of treatment is violated if the distinction has no reasonable or objective justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies.

[15] No. 23885/94, Judgment of 8 December 1999.

[16] Judgment, para. 8. The Constitutional Court, in dissolving OZDEP, made the interesting observation (Judgment, para. 14) that the Turkish Constitution 'did not preclude the *celebration of difference* but forbade propaganda based on racial difference . . . aimed at destroying the constitutional order'. (Present author's emphasis.)

[17] Judgment, para. 41.

[18] *United Communist Party*, para. 45.

[19] *Ibid.*, para. 43. The forms of pluralism generally referred to are pluralism in the realm of ideas and opinions, and in political parties.

[20] Judgment of 23 July 1968.

> A difference in treatment . . . must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship between the means employed and the aim sought to be realized.[21]

According to the Court, language maintenance and development constitute legitimate aims within the Convention, consistent with Article 14. On the other hand, the Court refused to interpret the right to education to include the right to education in one's own language, arguing that, if it were otherwise, anyone would be free to claim any language of instruction in the territories of the Contracting States. It may be observed that the organs of the ECHR have displayed some reluctance to find discrimination relevant and proven. Thus in the 'Turkish cases': the Court finds regular violations by the State of rights to life, liberty and property of Kurds, without the further step of identifying the *reason* for violations as the Kurdish ethnicity of victims.[22] Whereas discrimination on grounds of race and sex are regarded as particularly 'suspect' in the ECHR canon,[23] there has been reluctance to utilise 'national minority' as a ground of discrimination, although 'ethnic origin' and 'race' may function as near equivalents. In *Velikova v Bulgaria*,[24] a case involving the death of an individual of Roma ethnicity, the Court in assessing the application of Article 14 discussed the issues under 'ethnic origin', 'ethnicity' and racial prejudice. The allegation by the applicant in *Chapman v UK* alleged discrimination on the assorted grounds of 'race, national or social origin, association with a national minority and birth or other status . . . such discrimination is caused by popular prejudice against gypsies and a failure by local and national government to act despite that prejudice'.[25] Although Article 14 is not explicit on the question, it may

[21] Judgment, section I B, para. 10. The Court concluded that the means employed by the Belgian legislation pursuant to its linguistic policy objectives were not disproportionate.

[22] Comment by F. Hampson, 'Recent Turkish cases: their contribution to the case law of the European Court of Human Rights', *Human Rights Law Review*, 4 (3) (December 1999), 9–16.

[23] *East African Asians*, 3 EHRR 76 (1976); *Abdulaziz, Cabales and Balkandali*, Ser. A, No. 94 (1985). The 'suspect categories' make it particularly difficult for the State to defend on the basis of a margin of appreciation. Authors point to the possible identification of such categories on the basis of 'clear evidence of a European consensus': D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London, Dublin, Edinburgh, Butterworths, 1995), p. 482. On this basis, it may be possible to argue that discrimination on grounds of ethnic origin and association with a national minority could be added – the 'European consensus' has advanced enormously over the last decade, even if the Court may not always recognise this (see n. 25 below in this volume).

[24] No. 41488/98, European Court of Human Rights, Fourth Section, Judgment of 18 May 2000.

[25] No. 27238/95, Commission admissibility decision, 4 March 1998. Of recent 'Gypsy' cases taken from the UK to the European Court, only one – *Varey* – had a

be argued that States are obliged to ensure effective enjoyment of protection from discrimination. The ECHR jurisprudence has been refreshed to some extent in *Thlimmenos v Greece*,[26] where, in a case concerning Jehovah's witnesses, the Court observed (para. 44) that it had

> so far considered that the right under Article 14 not to be discriminated against . . . is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification . . . However, the Court considers that this is not the only facet of the prohibition of discrimination . . . The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

Protocol No. 12[27]

The Council of Europe has taken steps to open out the prohibition of discrimination through this new Protocol, Article 1 of which reads:

1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.[28]

Rights set forth by law include cases where there is discrimination in relation to specific rights under national law, or in rights to be inferred from a clear obligation of a public authority under national law, or in the exercise of a discretion by a public authority, or by any other act or omission of a

positive outcome for the individuals concerned; the cases of *Chapman*, *Beard*, *Lee*, and *Jane Smith v the UK* were lost by the applicants. All concerned planning restrictions on the stationing of caravans on private land. A number of rights in the ECHR were allegedly violated, including those in Articles 6, 8, 10, 14 and Articles 1 and 2 of Protocol 1. *Inter alia*, the Court was not persuaded that recent developments in minority rights were evidence of a 'consensus' on sensitive ethnic issues, and the principles of the FCNM were not regarded as – taken with other minority rights instruments – capable of providing sufficient concrete guidance for solutions in the instant cases. A summary of the cases (decided on 18 January 2001) may be found in *Human Rights Information Bulletin No. 52: November 2000–February 2001* (Strasbourg, Directorate General of Human Rights, Council of Europe, 2001), pp. 7–9.

[26] Appln. No. 34269/97, Judgment of 6 April 2000.

[27] The Protocol opened for signature on 4 November 2000, the date of the 50th Anniversary of the Convention. The text of the Protocol can be found on the Council of Europe Human Rights website: http://www.dhdirhr.coe.fr/Prot12

[28] The Protocol requires expressions of consent from ten States and a subsequent period of three months to bring it into force – Article 5.

public authority.[29] The *Explanatory Report* suggests that 'law' may also cover international law, but this does not mean that the provision 'entails jurisdiction for the European Court of Human Rights to examine compliance with rules of law in other international instruments'.[30] The *Report* compares Article 14 with a range of texts, including those which permit or mandate special measures to ameliorate disadvantage, observing that 'the present Protocol does not impose any obligation to adopt such measures'.[31] The absence of positive obligations has been criticised.[32]

Dignity

In the case of *Kalderas Gypsies v Federal Republic of Germany and Netherlands*,[33] forty-eight Kalderas gypsies in the FRG and The Netherlands claimed violations of Articles 3 and 14 of the Convention because of the refusal by the authorities to issue identification papers. The Commission observed that refusing identification documents to a nomadic group may amount to a violation of Article 3 – as degrading treatment, and Article 14 – discrimination. On birth certificates, refusal may amount to a violation of Article 8. In *Assenov and Others v Bulgaria*,[34] the applicants were a Roma family of Bulgarian nationality who claimed that Assenov had been ill-treated by police in connection with and subsequent to his arrest. *Inter alios*, Article 3 was violated by the failure of the Bulgarian authorities to carry out an official investigation into the allegations.[35] The Court observed that if 'this were not the case, the general legal prohibition on torture and inhuman and degrading treatment and punishment . . . would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity'.[36] Additionally, it was decided that Article 13 (right to an effective remedy) had been violated.[37]

[29] *Report*, para. 22.

[30] Para. 29. The *Report* (para. 25) makes clear, however, that the Protocol 'may not be construed as limiting or derogating from domestic or treaty provisions which provide further protection from discrimination'.

[31] *Report*, para. 16.

[32] The Protocol 'failed, in the operative paragraphs, to mention positive measures to promote equality between different groups': representative of Sweden before the UN Committee on the Elimination of Racial Discrimination, CERD/C/SR.1418, para. 8.

[33] No. 7823/77 and 7824/77, 11 DR (1977), 221.

[34] No. 24760/94, Judgment of 28 October 1998.

[35] Article 3 was read in conjunction with the general duty of the State under Article 1 to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, which thus 'requires by implication that there should be an effective official investigation' (Judgment, para. 102).

[36] Judgment, para. 102.

[37] Judgment, para. 118.

Identity issues

Names[38]

Choice of name on the basis of language, religion and/or ethnic appurtenance is widely understood as an essential aspect of identity; the naming of a place may have profound historical significance for indigenous groups. While the ECHR is silent on this issue, the Commission and the Court have held that regulation of names falls within the sphere of family and private life.[39] In the *Burghartz* case,[40] the Court ruled that a person's name as a means of identification concerns family and private life, but that the State has an interest in regulating the use of names. Accordingly, in the case of Swiss nationals married in Germany, the application to use a wife's name – Burghartz – as the family name in Switzerland succeeded. The Court ruled that there had been a violation of Article 8 taken with Article 14. In *Stjerna v Finland*,[41] the applicant was refused permission to change his last name from Stjerna to 'Tawasterjna', a name last used by ancestors in 1773. The Court distinguished the situation where permission to change is refused from that where a name is imposed by the State, but accepted that legal restrictions on a change of name may be justified in the public interest – for purposes of population registration, linking the bearer to a family, etc. Self-identification is not an absolute principle here because 'names retain a crucial role in the identification of people'.[42] There appears to be no special sensitivity in the ECHR to the adoption of a name to express an ethnic or national sentiment, though the principle of balance between private and public does not rule out such possibilities. In a case such as Stjerna for example, if the 'ancestor' were less remote and the name more clearly tied to the usage of a particular community, a different result can be envisaged.

Ways of Life

Key Article 8 cases have dealt with characteristic ways of life of indigenous communities. *G. and E. v Norway* [43] concerned the effects of the construction of a dam and a hydroelectric plant in the Alta Valley. The applicants were members of the Saami community that had traditionally used the lands for reindeer herding, fishing and hunting. The case was declared inadmissible by

[38] Further issues are explored in H. Mickiewicz, 'A human right to the native spelling of a personal name?', *Journal of International Relations* 4 (*1–4*) (1977), 49–69.

[39] Cf. *Coeriel and Aurik v Netherlands*, in ch. 5 of this volume. The application had previously been rejected by the Commission as manifestly ill-founded under Article 9 of the ECHR: Appln. No. 18050/91, published in *HRLJ* 15 (1994), 448–9.

[40] Ser. A, No. 280B (1994).

[41] Ser. A, No. 299B (1994).

[42] Para. 39.

[43] Nos. 9278/81 and 9415/81, DR 35 (1983), 30–45.

the Commission, but aspects of the reasoning under Article 8 of the Convention are significant. The Commission noted the statements of the applicants

> that by birth they belong to a minority group, the Lapps. For hundreds of years their kinsfolk have been working with reindeer, fishing and hunting. Every year they move their herd of deer around, and, therefore, there is a great demand for space. The Lapps have their own culture and language, far apart from the other Scandinavian languages . . . [The applicants] maintain that they will not only lose their land, but also their identity.[44]

The Commission observed that 'under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular life-style it may lead as being "private life", "family life", or "home"'.[45] It was also stated that the traditional use of vast territories for grazing, hunting and fishing 'is not a property right within the meaning of Article 1 of the First Protocol',[46] but that the consequences of the plant on traditional Saami economic activities may entitle them to compensation. None the less, the applicants could continue their traditional way of life. Therefore, the measure complained of could properly be regarded as an interference in accordance with law and

> necessary in a democratic society for one of the purposes enumerated . . . the economic well-being of the country. The Commission finds that, without ascertaining the exact extent and nature of the interference with the applicants' rights . . . after the careful consideration of the necessity of the project by the national organs, the interference could reasonably be considered as justified.[47]

It is notable that the Commission's assessment of the effects of the projects on the Saami is measured primarily in spatial and economic rather than cultural terms.[48] The Commission also uses a generalist criterion of economic well-being to justify the interference, and as, Scheinin observes, a reference to '*majority decision-making* as a proper justification for interfering with a *minority culture*'[49] – the adequacy of decision by the national organs. The Commission rebutted any allegation of discrimination by noting that the ECHR does not guarantee specific rights to minorities and that the authors had, as other Norwegian citizens, the right to vote and stand for election to the Norwegian Parliament.[50] *Buckley v UK*[51] was the first

[44] *Ibid.*, 32–3.
[45] *Ibid.*, 35.
[46] Compare *Konkama v Sweden.*
[47] *Ibid.*, 36.
[48] See M. Scheinin 'The right to enjoy a distinct culture, etc.', in T.S. Orlin, A. Rosas and M. Scheinin (eds.), *The Jurisprudence of Human Rights Law: A Comparative Interpretative Approach* (Åbo Akademi University, 2000), 159–222.
[49] Scheinin, p. 172.
[50] 35 DR, 35.
[51] No. 20348/92. The Report of the Commission (the Commission Report) was adopted on 11 January, 1995. Judgment of the Court was delivered on 25 September 1996.

Roma/Gypsy case to reach the European Court of Human Rights. The applicant was a gypsy by birth whose family had for generations been based in the area of South Cambridgeshire near Willingham.[52] The case concerned the refusal of planning permission by UK local authorities and the Secretary of State for the Environment for the applicant to station caravans on her own land.[53] Permission was refused because of the unsightly nature of the caravans,[54] the concentration of gypsy caravans in the area and the availability of an official gypsy site.[55] Following an inspector's report, the Secretary of State found, *inter alia*, that 'the concentration of Gypsy sites in the area had reached the desirable maximum and the need for additional sites for gypsies should not outweigh the planning and highway objections'.[56] The Commission concluded by seven votes to five that there had been a violation of Article 8 of the Convention. The applicant had a right to a home – an autonomous concept which did not depend on classification by domestic law.[57] It was accepted that planning measures pursued, among other legitimate aims, the economic well-being of the country.[58] However, the Commission expressed doubts concerning the nature of the planning restrictions and the limited alternatives available to Buckley in choice of home[59] in view of her traditional lifestyle as a Gypsy. Disagreement between minority and majority in part concerned the relevance of considering traditional lifestyle in the context of the Convention.[60] The Commission concluded[61] that the interference with rights was not necessary in a democratic society – the burdens upon the applicant were excessive and disproportionate. The Court[62] took a different view, finding that there had been no violation of Article 8,[63] particularly in the light of the doctrine of the margin of

[52] Commission Report, para. 21.

[53] For the UK legal background, see *ibid*., paras. 46–57.

[54] Which would, according to the local District Council, 'detract from the rural and open quality of the landscape' (*ibid*., para. 24).

[55] Described by an official of the Romani Union as subject to disorder, and not suitable for a single mother (the applicant): *ibid*., para. 41.

[56] *Ibid*., para. 27.

[57] *Ibid*., para. 63.

[58] *Ibid*., para. 72.

[59] 'Given that there are insufficient places for gypsies on official sites, it is unreasonable . . . to expect the applicant . . . to apply for a site which offers distinct disadvantages compared to her present location on her own land, close to other members of her family' (*ibid*., para. 82).

[60] The dissent of Conforti *et al.* was particularly insensitive to ethnic dimensions of the case. The opinion insisted on the irrelevance of 'life-style', and equated Buckley's actions with those who construct buildings abusively and are then confronted with a demolition order.

[61] By seven votes to five.

[62] *Buckley v the United Kingdom*, Judgment of 25 September 1996.

[63] Agreeing with the Commission that the case concerned the applicant's right to respect for her home: Judgment, para. 54.

appreciation allowed to national authorities in the application of the Convention. The process of weighing the interest of the applicant against the general interest had been done responsibly by the national authorities:[64] the 'special needs of the applicant as a Gypsy following a traditional lifestyle were taken into account'.[65] In relation to the applicant's refusal to accept alternative accommodation on the official caravan site, the Court simply stated that 'Article 8 does not go so far as to allow individuals' preferences as to their place of residence to override the general interest'.[66] Neither was there any violation using Article 8 in conjunction with Article 14 – the court did not find that the applicant had at any time been penalised or subjected to any detrimental treatment for attempting to follow a traditional gypsy lifestyle. On the contrary, the Court charitably interpreted UK law as 'aimed at enabling Gypsies to cater for their own needs'.[67] Dissenting opinions appended to the judgment forcefully articulated aspects of the case concerned with culture and group oppression. The cultural aspect was delineated by Judge Repik in terms of the psychological rootedness of the travelling imperative, which in this case presupposed a secure site to which to return.[68] Judge Lohmus set out a basic theorem:

> It has been stated before the Court that the applicant as a gypsy has the same rights and duties as all the other members of the community. I think that this is an oversimplification of the question of minority rights. It may not be enough to prevent discrimination so that members of minority groups receive equal treatment under the law. In order to establish equality in fact, different treatment may be necessary to preserve their special cultural heritage.

The longest dissent was offered by Judge Pettiti, who believed that British policy was discriminatory, and that if the *Buckley* case 'was transposed to a family of ecologists or adherents of a religion instead of gypsies, the harassment . . . would not have occurred'. Judge Pettiti added that respect for family life should not be subordinated 'to the greater convenience of the local community and its greater willingness to accept others'. His concluding paragraph delivers a tangible note of regret that the Court had lost the opportunity for a legal critique of national law transposable to the rest of Europe in partial compensation for injustices suffered by the Gypsy

[64] In the submission of the government, national law 'was designed to achieve a fair balance between interests of individuals and those of the community as a whole' (Judgment, para. 68). The government also offered the view (*ibid.*) that, in any event, 'it was unacceptable to exempt any section of the community from planning controls, or to allow any group the benefit of more lenient standards than those to which the general population is subject' – a claim which would deny the right of a minority to differential standards in cases backed up by international standards.

[65] Judgment, para. 80.

[66] Judgment, para. 81.

[67] Judgment, para. 88.

[68] And not the precariously available official site.

community. The issue will not go away. Following *Buckley*, the Commission considered seven applications from Gypsies under Article 8 and Article 1 of the First Protocol, and all but one was declared admissible as raising serious issues of fact and law under the Convention.[69]

Language

Linguistic freedom has been treated in a very limited fashion in the Convention. Article 6.3e provides for the free assistance of an interpreter if an accused person cannot understand or speak the language of the court,[70] the provision has been treated as an aspect of the administration of justice and not as instantiating a right to use a language of choice. In *Isop v Austria*,[71] the applicant claimed that the Austrian State Treaty of 1955 gave him a right to use the Slovene language in criminal proceedings in the area where he lived. He claimed a violation of Article 6 in conjunction with Article 14. It was observed that he understood and spoke German. The Commission pointed out that Article 6 guaranteed the right to present a case to court; it did not include a right to be heard in one's own language. Equally, the Convention does not give a right to witnesses in a court case the right to speak a language of their choice.[72] Similarly, according to *Fryske Nasjonale Partij v Netherlands*[73] the Convention does not guarantee a right to use a language of choice in dealings with the authorities. The cases deal with the use of language in the public realm. There, requirements of bureaucratic efficiency, costs of providing language services, and the existence of official or State languages, weigh along with individual preferences. In the private sphere, the situation is different. In essence, the reservoir of potential restrictions on the privacy right in Article 8 can have little relevance to the private use of languages of choice.

Education

The right to education is referred to in Article 2 of Protocol 1:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall

[69] *Coster v UK*, No. 24876/94; *Beard v UK*, No. 24882/94; *Smith v UK*, No. 2154/94; *Lee v UK*, No. 25289/94; *Varey v UK*, No. 16662/95; *Smith v UK*, (1998), 25 EHRR, CD, 52; *Chapman v UK*, No. 27238. The second *Smith* case – 25 EHRR, CD, 52 – was declared inadmissible. But see n. 25 above.

[70] See also Article 5.2.

[71] Appln. No. 808/60, 5 YBECHR (1962), 108.

[72] *Bideaut v France*, No. 11261/84, DR 48 (1986), 232 – concerning the use of the Breton language. The claim was manifestly ill-founded: the claimant did not argue that he was unable to speak French.

[73] No. 11100/84, DR 45 (1985), 240.

> respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The provision was interpreted restrictively in the *Belgian Linguistics* case. According to the Court, the States Parties are not obliged by Article 2 to establish at their own expense, or to subsidise, education of any particular type or at any particular level. Rather, the case safeguards the question of access to schools once established. In the case, the applicants argued that 'philosophical convictions' should be interpreted to include the cultural and linguistic preferences of the parents. However, the Commission, followed by the Court, was unanimous that the second sentence of Article 2 was not intended to guarantee respect for preferences or opinions in cultural or linguistic matters.[74] In *Kjeldsen, Busk Madsen and Pedersen v Denmark*,[75] the European Court of Human Rights emphasised the role played by education in a democratic society, observing that the Protocol 'aims . . . at safeguarding the possibility of pluralism in education . . . essential for the preservation of the "democratic society" as conceived by the Convention'. The State is forbidden to pursue an aim of indoctrination – which might be considered as not respecting parents' religious and philosophical convictions. The term 'philosophical convictions' was explained by the Court of Human Rights in *Campbell and Cosans v UK*[76] as relating to 'such convictions as are worthy of respect in a democratic society . . . and are not incompatible with human dignity'.[77] On the basis of this reading, one author comments that 'the desire of parents, based on cultural and linguistic association with an ethnic group, to have their children educated in their mother tongue'[78] also has to be recognized as such a conviction. The decision of the European Commission of Human Rights in the case of *Cyprus v Turkey*[79] points to further potential of the ECHR. On schools in northern Cyprus, which offered teaching in English or Turkish, but were also open to Greek Cypriots, the Commission observed that

> education in such schools does not correspond to the needs of the persons concerned who have the legitimate wish to preserve their own ethnic and cultural identity. While it is true that Article 2 of Protocol No. 1 guarantees access only to existing educational facilities, it must be noted that . . . such educational facilities have in fact existed in the past and have been abolished by the Turkish Cypriot authorities . . . In the Commission's opinion, the total absence of appropriate secondary schools for Greek Cypriots living in northern

[74] Series A, No. 6 (1968).
[75] Series A, No. 23 (1976).
[76] Series A, No. 48 (1982).
[77] p. 16.
[78] Blum, cited in C. Hillgruber and M. Jestaedt, *The European Convention on Human Rights and the Protection of National Minorities* (Cologne, Verlag Wissenschaft und Politik, 1994), p. 26, at n. 64.
[79] No. 25781/94, report adopted on 4 June 1999.

> Cyprus cannot be compensated for either by the authorities' allowing the pupils concerned to attend such schools in southern Cyprus. In fact, this permission is not unconditional in that until recently all pupils were not allowed to return after completion of their studies and even now male students beyond the age of sixteen are not allowed to do so. In these circumstances the practice of the Turkish authorities amounts to a denial of the substance of the right to education.[80]

The Commission's decision is heavily conditioned by the facts of the case, including the previous existence of schools, latterly abolished. The decision brings to mind the principle that human rights instruments should be interpreted as far as possible to preserve and augment the existing stock of international and domestic rights.[81]

Religion

The Convention outlines a basic freedom of religion provision in Article 9. This right incorporates communal dimensions – the right is to be exercised 'either alone or in community with others', phraseology which indicates that the State may not reduce the exercise of religion to a purely private activity, to the detriment of its communal dimension.[82] In the light of Article 9, States may need to address the consequences where a plurality of religious communities seek to enjoy a degree of autonomy. In *Serif v Greece*,[83] following the death of the Mufti of Rodopi, the Greek authorities appointed MT as Mufti of Rodopi, having changed the method of selection from community election to appointment by presidential decree. Serif, on the other hand, was elected Mufti after Friday prayers at the Mosque. Serif proceeded to dress and act as Mufti, challenging the credentials of MT, and was fined for usurping the functions of a minister of a 'known religion'. The Court sidestepped complex questions of treaty law in favour of finding a violation of Article 9 (freedom of religion), rejecting the government justification that it was unifying the leadership of the community in order to ease communal tensions. The Court recalled that:

> freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention . . . Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one

[80] *Ibid.*, para. 478.

[81] The European Court of Human Rights did not find specific violations against the rights of the Gypsy community in the north of Cyprus on grounds of failure to exhaust domestic remedies – Case of *Cyprus v Turkey* (Appln. No. 25781/94, Judgment of 10 May 2001, paras. 349–53; see the partly dissenting opinions of Judges Palm *et al.*, and of Judge Costa on this point.

[82] *X v UK*, No. 8169/78, DR 22 (1981), 27.

[83] No. 38178/97, Court of Human Rights, Second Section, Judgment of 14 December 1999.

> of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.[84]

The Court did not decide explicitly between the claims of the State and the community, but the judgment suggests that States should be cautious in interfering with the autonomy of religious groups.[85] The Court of Human Rights has not decided clearly on what counts as a religious belief nor placed limits on belief. In a broad statement of principle, the Court considered that freedom of religion under the Convention excluded 'any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate'.[86] This is a very wide proposition bearing in mind the variety of practices that potentially cluster under the umbrella of religion. Article 9 has enjoyed only limited development, and its import – like Article 14 – is often submerged in violations of other articles.[87] None the less, the Convention evinces strong respect for religious beliefs and practices. Religious susceptibilities were regarded as worthy of protection in *Otto Preminger Institut v Austria*,[88] where the Court justified the seizure by the authorities of a film which offended sensibilities of Catholics (a majority in the region in question), on grounds of protection of the rights and freedoms of others. Accordingly the manner in which religious beliefs are opposed or denied can engage the responsibility of the State, and individuals must 'avoid as far as possible expressions which are gratuitously offensive to others'.[89] This solicitude for others can be extended to minority/indigenous sensibilities; religious sentiment is not confined to large majoritarian or State-supported religions.[90] However, minority religious sensibilities have not always fared well. In *Choudhury v UK*,[91] the Commission decided that the absence of a criminal sanction in English law for publications which offended the religious beliefs of non-Christians was not a violation of Article 9. In a number of cases, the Commission has dealt with complaints from prisoners concerning restrictions on religious observance. The cases, which justify restrictions on worship and dietary practices[92] and

[84] Judgment, paras. 49 and 53. Cf. Harris, O'Boyle and Warbrick, *Law of the Convention*, p. 357: 'Article 9 embraces another manifestation of tolerance and pluralism which runs through its conception of the values protected by the Convention'.

[85] Despite the judgment of the Court of Human Rights, the Greek courts continue to sentence those who pretend to the authority of religious leaders: *Press Release*, Greek Helsinki Monitor, 1 June 2000.

[86] *Manoussakis, et al. v Greece*, Judgment of 26 February 1996, para. 47.

[87] *Hoffmann v Austria*, Ser. A 255-C (1993).

[88] Ser. A, No. 295 (1994).

[89] Para. 49.

[90] Para. 47 of the Judgment referred to members of a religious majority or minority.

[91] No. 17439/90, *HRLJ* 12 (1991), 172.

[92] *X v UK*, DR 5, 8.

access to literature,[93] by invoking a broad margin of appreciation for the benefit of State authorities, now appear dated.

Property

Article 1 of the First Protocol to the Convention states a basic property right, styled as the right of every natural or legal person to the 'peaceful enjoyment of . . . possessions', and that '[n]o one shall be deprived of . . . possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law'. These provisions are stated not to impair the right of the State to enforce laws controlling the use of property in accordance with the general interest. The Court has taken a broad view of what constitute possessions, which, besides chattels and land, include items having an economic value such as business goodwill[94] and patents.[95] In the *Konkama* case,[96] the applicant Saami villages[97] claimed that national and regional regulations on small game hunting and fishing constituted an infringement of exclusive Saami hunting and fishing rights in the area in question[98] and thus of Article 1 of the Protocol. One purpose in the Swedish legislative design was 'to give the general public wider access to hunting and fishing in the mountain region'.[99] The Commission observed that reindeer herding, hunting and fishing 'are fundamental elements of the Saami culture', and considered that 'the exclusive hunting and fishing rights claimed by the applicant Saami villages . . . can be regarded as possessions' within the meaning of the Protocol.[100] The Commission considered that the central issue in the dispute was whether the Saami villages were holders of exclusive hunting and fishing rights, noting, however, that this was a matter of dispute. While the issues were not resolved by the Commission in the light of its finding that the claims were inadmissible, the decision

[93] *X v UK*, DR 100, 100.

[94] *Van Marle and Others v The Netherlands* (1986), Ser. A., No. 101, para. 41.

[95] No. 12633/87, *Smith Kline and French Laboratories v The Netherlands*, DR 66 (1990), 70.

[96] No. 27033/95, *Konkama and 28 other Saami Villages v Sweden*, DR 77/78.

[97] Thirty-nine villages in total.

[98] The Bill (1992/93: 32) applied to state property above the cultivation line and in the reindeer grazing mountains; relevant provisions on hunting and fishing were enacted in a reindeer herding ordinance.

[99] Admissibility decision.

[100] The Saami claimed immemorial rights of reindeer herding, hunting and fishing on certain land, as confirmed by a 1993 Amendment to the Reindeer Herding Act. They also claimed ownership of the land and waters in the area. The Commission noted the 'so-called Taxed Mountains Case' of 1981, where the Supreme Court of Sweden rejected ownership and related claims, while acknowledging that there existed a strongly protected right of usage (*bruskratt*).

recognises that such specific indigenous rights fall within the ambit of the Protocol. The Commission also agreed that Article 6 of the Convention was applicable in as far as the Saami claims raised an issue of civil rights.[101]

Implementation

Apart from the inter-State procedure,[102] Article 34 (formerly Article 25) of the Convention provides that petitions may be received from 'any person, non-governmental organization or group of individuals claiming to be a victim of a violation'. Broad categories of applicant have been held not to include local government institutions or semi-State bodies.[103] On the other hand, besides individuals, applications have been accepted from building societies,[104] churches,[105] companies,[106] political parties,[107] professional associations[108] and trades unions.[109] Each victim claims a violation of their own rights, and in the case of joint claims, each claimant must be a victim. Since minorities or indigenous groups are not owed rights, they are not victims as such. On the other hand, political parties, NGOs or other entities which reflect the interests of minorities can be victims of violations of the organisations' own rights. The concept of indirect victim can also extend the range of effective claimants. Limitations for the vindication of minority or indigenous rights may not be great in practice. The manner in which a minority is organised can assist petition procedures, and domestic legal arrangements are not decisive. In the *Konkama* case, the Swedish government agreed that the applicant *Saami villages* [110] were non-governmental organisations for the purpose of the Convention, but denied that the villages could be victims of alleged violations as the rights under the relevant legislation were not afforded to the villages but to their members. This was rejected by the Commission on the grounds that the rights could be exercised by an individual Saami only as a member of a Saami village. Accordingly, the applicant villages could claim to be victims.

[101] Article 6.1. See also *Muonio Saami Village v Sweden*, Appln. No. 28222/95, European Court of Human Rights 15 February 2000; *Noack v Germany*, Appln. No. 46346/99, European Court of Human Rights 25 May 2000.

[102] Comments in Hillgruber and Jestaedt, *European Convention*, pp. 77–8.

[103] *Rothenthurm Commune v Switzerland* DR 59 (1988), 251; *Ayuntamiento de M v Spain*, DR 68 (1991), 209.

[104] *National and Provincial Building Society et al. v UK*, Nos. 21319/93, 21449/93 and 21675/93, Judgment of 23 October 1999.

[105] *Church of Scientology v Sweden* DR 21 (1980), 109.

[106] *Pine Valley Developments v Ireland* (1991), Ser. A, No. 222.

[107] Including cases cited in the present chapter – e.g., *United Communist Party of Turkey v Turkey*, *OZDEP v Turkey.*

[108] *Asociación de Aviadores de la Republica v Spain* DR 41 (1988), 211.

[109] *CCSU v UK*, DR 50 (1987), 228.

[110] Present author's emphasis.

The Framework Convention for the Protection of National Minorities[111]

In the drafting of the ECHR, unavailing suggestions were made for the adoption of a specific provision on minority rights; more recently the Council of Europe laboured in vain to produce additional minority rights (and even cultural rights) protocol to the ECHR.[112] The lack of a binding 'differentiated' instrument in the Council of Europe was remedied in 1995, when the FCNM was opened for signature by the Committee of Ministers. The strength of the FCNM lies in its character as a binding treaty.

Some leading issues

National minorities

The Convention protects 'national minorities'. The 'minority' nomenclature has not inhibited the inclusion of indigenous groups. A number of States in their reports under the Convention refer to the existence of indigenous peoples or groups. Thus, Finland makes extensive reference to the Saami throughout the initial State report and appendices;[113] the Russian Federation specifies that 'the number of small indigenous peoples in Russia is 65'.[114] Section I of the Convention makes important points on the integration of minority rights with human rights and principles of freedom of choice of every person belonging to a national minority to be treated as such without disadvantage,[115] and the individual as well as communal exercise of the rights.[116] The *Explanatory Report* offers the opinion that 'no collective rights of minorities are envisaged',[117] and that 'choice of belonging' 'does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity'.[118] Despite the relative openness of the text on the matter of group existence, a number of States have provided restrictive definitions of the groups covered by the Convention.[119] Some States have

[111] The text was opened for signature by the Committee of Ministers of the Council of Europe on 1 February 1998, entering into force in 1 February 1998.

[112] P. Thornberry and M. A. Martín Estébanez, *The Council of Europe and Minorities: A Review of Instruments and Mechanisms* (Strasbourg, Council of Europe Press, forthcoming 2002).

[113] Initial Report, 16 February 1999.

[114] Initial Report, 15 March 2000, p. 3.

[115] Article 3.1.

[116] Article 3.2.

[117] Para. 31.

[118] Para. 35.

[119] See for example the statements on signature/ratification and initial reports of Estonia, Denmark, Germany and Slovenia.

insisted on the necessity of a territorial element for a national minority – raising a question on the approach to dispersed or nomadic groups.[120] Germany makes a distinction between the national minority and 'ethnic groups traditionally resident in Germany' who include Roma and Sinti;[121] Slovenia makes an analogous distinction between the national autochthonous minorities and the Roma community.[122] Denmark applies the Convention only to the German minority in South Jutland, and explains that home rule arrangements in the case of the Faroe Islands, and Greenland (which has a substantial number of indigenous people) 'are not based on ethnic or linguistic criteria' and accordingly, 'the populations of these territories are not under international conventions defined as minorities of Denmark'.[123] Critical remarks were essayed by some members of the UN Human Rights Committee in the face of similar claims by Denmark under Article 27 of the ICCPR, but not in the Committee's Concluding Observations.[124] The fact that, for example, Greenlanders may also be regarded as an indigenous people should not be taken to limit the Convention's application: minorities in many countries claim indigenous status but choose to pursue claims to minority rights.[125] Against such restrictive views may be set the liberal approach of most States, including statements to the effect that the existence of a minority depends simply on the factual situation in the country, and willingness to accept that the emergence of new national minorities may

[120] See the ratification statements by Austria and Denmark – *Council of Europe Information*; website: www.coe.int

[121] On signature, 11 May 1995, and ratification, 10 September 1997. On the other hand, during proceedings at the 58th Session of the UN Committee on the Elimination of Racial Discrimination, the delegation of Germany clarified – in response to questions put by the present author – that Roma and Sinti met the conditions for the application of the term 'national minority': this was not a concession by Germany, but an employment of principle. At the time of writing, only the summary record for the first part of the meeting is available: CERD/C/SR.149, para. 47.

[122] On ratification, 25 March 1998.

[123] Initial Report, p. 14. On the other hand, the report goes on to describe the distinct languages of these territories, and their 'culture and language' (*ibid.*, p. 15). So even if the home rule arrangements are not defined in ethnic or linguistic terms, there are ethnic groups which have minority characteristics.

[124] In Committee discussions, (CCPR/C/SR.1533), members considered that 'minority status is not dependent on residence in certain regions' (Mavromattis, para. 42), and asked why the favourable treatment of the German minority is not considered as discrimination (Evatt, para. 63). A question was asked on what were the criteria for minority status (Bhagwati, para. 77), and a member (Evatt) suggested that Denmark needed to develop greater understanding of the principles of Article 27 (CCPR/C/SR.1534, para. 62). The Concluding Observations did not carry through these criticisms.

[125] Denmark reported on home rule in the Faroes and Greenland to the UN HRC under Article 1 of the ICCPR. Indigenous peoples may prefer not to utilise the FCNM – Initial Report of Norway, pp. 5–6.

be a consequence of social developments.[126] A number of States have also reported that their domestic law attempts neither to define nor 'recognise' national minorities.[127]

Many arguments through the 1990s probed the issue of whether minorities must also have the citizenship of the State in question. In cases of exemption of non-citizens from the category of national minority, the objection of the Russian Federation, which considers that no State 'is entitled to include unilaterally in reservations or declarations . . . a definition of the term "national minority" ',[128] is noteworthy. Further,

> attempts to exclude from the scope of the . . . Convention . . . persons who permanently reside in the territory of State parties . . . and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the . . . Convention.[129]

The Russian declaration raises an issue of the validity of the various readings of the term national minority, particularly the narrower versions. The statement is close to claiming that the restrictions *ratione personae* contradict, in the language of the Vienna Convention on the Law of Treaties – the object and purpose of the Convention.[130] The UN Human Rights Committee offers the helpful advice in such situations that 'an objection to a reservation made by States may provide some guidance . . . in . . . interpretation as to . . . compatibility with the object and purpose' of the treaty in question.[131]

Culture and its limitations

The preamble to the Convention refers to respecting the ethnic, cultural, etc., identity of each person and to creating conditions for the expression of this identity. The text implies that identity may have multiple aspects, so that the nuances of expressing identity will vary with the person. According to Article 5.1, the parties undertake to promote the conditions necessary for persons belonging to minorities 'to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage'. The *Explanatory Report* comments that 'reference to "traditions" is not an endorsement or acceptance of practices which are contrary to national law or international standards. Traditional practices remain subject to limitations arising from the requirements

[126] See remarks on the 'newly developing Russian minority' in Initial Report of The Slovak Republic, 4 May 1999, p. 11.

[127] Romania, Initial Report, p. 15.

[128] Declaration made on ratification, 21 August 1998 – Council of Europe Information, 21 January 2000.

[129] *Ibid.*

[130] Article 19(c).

[131] General Comment No. 24 (52), CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 17.

of public order'.[132] Thus interpreted, the limits of cultural expression in the Convention are narrow: the *Report* would allow wide scope for restrictive national legislation.[133] In this instance, the provisions of Article 19 of the Convention become relevant – allowing only for limitations, etc., which are provided for in international legal instruments, in particular the ECHR. The Convention also recognises that culture and identities are mutable through employing terms such as express, preserve and develop. There is no question within its terms of locking in minorities (or indigenous groups) to an unchangeable corpus of traditional lifestyles and practices before allowing access to the norms of international law.[134]

Language and education

The Convention's provisions are replete with 'qualifiers'. Their chief innovation is to introduce the concept of a minority *area*, within the (indeterminate but protected)[135] boundaries of which some cultural rights are enhanced.[136] Article 10 recognises the right to use a minority language freely and without interference, in public or in private, perfecting the freedom of expression set out in Articles 7 and 9.[137] Paragraph 2 of Article 10 is directed towards the possibility of using minority languages in dealings with administrative authorities. Not all relations with public authorities are dealt with: the reference is to administrative authorities, which 'must be broadly interpreted' (the *Explanatory Report* specifically mentions Ombudsmen).[138] The area where the right applies is one inhabited by minority members 'traditionally or in substantial numbers'. For the right to be activated, there must be a request and the minority request should correspond 'to a real need'. If this is the case, the parties are only committed to the thin obligation 'to endeavour to ensure, as far as possible, the conditions which would make it possible' to use the minority language in relations with administrative authorities. The provision imports a lexicon of qualifiers: traditional or substantial inhabitation, real need, and the various vocabularies of possibility, before the right is activated. The *Explanatory Report* suggests that the existence of a real need 'is to be assessed by the State on the basis of objective criteria',[139] and

[132] Para. 44.

[133] See remarks in the report of Slovakia on 'value modification' in relation to Roma through education – Initial Report, p. 27.

[134] Compare *Ilmari Länsman v Finland*; see ch. 5 of this volume.

[135] Article 16 imparts a measure of integrity to minority areas.

[136] Finland refers to Aland and the Saami Homeland as relevant *areas* – Initial Report, pp. 19–20.

[137] Para. 3 of Article 10 – which provides a right to be informed of reasons for arrest, etc., – adds little or nothing to the body of minority rights. The paragraph is satisfied by proceedings in the language understood by a person arrested, etc., not necessarily a minority language.

[138] Report, para. 64.

[139] *Ibid.*, para. 65.

that the financial resources of the State must also be taken into consideration in applying the article. The issue of need can hardly be in the exclusive domain of the State – simply to be 'assessed' by State agencies. If need is subject to 'objective criteria', as the *Report* suggests, the question of a group input to the assessment cannot be discounted.[140]

The first paragraph of Article 11 sets out a right to use names in the minority language 'and the right to official recognition of them, according to modalities provide for in their legal system'. This is followed by the right to display minority language 'signs, inscriptions and other information of a private nature visible to the public';[141] and the second *area* provision,[142] whereby the State shall endeavour 'to display traditional local names, street names and other topographical indications intended for the public also in the minority language'.[143] According to the *Explanatory Report*, the first paragraph of Article 11, providing for official recognition of minority names, allows these to be transcribed into the alphabet of the official language in their phonetic forms.[144] Relying largely on Article 11, the OSCE Oslo Recommendations interpret this requirement to mean additionally that the phonetic rendering 'must be done in accordance with the language system and tradition of the national minority'.[145] This will be the case even if the minority linguistic system sits uneasily with the forms of the official language.[146] Paragraph 68 of the *Explanatory Report* also states that Article 11 means that persons who have been forced to change their names – perhaps under policies of forced assimilation – should have the right to revert to them. It must be supposed that in such cases any costs incurred in securing a reversion will fall on the authorities and not on the victims.

The question of minority language signs visible to the public draws the comment from the *Report* that the right does not prevent the individual being required to use the official language in addition to the minority language.[147] As a blanket proposition, this cannot be right. While particular

[140] Article 15 supports this view.

[141] Para. 2.

[142] In this case dependent on being 'traditionally inhabited by substantial numbers' of persons belonging to minorities – unlike Article 10.2, inhabitation and numbers are cumulative requirements.

[143] Para. 3.

[144] Para. 68. See also R. Hoffman, 'A presentation of the Framework Convention . . . and its contribution to the protection of minority languages', in *Implementation of the European Charter for Regional or Minority Languages* (Strasbourg, Council of Europe, 1999), pp. 21–4, at p. 23.

[145] Oslo Recommendation 1 and Explanatory Report.

[146] This applies for example to non-Slovak female suffixes. Thus, the 'female surname of a person other than Slovak nationality is written without the grammatical ending of Slovak declination' – in the event of various requests to that effect; Initial Report of Slovakia, p. 23. This is a question relating to 'linguistic systems'.

[147] Para. 69.

issues may be raised under health and safety, or signs using offensive language, these can be addressed by specific State legislation. On the other hand, many private signs (the name of a house, a poster in the window) are visible to the public, and there are clearly cases where there is no conceivable State interest in adding the official or other language. Some States reporting on this article indicate that the freedom to display is not subject to restriction.[148] Different issues are raised by paragraph 3, where the question is the public allocation of street names, etc., if there is sufficient demand. In this case, it is appropriate that the official or State language enters the equation. What is sufficient will vary with the case;[149] questions of visibility of the respective language components of any signage will also be raised.[150] Erasing minority 'footprints' through changing names of towns, villages and historical sites can be part of a process of assimilation against the will of a minority.

Article 12 provides that parties 'shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority'. This is the FCNM's account of inter-cultural education. Analogous provisions are found in the human rights canon.[151] The aim, in the words of the *Report* is to create a climate of tolerance and dialogue.[152] Provisions on inter-cultural education require balancing with provisions to strengthen the minority's sense of itself. Accordingly, the Convention makes provision in Article 13 for the setting up of private educational establishments, and learning minority languages – Article 14. Apart from the general right 'to learn his or her minority language',[153] the parties shall endeavour to ensure, in minority *areas* and within the framework of their education systems, that minorities 'have adequate opportunities for being taught the minority

[148] See Report of Finland, p. 22; Report of Hungary, p. 99.

[149] Estonia requires place names in Estonian, unless an exception is 'justified historically' – Report, p. 50; Finland adopts the lowest percentage rule for a minority population in a municipality to trigger bilingual signage rules – 8 per cent minority inhabitation – as well as all municipalities where over 3,000 inhabitants speak the other official language – Report, pp. 22–3; Romania opts for 20 per cent habitation – Report, p. 38; Slovakia also operates a 20 per cent minority settlement rule for road signs – Report, p. 24; Ukraine appears to require a majority in a locality of members of a national minority – Report, p. 26; UK rules are generally permissive and devolve to local bodies (in Northern Ireland, adding a language implicates the agreement of 'the occupiers of a street') – Report, p. 37.

[150] Among reporting States, Denmark uniquely raises the issue of road safety for bilingual signs: Report, p. 37.

[151] See for example Articles 27 and 31 of ILO Convention No. 169; see ch. 14 of this volume.

[152] Para. 71.

[153] Article 14.1.

language or for receiving instruction in this language', without prejudice to learning or teaching in the official language.[154]

The education provisions look tentative and ambiguous. The draconian statement in Article 13.2 that the right to set up private institutions shall not entail any financial obligation for the parties may be incorrect for many practical situations. As the *Explanatory Report* notes in respect of paragraph 1, the principle of non-discrimination enters the equation when considering minority education.[155] It can be argued that, in conformity with this principle, when States subsidise the education of some groups, they would be obliged to consider subsidising others.[156] The wording of the language learning provisions appears to visualise: (a) being taught the minority language as any language; or (b) being taught through the medium of the minority language. In which case, it is inexpertly drafted, since the provision for learning through the minority language comes across as a vague injunction concerning 'instruction'. Assuming that alternatives (a) and (b) are indicated, there appears to be no obligation to support education through the medium of a minority language. The *Explanatory Report* observes in paragraph 77 that there is nothing to prevent a State from implementing (a) and (b), perhaps through the medium of bilingual instruction.[157] The assumption of the Convention seems to be that minority and official languages stand opposed; that capabilities in one diminish the standards of the other. The Hague Recommendations attempt to countermand this perception by suggesting a scheme whereby being comfortable in the minority language leads to confidence in mastering the State language. The Hague

[154] Article 14.2 and 14.3. The *Explanatory Report* (para. 78) observes that 'knowledge of the official language is a factor of social cohesion and integration'.

[155] Para. 72. For recent experience of the UN HRC, see *Waldman v Canada*; and *Tadman et al. v Canada*, and ch. 5 of this volume.

[156] Here, the Hague Recommendations make two pertinent points: (1) the setting up of private schools should not be inhibited by unduly burdensome regulations (recommendation 9); (2) minority education institutions (or promoters) are entitled to seek funding from the State or elsewhere (Recommendation 10). A number of States report that they subsidise private minority education – Czech Republic, *Report*, pp. 35–6; Denmark, *Report*, p. 40; Hungary, *Report*, pp. 120–2; Slovakia, *Report*, p. 29; UK, *Report*, p. 32. For a broad review, see *Report on the Linguistic Rights of Persons belonging to National Minorities in the OSCE Area* (The Hague, OSCE High Commissioner on National Minorities, March 1999).

[157] The fact that there is a general provision on language learning in para. 1 of Article 14 suggests that the provisions in paras. 2 and 3 of that article, which are restricted to minority *areas*, must add something significant to the basic right in para. 1. This should mean the right to have education (instruction) through the medium of the minority language, subject to the conditions in paras. 2 and 3. We may call this the strong conclusion. The distinction between paragraphs cannot imply, as the *Report* appears to suggest (para. 74), that the State under paragraph 1 is in effect obliged to nothing. The *Report* does not draw the strong conclusion in respect of paragraphs 2 and 3.

approach is partly grounded in an interpretation of the FCNM, but reaches out to relevant international norms interpreted in the light of educational research.[158] The FCNM makes no comment on levels of education. Nor does it comment on the drafting of curricula which particularly concern minorities – including the general curriculum to the extent that minority cultures are represented therein. However, the participation provisions of Article 15 suggest, *de minimis*, that minorities should have input into curricula, making education more responsive to their interests and concerns.

Obligations of minorities

While it does not elaborate a special principle to promote the loyalty of groups to their 'host-State', the Convention approaches the question of duties in Article 20:

> In the exercise of the rights and freedoms . . . in the present Framework Convention, any person belonging to a national minority shall respect the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities.

While group loyalty to their States has not been an explicit demand of international human rights law,[159] there is a temptation to insert provisions in instruments on minority rights because of sensitivities about self-determination, secession, etc., despite the regular separation of the issues of minority rights and self-determination in international discourse.[160] Respect for national legislation as a treaty demand raises questions. What if the national legislation does not respect the rights of members of minorities? Are group members placed under an obligation to 'respect' when others are not? The rights in the Convention should never be regarded as conditional on respecting the national legislation. The *Explanatory Report* offers limited guidance to the application of the provision, noting that 'this reference to national legislation clearly does not entitle Parties to ignore the provisions of the . . . Convention'.[161]

Cross-border contacts

Article 17.1 recites the commitment of the parties 'not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural,

[158] Hague Recommendations 11–18 and *Explanatory Report.*

[159] For an appreciation of the issues, see various references in J. Jackson-Preece, *National Minorities and the European Nation-States System* (Oxford, Clarendon Press, 1998).

[160] See for example the opening paragraphs of General Comment 23 of the HRC, and ch. 6 of this volume.

[161] Para. 89.

linguistic or religious identity'. The provision draws only the brief observation in the *Explanatory Report*, that it was unnecessary to include an explicit provision on contacts *within* the State, as this was adequately covered by other provisions, notably Article 7. A number of States have reported substantively on this provision.[162] The observations of the UK on the relationship between Article 17 and legislation on terrorism appear overcautious in view of the article's emphasis on free and peaceful contacts. The contacts right may also be linked with the consideration in the preamble that the realisation of a tolerant and prosperous Europe does not depend solely on cooperation between States 'but also requires transfrontier cooperation between local and regional authorities without prejudice to the constitution and territorial integrity of each State'. Cross-border contact rights may be of considerable significance to indigenous groups, and are written into ILO Convention 169.

Implementation[163]

The Convention sketches an outline of an implementation mechanism.[164] Article 25.1 provides that, within one year from the Convention coming into force for the Contracting Party, State reports are to be transmitted to the Secretary-General of the Council of Europe, who will transmit them to the Committee of Ministers (COM). Further information of relevance to the implementation of the Convention will be transmitted 'on a periodical basis' and 'whenever the Committee of Ministers so requests'.[165] The COM is assisted by an Advisory Committee (AC), 'the members of which shall have recognised expertise in the field of protection of national minorities'.[166] *Ex facie*, the supervision of the Convention is entrusted to the political wisdom of the COM, with the AC playing a subordinate role. These heavily criticised arrangements were developed in less ostensibly political directions through a set of rules adopted by the COM in 1997 on the basis of preparatory work by an ad hoc committee (CAHMEC) with a significant input from the Parliamentary Assembly and expert opinion. While the rules augment the transparency and impartiality of the mechanism, its success will be assessed on the basis of its eventual track record. The first year of

[162] Reports of Croatia, pp. 165–7; Czech Republic, p. 43; Denmark, pp. 49–50; Estonia, p. 64; Finland, p. 29; Hungary, pp. 143–7; Italy, pp. 152–3; Romania, pp. 62–3; Slovak Republic, pp. 40–1; Ukraine, pp. 33–4; and the UK, p. 65.

[163] For a review of the initial working of the Convention mechanism, consult the *First Activity Report of the Advisory Committee*, 1 June 1998–31 May 1999, ACFC/INF (99) 1def., 15 September 1999; also the *Second Activity Report*, 1 June 1999–31 October 2000 (Council of Europe website).

[164] The Convention and associated documents are brought together in *Framework Convention for the Protection of National Minorities: Collected Texts* (Strasbourg, Council of Europe Publishing 1999).

[165] Article 25.2.

[166] Article 26.1.

operation of the AC saw the setting up of various procedures and processes. In general, the AC observes that, in almost all cases, additional information has been sought from the country concerned – data which mainly relate to the application of norms in practice.[167] In-country meetings have been held.[168] The AC argues the usefulness of involving NGOs and minority groups in processes leading to State reports, and decided that contacts with independent sources should be a regular feature of its work. Information is sought from non-governmental sources as well as official reports, and meetings have been held with concerned groups.[169] The COM is not informed on every occasion about NGO contacts; instead a blanket notification to the COM covers the monitoring cycle. Parallel reports from NGOs have been submitted to the AC.[170] Initially at least, and in the interests of consistency, the AC decided to group together a set of opinions on the country reports, rather than submit separate single opinions.[171] The President of the AC has argued that it is under-resourced: a Secretariat of three administrators 'is clearly inadequate and needs to be augmented as a matter of urgency'.[172]

Comment

The above discussion deals only in two major texts of the Council of Europe; a third instrument of relevance is the European Charter for Regional or Minority Languages. The European canon of rights instruments is broader than this, and includes the instruments of the OSCE including the institution of the High Commissioner on National Minorities, regional institutional instruments such as those of the Central European initiative and the Council for Baltic Sea States, EU commitments to cultural diversity, many bilateral instruments on minority rights, and so on,[173] to say nothing of the

[167] *First Activity Report*, para. 17.

[168] *Ibid.*, paras. 19–20 – in Finland, Hungary and Slovakia.

[169] *Ibid.*, para. 20.

[170] Some self-defining indigenous groups have made extensive representations to the Advisory Committee – *Parallel Report on the Situation in Crimea* (Akmesdzit (Simferopol), Crimea, Ukraine, 1999) prepared by the Foundation for Research and Support of Indigenous Peoples of Crimea (on file with author); see also Speech by the President of the Advisory Committee, Prof. R. Hoffman, to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 6 April 2000.

[171] *First Activity Report*, para. 21.

[172] Hoffman speech.

[173] For a recent review of some regional and national institutions, see A.-M. Biro and P. Kovacs (eds.), *Diversity in Action* (Budapest, OSI, 2001). The European corpus of bilateral treaties for the benefit of minorities is analysed in A. Bloed and P. van Dijk (eds.), *Protection of Minority Rights through Bilateral Treaties: The case of Central and Eastern Europe* (The Hague, Kluwer Law International, 1999).

way in which respect for cultural diversity and indigenous rights may be incorporated into national constitutions.[174] In a very extensive and sometimes disappointing jurisprudence from the viewpoint of ethnic and indigenous rights, the ECHR provides at least some validation of indigenous presence through the realm of respect for private life and property, the principle of non-discrimination as recently clarified (*Thlimennos*), respect for pluralism, freedom of expression and sundry other protections. On the other hand, of the global and regional instruments examined in the present work, it is the least developed in the field of ethnic relations and indigenous rights. This is not to assume that further developments are unlikely. The strong dissents in *Buckley*, and narrow majorities in *Chapman et al.* are evidence of some unease in the Court with the current approach to the Roma, and, therefore, perhaps other groups. A particularly interesting aspect concerns the procedures for application: the establishment of the rule that minority organisations can be victims of rights violations and can claim as such (*Konkama*, *Muonio*). The FCNM, despite its limited implementation mechanism,[175] incorporates elements of considerable value for indigenous groups, and the text repays study as an expression of contemporary minority rights standards through a binding treaty. The relentless individualism of the terminology betrays a nervousness about the collective dimensions of rights, an impression heightened by the highly qualified language in some articles. On the other hand, the defence of minority areas can have relevance to indigenous groups, as can the strong affirmation of the values of cultural diversity and the need for resolute action to enable groups to maintain their cultures and languages. The stress on participation in decision-making is also noteworthy, and the validation of cross-border contacts. European texts display a particular 'style' notably in the commitment to dealing in the currency of the 'national minority'. However, apart from disputes as to whether this includes only citizens of states or long-term residents, the term is broad enough to encompass indigenous groups, and the FCNM is adequate to encompass some if not all indigenous concerns. Remarks on the 'model of minority rights' (see ch. 6 of this volume) can be adapted, *mutatis mutandis*, to the FCNM.

[174] For examples, see L. Hannikainen, 'The status of minorities, indigenous peoples and immigrant and refugee groups in four Nordic countries, *Nordic Journal of International Law 65* (1996), 1–71.

[175] See the essay by the present author, Minority rights: retrospect and prospect', in M. Vassiliou and H. J. Psomiades, *Human Rights in the 21st Century* (Athens and Komotini, Sakkoulas Publishers, 2001), pp. 163–95. Contrast, M. Telalian, 'Mechanisms for monitoring compliance with human rights, [etc.]' *ibid.*, pp. 111–58.

Part IV

ILO treaties on indigenous peoples

13

ILO standards I

Introduction

In the matter of general instruments on indigenous peoples, the ILO was first in the field. As noted, ILO Conventions 107 and 169 are in force, although the former is now closed to ratification. Both employ, to differing extents, the language of collective rights – rudimentary in the first treaty, massively conditioning the second. They represent the bulk of contemporary hard law of international indigenous rights. They work within the context of the ILO, but interrelate with the general world of human rights. They offer adapted general rights as well as specific rights not found elsewhere in international treaty law. The ILO can claim much of the credit for bringing rights of indigenous peoples – as such, and not as derivatives of other rights or applications of them – into the forefront of contemporary discussion. The Organisation has been regularly concerned with the condition of indigenous peoples during the course of its existence.[1]

A brief history

According to ILO statements, the indigenous issue has been on the Organisation's agenda since 1921, when the ILO undertook studies on the labour conditions of indigenous and tribal workers, particularly the forced labour of so-called native populations in colonies.[2] In 1926 the Governing Body

[1] In addition to the two specific conventions, Convention No. 29 – (the Forced Labour Convention 1930); No. 111 – the Discrimination (Employment and Occupation) Convention 1958; and No. 182 – the Convention on the Elimination of the Worst Forms of Child Labour 1999, are among those relevant to indigenous peoples.

[2] See the section on the ILO in the Martinez-Cobo Report, UN Doc. E/CN.4/Sub.2/1982/2/Add.1, 16 May 1982, paras. 31–134; and *ibid.*, pp. 60–2, for a list of

established a Committee of Experts on Native Labour to formulate international standards for the protection of indigenous workers.[3] The work of this committee served as the basis for the adoption of a number of Conventions, including the *Forced Labour Convention*, No. 29, 1930. Among conventions adopted in the pre-UN period of the ILO,[4] a number utilise 'indigenous' in their titles, such as the Recruiting of Indigenous Workers Convention, No. 50, 1936; the Contracts of Employment (Indigenous Workers) Convention, No. 64, 1939; and the Penal Sanctions (Indigenous Workers) Convention, No. 65, 1939.[5] The Recruiting of Indigenous Workers Convention, 1936, defined 'indigenous workers' as 'workers belonging to or assimilated to the indigenous populations of the dependent territories of Members of the Organization and . . . the dependent indigenous populations of the home territories of Members of the Organization'.[6] The Convention was therefore to apply to indigenous workers in independent countries as well as the non-self-governing territories.[7] In the words of a government delegate from Belgium, 'intervention by the public authorities in favour of the indigenous populations is justified by the purpose of colonisation, which is the material, moral and educational development of the native populations . . . Moreover, we must not forget the educational purpose of social legislation, which is to

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conventions, recommendations, special technical meetings, etc., concerning indigenous populations and rural workers, plus a brief bibliography. See also the briefer summary in *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report VI(1), International Labour Conference, 75th Session, 1988, pp. 3–7.

[3] 'Native labour' was defined in 1936 as 'the labour of persons belonging to indigenous peoples under the administration of non-indigenous races, irrespective of whether these territories are dependencies of Member States or are themselves Member States or other fully self-governing countries' (International Labour Conference, 20th Session 1936, report entitled *The Regulation of Certain Special Systems of Recruiting Workers*, ch. II, p. 78).

[4] For a postwar example, see the Contracts of Employment (Indigenous Workers) Convention 1947 which applied only to non-metropolitan territories – *Conventions and Recommendations 1919–1951, vol. 1* (Geneva, International Labour Office, 1996), p. 522.

[5] See *Conventions and Recommendations*. In discussions on the Penal Sanctions Convention, the workers' representative of The Netherlands likened systems under discussion to slavery – penal sanctions were allegedly justified for non-performance of contracts because indigenous people had no property, rendering civil action useless – International Labour Conference 25th Session, *Record of Proceedings* (Geneva, International Labour Office, 1939), pp. 302ff. For speeches in support of the sanctions, see, *ibid*., pp. 306 (Great Britain), and 307 (Australia).

[6] Article 2(b); text of the Convention in *Conventions and Recommendations*, pp. 277–86. The formulation was employed in some other Conventions such as the Contracts of Employment (Indigenous Workers) Convention, and the Penal Sanctions (Indigenous Workers) – the former Convention uses 'population' instead of 'populations' – *Conventions and Recommendations*, pp. 348–58.

[7] 'Dependent territories' were defined in Article 35 (421) of the ILO Constitution as 'colonies, protectorates and possessions which are not fully self-governing' – they included territories under 'B' and 'C' class mandates.

encourage among the indigenous workers an appreciation of the need for labour and of the need for discipline in its performance'.[8]

Following prompting from American Regional Conferences of ILO members, the ILO set up a Committee of Experts on Social Policy in Non-Metropolitan Territories,[9] and later a Committee of Experts on Indigenous Labour, which held its first session in January 1951.[10] The latter Committee adopted a number of resolutions 'all of them revolving round the dominant idea that the legislation of each country should be extended to the whole population, including the aborigines, who had hitherto been excluded from its scope'.[11] The resolutions continued the economistic and labour-orientated themes which had dominated the ILO's work on indigenous peoples.[12] A resolution of the Fourth Conference of American States Members of the ILO in 1948 had stated explicitly that the problems of indigenous populations, and the action required to solve them, are essentially social and economic in character. The resolution described the populations as important manpower resources, the more effective utilisation of which would contribute to their own good and that of the national economy as a whole.[13] At its 2nd session in 1954, the Committee of Experts on Indigenous Labour adopted resolutions on indigenous forest-dwelling populations, raising living standards, social protection and integration, land problems, and ways and means of international technical assistance.[14] The Committee discussed the question of integration at some length, drawing a distinction between that concept and artificial assimilation, and concluded that 'the cultural autonomy of each social unit involved should be respected as the best guarantee of the contribution it may make to the welfare of the "great society"'.[15] In the light of the Committee's recommendations, the International Labour Office published in 1953 a major survey of the conditions of aboriginal populations throughout the world,[16] and at its 40th session in 1957, the International

[8] International Labour Conference, 25th Session (Geneva, International Labour Office, 1939), *Record of Proceedings*, p. 302. For a complaint about the non-representation of indigenous workers in the proceedings, see remarks by the workers' delegate of The Netherlands, *ibid*., p. 303.

[9] ILO, *Minutes of the 94th Session of the Governing Body*, pp. 113–14, 208, 209; *95th Session*, pp. 109, 110.

[10] The report was published in ILO, *Minutes of the 114th Session of the Governing Body*, appendix V, pp. 85–90. See also 'First Session of the ILO Committee of Experts on Indigenous Labour', *International Labour Review*, LXIV: No. 1 (July–November 1951), 61–84.

[11] UN Doc. E/CN.4/Sub.2/1982/2/Add.1, para. 48.

[12] *Ibid*., para. 49.

[13] *Ibid*., paras. 45–7.

[14] *International Labour Review* LXX: No. V (November 1954), 418–41.

[15] Summary from *Partial Revision*, VI(1), 1988, 3.

[16] A complementary book on nomadic and semi-nomadic populations was proposed but not published: Martinez-Cobo, Report, para. 63.

Labour Conference adopted two basic texts, Convention No. 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries,[17] and Recommendation No. 104 on the same.[18]

The ILO today

The ILO is now one of twelve specialised agencies of the UN.[19] The tripartite structure of the ILO – governments, employers, employees – is unique among intergovernmental organisations. The Organisation is composed of three organs: the General Conference of representatives of member States (the International Labour Conference); the Governing Body; and the International Labour Office. The rights that concern the ILO go beyond labour in the narrow sense, reaching out to many aspects of discrimination and injustice. ILO rights are elaborated through the adoption and implementation of international standards. Conventions and recommendations (intended as guidelines to legislation and practice) are adopted at the annual International Labour Conference. The Constitution of the Organisation[20] expresses its abiding concern with social justice,[21] linking labour injustice with dangers to the peace and harmony of the world.[22] The aims of the ILO are set out in the Declaration made by the General Conference in 1944.[23] They express an elaborate commitment to a war against want together with an affirmation that 'all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security, and equal opportunity'.[24] The Declaration adds that 'the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy'.[25]

Supervision of ratified conventions

ILO supervisory mechanisms have been described as 'the most comprehensive international system for examining the implementation of international

[17] *Conventions and Recommendations*, pp. 901–8.
[18] *Ibid.*, pp. 909–15.
[19] In accordance with Articles 57 and 63 of the United Nations Charter.
[20] *Constitution of the International Labour Organization*, in Ian Brownlie (ed.), *Basic Documents in International Law* (Oxford, Clarendon press, 4th edn, 1995), pp. 50–73.
[21] First preambular paragraph.
[22] Preamble, generally.
[23] Brownlie, *Basic Documents*, pp. 73–6.
[24] II(a).
[25] II(b).

human rights standards'.[26] The instruments on indigenous peoples are monitored through the regular mechanisms.[27] One of the key players in the system is the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), consisting of twenty independent experts on labour law and social problems named by the Governing Body of the ILO on the recommendation of the Director-General. Government reports (perhaps supplemented by other information) are examined on the basis of the report form for the Convention in question.[28] Examination is confidential, but an annual report is issued which is available to the public after the annual meeting of the Committee of Experts. If the Committee notes problems in the application of the conventions, it may respond by making *direct requests* (which are not published in the Committee's reports),[29] sent directly to governments and to workers and employers' organisations in the countries concerned. Many issues are resolved at the direct request stage. For more serious problems, the Committee makes *observations* which are sent to governments and published as part of the Committee's annual report to the International Labour Conference. At the annual ILO Conference in June, serious issues raised by the Committee of Experts are discussed by the Conference Committee on the Application of Standards (ILCCR), the second supervisory step. This latter committee reports to the full Conference on the problems that governments are encountering. The Conference Committee's report is published in the proceedings of the International Labour Conference each year.[30] The ILO also employs direct contacts whereby at the request and consent of a government, an International Labour Office official or individual expert is sent to the country concerned to discuss problems and facilitate a solution.[31]

[26] Lee Swepston, 'Human rights complaint procedures of the International Labour Organization', in H. Hannum (ed.), *Guide to International Human Rights Practice* (Philadelphia, University of Pennsylvania Press, 2nd edn, 1992), pp. 99–116, at p. 115.

[27] Consult *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, International Labour Office, Geneva Rev.2/1998.

[28] Article 22 of the ILO Constitution requires member States to submit periodic reports to the International Labour Office on measures taken to give effect to ratified conventions. The regular procedures may be supplemented by the use of comments to the Governing body submitted by employer and trades union organisations; the comments will be passed on to the Committee of Experts and may address breaches of any Convention whether or not a report is due.

[29] Direct requests can be consulted on the ILOLEX database.

[30] In bad cases of non-compliance, the Committee may decide to include a 'special paragraph', drawing attention to the failure to respect international labour standards.

[31] Under Article 19 of the ILO Constitution, the Governing Body can call on all member States to report on law and practice with regard to unratified Conventions and Recommendations. Further, certain principles are binding on all ILO members even in the absence of a relevant ratification. The 1998 Declaration of Fundamental Principles and Rights at Work states that members have an obligation to respect

Besides the basic monitoring procedures, the ILO Constitution provides for *representations* and *complaints* concerning failure to implement ratified conventions. Under the first procedure, in accordance with Articles 24 and 25 of the Constitution, a representation alleging failure to implement a Convention may be submitted by a workers' or an employer's organisation.[32] On being declared receivable, a special committee of the Governing Body (Tripartite Committee) examines the substance of the representation, and makes recommendations to the Governing Body. Publication of a finding by the Governing Body closes the decision unless the case is subsequently handled under the complaints procedure set out in Articles 26–34 of the Constitution. Besides any decision of the Governing Body to make a representation into a complaint, the latter procedure may be instituted by Governments and Delegates to the International Labour Conference.[33] The Governing Body can appoint a Commission of Inquiry to investigate the complaint; the Commission may subsequently make recommendations to the parties.[34] Their reports are transmitted to the Governing Body and the parties concerned. There is an additional possibility of referring a decision of the Commission of Inquiry to the ICJ.[35]

In all this, there are clear limitations of *locus standi* in the procedures for indigenous and other groups. In view of the role of employers and workers, non-occupational NGOs do not present representations or complaints; the same is true for individuals. The CEACR reported in 1994:

> The ILO's supervisory system has earned wide international recognition for its efficiency, but it could be further improved. A general question which arises in this context is whether the present supervisory procedure should not be opened up to individuals . . . As things now stand, it seems that opening up the system to individuals cannot be envisaged; besides, they can transmit their comments on the application of ratified conventions through organizations of employers and workers.[36]

Besides the above procedures, there are many programmes of technical assistance within the ILO, some of which have been specifically applied to

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fundamental rights in ILO Conventions in the areas of freedom of association and collective bargaining (87 and 98), elimination of forced labour (29 and 105), abolition of child labour (138 and 182), and the elimination of discrimination in employment and occupation (100 and 111); countries which have not ratified these core standards will be required to report annually.

[32] Governments alleging a failure to implement use the Complaints procedure.

[33] The Governing Body may also decide to initiate a complaint.

[34] Article 28 of the ILO Constitution. There is no fixed time period for the Commission to undertake the investigation. NGOs can play an important informational role in the work of such Commissions.

[35] Article 29(2) ILO Constitution. See also Articles 33 and 34.

[36] Report of the Committee of Experts, International Labour Conference, 81st session, 1994, Report III (part IVA).

indigenous matters. Besides assistance to particular governments on indigenous standards, the ILO has produced *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169*,[37] in the context of the Project on the Promotion of ILO Policy on Indigenous and Tribal Peoples, initiated in 1996.[38] Neither the Constitution nor the Declaration make specific reference to indigenous or tribal peoples though they provide clear indications of the economic and social framework through which the ILO approaches the question. Possible components of such thinking are developed in the last paragraph of the Declaration in which the Conference affirms that the Declaration's principles:

> are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as those who have already achieved self-government, is a matter of concern to the whole civilized world.[39]

ILO Standards of 1957

Convention 107 was ratified by 27 States, 14 of them from the Americas and the Caribbean. Numbers have been reduced in accordance with principles outlined below so that Bolivia, Colombia, Costa Rica, Mexico, Paraguay and Peru no longer report to the ILO on Convention 107, but on Convention 169 of 1989. The older Convention will continue to operate in some large States such as Bangladesh and India[40] for the foreseeable future.[41]

[37] By M. Tomei and L. Swepston (Geneva, International Labour Office and International Centre for Human Rights and Democratic Development, July 1996). This has been followed by a simpler *Manual* on the Convention (Geneva, International Labour Office, 2000) under the supervision of H. Rasmussen and C. Roy.

[38] For current details of the project, see *Recent Developments Concerning Indigenous and Tribal Peoples*, International Labour Office report to the WGIP, July 2000, pp. 6–9 (on file with author). The Project currently engages in the provision of policy advice and capacity-building in a range of African and Asian countries, including States parties to Convention 107 and States considering ratification of Convention 169. Additionally, the Project facilitates indigenous to indigenous exchanges. The INDISCO Programme assists indigenous and tribal peoples with their own development projects. A Task Force on Indigenous and Tribal Peoples has been established within the Organisation – this is intended to increase cooperation and coordination among various sectors of the ILO whose work directly or indirectly relates to indigenous issues.

[39] Para. V.

[40] For recent observations by the ILO concerning India, see *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4A), International Labour Conference 1995, pp. 289–90.

[41] In some States' parties to 107, the newer Convention 169 has been under consideration (e.g., in Brazil); in others – including notably the Asian and African parties to Convention 107, the older standards are likely to remain in operation.

Discussion of the principles of 107 is thus not entirely 'moot' in view of its continuing force in relation to large indigenous population groups. Convention 107 is about indigenous and tribal and semi-tribal 'populations', and the title refers to their 'protection' and 'integration'. As discussed in a previous chapter, the tribal category governs the Convention, commencing with the reference in the title to 'indigenous *and other* tribal . . . populations'.[42] Action under the Convention is not only to benefit the populations in question, but is in the 'interests of the countries concerned'. This balance characterises the Convention as a whole.

The Convention is divided into eight parts: general policy (articles 1–10); land (articles 11–14); recruitment and conditions of employment (article 15); vocational training, handicrafts and rural industries (articles 16–18); social security and health (articles 19 and 20); education and means of communication (articles 21–6); administration (article 27) and general provisions – application, ratifications, etc. (articles 28–37). The sections below draws out some of the principal themes of 107, and does not attempt a 'complete' reading. The first section looks at elements of the text and *travaux.* The second makes a brief assessment of the work of relevant Committees in bringing aspects of a recalcitrant text into contemporary relief. Much of the language of 107 reads like jottings from a distant age. Four issues are highlighted – the 'populations'; the general policy of the instrument; land rights, and education. Despite the manifest limitations of Convention 107, the supervisory organs of the ILO continue to work with the States' parties. It would appear from the work of the two principal committees that the present tendency is to stress some aspects of the Convention more than others: the milieu of 1957 is complemented by contemporary sensibilities.

Populations

In the 'progressivist' language of Convention 107, members of tribal or semi-tribal populations exist at a less 'advanced' state than other sections of 'the national community'. Levels of advancement are implied throughout the text, and asserted explicitly in the statement of coverage in Article 1.1(a).[43] The 'indigenous' populations contemplated by Article 1.1(b) live closer to the institutions of an earlier time – pre-conquest, pre-colonisation – than the present, and remain essentially 'undeveloped'. The populations are thus prevented by their backwardness from 'sharing fully in the progress of the

[42] Present author's emphasis.

[43] Discussed in chapter 2 of this volume. It may be noted that only tribal and semi-tribal populations are described as 'less advanced'; the phrase is not repeated for those who are 'indigenous'.

national community of which they form part'.[44] Accordingly, one of the keys to the Convention is the notion of 'development' or 'improvement'.[45]

Some of the 'improvement' relates to 'living and working conditions';[46] another aspect is 'the fostering of individual dignity, and the advancement of individual usefulness and initiative',[47] or the 'full development of their [the population's] initiative'.[48] The populations are apparently limited in their capacity for self-development – Article 2 provides that 'Governments shall have the primary responsibility' for developing 'co-ordinated and systematic action' for the protection and integration of the populations, and not the populations themselves. A later committee for the revision of 107 remarked, perhaps too casually, that: 'the presumption that indigenous and tribal groups were incapable of speaking for themselves was reasonable in 1957'.[49] The question of traditional leadership was discussed in the drafting process. Egypt would have regard only to 'progressive and democratic leadership'.[50] Colombia struck a threatening note on indigenous leaders, stating that 'any isolationist attitude or hostility to acculturation displayed by them should be fought'.[51] Concepts of self-development appear distant from the original 'psychology' of the Convention.

In the contemporary implementation of 107, much of the emphasis is placed on the incidence of relevant populations. The CEACR has pressed for more details on population composition, size of groups, etc. In some views, 107 is not tied to communities living in a pristine state – thus, Peru considered that indigenous peoples in marginal areas (*pueblos jovenes*) of the cities fall within the scope of the Convention.[52] On the other hand, States have often tried to deny the presence of indigenous groups on their territory, or split likely population groups into those to whom the Convention applied and those to whom it did not.[53] The CEACR has resisted these

[44] Preamble.

[45] As an employers' delegate from Peru observed in the drafting process 'the integration of the indigenous person within the national community means a raising of his [sic] cultural level'; the remarks were coupled with references to creating a new internal consumers' market: International Labour Conference, 40th Session 1957, Report VI(1), p. 38.

[46] Preamble.

[47] Article 2.3.

[48] Article 5(b).

[49] *Partial Revision*, Report VI(1), 1988, 28.

[50] Report VIII(2), 1956, p. 21.

[51] Report VIII(2), 1956, p. 21.

[52] CEACR, *Direct Request*, 1991. Recall also the term 'semi-tribal' in Article 1, described by the Committee on Indigenous populations in the drafting of 107 to include groups 'at an advanced stage in the process of losing their tribal characteristics': International Labour Conference, 40th Session 1957, *Protection and Integration of Indigenous and Other tribal and semi-Tribal Populations in Independent Countries*, Report VI(1), p. 29.

[53] Thornberry, *International Law*, pp. 338–43.

evasions, as increasingly, have other human rights bodies.[54] In an Individual Direct Request to Guinea-Bissau in 1995, the Committee noted

> that no distinction is made in the national legislation between different population groups . . . this, in itself, is . . . not a sufficient reason for deciding that the Convention is not applicable to a country.[55]

In an Individual Direct Request to India in 1994, the Committee expressed concern at the exclusion of approximately 6 million tribal people from the scheduled lists.[56] The Committee has, on more than one occasion, stressed the need for accurate census information.[57]

Protection and integration

Convention 107 promotes its improving objectives through the instrumentalities of protection and integration. The protection elements are scattered throughout the text. As foreshadowed in the views of the Committee of Experts on Indigenous Labour, the populations are to be protected from 'artificial assimilation',[58] and the use of force to secure their integration.[59] 'Regard' shall be had for their customary laws.[60] Their methods of social control of offenders shall be used as far as possible.[61] Compulsory personal services are prohibited,[62] and members of the populations are to be safeguarded 'against the improper application of preventive detention'.[63] There is limited protection against removal from 'habitual territories'.[64] The non-indigenous shall not be permitted to take advantage of indigenous customs or indigenous lack of understanding of national land laws.[65] The indigenous mother tongue or vernacular will, as far as possible, be preserved.[66] Additionally, broad principles of equality and non-discrimination – for the benefit of indigenous individuals – in various fields suffuse the Convention – the general laws of the State were to be extended to all segments of the population, as the Committee of Experts on Indigenous Labour had

[54] For another example, see the *Individual Direct Request* to Iraq, 1990. For analogies, see General Comment No. 23 of the HRC of the ICCPR.
[55] Unparagraphed.
[56] Para. 2.
[57] *Direct requests*, Argentina 1991; Costa Rica 1991.
[58] Article 2.2(c).
[59] Article 2.4.
[60] Article 7.1.
[61] Article 8(a).
[62] Article 9.
[63] Article 10.1.
[64] Article 12.1.
[65] Article 13.2.
[66] Article 13.3.

suggested.[67] These elements of protection are regularly qualified by the push to integration: the latter was enthusiastically supported in the drafting process.[68] The statement of Mexico can be taken as representing a broad spectrum of pro-integration sentiment: referring to its own policy, the representative observed that

> indigenous policy is not aimed at perpetuating the values and institutions of indigenous communities for their own sake. Its main objective is to promote cultural change and to guide the process of acculturation of underdeveloped indigenous communities in order to speed up their integration into the national community.[69]

Special vocational training for the populations depends upon their state of cultural development, and will not survive the integration process.[70] Integration is referred to twice in the preamble. The statement of coverage in Article 1 includes the semi-tribals who 'are not yet integrated' into the national community. The overall government responsibility for the implementation of the Convention is for protection of the populations and their 'progressive integration into the life of their respective countries'.[71] Governments are encouraged to create possibilities of national integration.[72] The dynamics of integration condition any possible exceptions. Thus, special measures are permitted under the non-discrimination principle, but not to create a state of segregation nor to continue beyond their usefulness.[73] The force of the non-segregation principle meant that – in the opinion of some governments, provision for special indigenous laws was superfluous.[74] The 'special measures' were regarded by some as 'purely transitional'.[75] Pakistan proposed that, in order to 'avoid perpetuation of a state of segregation a time limit of, say 20 years should be fixed'.[76] The concept of integration conditions the Convention to such a radical extent that the instrument could be seen as a vehicle for developing indigenous peoples out of existence. Consider for example Article 4:

> In applying the provisions of this Convention relating to the integration of the populations concerned –

[67] See p. 322 in this volume.
[68] The Conference Committee decided against a definition of 'integration' on the grounds that a definition would necessarily be restrictive: *International Labour Conference, 40th Session*, report VI(2), p. 15.
[69] Report VIII(2), 1956, p. 14.
[70] Article 17.3.
[71] Article 2.1.
[72] Article 2.2(c).
[73] Article 3.2.
[74] *Partial Revision*, Report VIII(2), 26 (Mexico).
[75] Report VIII(2), 1956, p. 16 (Ecuador); also p. 17 (Haiti).
[76] *Partial Revision*, Report VIII(2), 1956, p. 17.

(a) due account shall be taken of the cultural and religious values and of the forms of social control existing among these populations, and of the nature of the problems which face them both as groups and as individuals when they undergo social and economic change;

(b) the danger involved in disrupting the values and institutions of the said populations unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept shall be recognised. . . .

The underlying proposition is that while due account shall be taken of indigenous cultures in the push to integration, indigenous societies are destined to disappear in the fullness of time.[77] Their cultures are not accorded intrinsic value, but appear as obstacles to the development process. The concept of offering appropriate substitutes for ancient religious or social formations is extraordinary; it is as if to say that 'we (the developed world?) do not care for your religion very much, so why not have another?'.[78] This is unlikely to form the basis for respect for indigenous cultures as enduring entities with a distinctive world-view. On the contrary, it is to impose another, monolithic world view by government fiat, sanctioned by a culturally hegemonic international law. The view of indigenous peoples as impermanent and perhaps inconvenient for development processes is echoed elsewhere in the text. Thus, the populations 'shall be allowed to retain there own customs and institutions', provided that these 'are not incompatible with the national legal system or the objectives of integration programmes'.[79] This goes beyond 'normal' human rights restrictions which, *de minimis*, must be established by law, to a possible extra-legal restriction on customs and institutions in the name of integration. Limitations on recognition of customs and traditions were broadly supported. Egypt went far along the path of restriction in proposing that 'care should be taken, as a principle, to abolish all customs, obligations and practices preventing or limiting the enjoyment of rights of citizenship'.[80] The USSR made a more modest observation on the need to deal with customs incompatible with humanitarian principles.[81] The International Labour Office took this to refer to cruel practices – head hunting, cannibalism, ritual murder, etc., 'which may exist among certain non-integrated groups'.[82]

In the recent work of the CEACR, the older – 'literalist' – emphasis on integration appears to have softened, steering away from assimilation. Thus, in an *Individual Direct Request* to Brazil in 1990, the committee noted that

[77] The semi-tribal populations were assumed to be well advanced along this road!

[78] Compare the transforming objectives of the Convention on the Elimination of All Forms of Discrimination against Women; see discussion in ch. 17 of this volume.

[79] Article 7.2.

[80] Report VIII(2), 1956, p. 17.

[81] Report VI(2), 1957, p. 16.

[82] *Ibid.*

Brazilian policy was 'intended gradually to integrate Indians into civil society through measures to preserve and strengthen their identity and culture, as well as respect for their customs and traditions'.[83] This recaptures some of the original sentiments of the Committee of Experts on Indigenous Labour, barely reflected in 107: the Convention does not literally promise any 'strengthening' of indigenous culture. Analogously, the basic Article 2 requirement of 'co-ordinated and systematic action' to discharge the 'primary responsibility' of governments has been taken as sufficient to mount a critique of indigenous policies. In an *Individual Observation* on Paraguay in 1991, the CEACR discussed whether the fragmentation of government activity for the indigenous satisfied the requirements of Article 2. On the widespread activities of missionary groups among the indigenous, the Committee noted that they appeared to operate without State supervision, and:

> It appears that they sometimes exercise extraordinary authority over the communities . . . and that there have even been allegations of forced conversions and detention against the will of those concerned.

There was also concern whether Paraguay had met the requirement to 'create or develop agencies to administer the programmes involved 'in applying the Convention'.[84] In the case of Brazil, the Committee expressed its concern about decentralisation of health services, and in particular 'the potential lack of policy coordination in respect of indigenous populations'.[85]

The meagre provisions of Convention 107 on the role of indigenous individuals and communities in development processes have been amplified by the CEACR. The strongest element in the text is contained in Article 5(b), whereby governments are obliged to 'provide these populations with opportunities for the full development of their initiative'. The vocabulary of participation is absent from 107, whereas it largely controls Convention 169 – the reference to seeking the collaboration of the populations in Article 5 of 107 fills the gap to some extent. The CEACR has none the less deployed the term in an *Individual Observation* to Bangladesh to the effect that new special laws were 'adopted without consultation of representatives of the tribal people . . . therefore the level of participation of the tribal people . . . was very low'.[86] The CEACR declared itself not in a position to judge but requested information. The Committee went further in a *Direct Request* to Colombia in 1991, considering that development and or missionary activities require the consent of the indigenous communities, despite the absence

[83] Para. 3.
[84] Article 27.
[85] 87th Session 1999, Report III (Part 1A), p. 439.
[86] Paragraph 6. See also the 87th Session of the International Labour Conference, Report III (Part 1A), pp. 437–8, where Bangladesh was asked to specify 'the modalities of tribal participation in the planning and implementation phases of programmes and projects'.

of a requirement of consent in the text. The CEACR has taken the view that formal participation of indigenous peoples in decision-making bodies is in line with the Convention.[87]

Land rights

The Convention addresses the populations as groups, though individual rights language is also prominent – according to Article 2, the 'primary objective' of the coordinated and systematic action demanded by the Convention is 'the fostering of *individual* dignity, and the advancement of *individual* usefulness and initiative'.[88] The title and preamble refer to the populations as collectives, the statement of coverage in Article 1 refers to 'members of' the populations, with only the definition of 'semi-tribal' making a point on 'groups and persons'. The substantive articles refer to 'the populations' and 'members of the populations'. In one important instance, collective rights, as such, intrude, in language which recalls the UDHR:[89]

> The right of ownership,[90] collective or individual, of the members of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.[91]

The land rights provisions have not permitted much in the way of revisionist interpretation by the CEACR. There are obvious gaps in 107 compared to the later Convention 169. The provisions of 107 are basic – ownership, individual or collective, coupled with a prohibition on removal weakened by the inclusion of important exceptions – removal is for example possible 'in the interest of national economic development'.[92] Customary procedures for the transmission of ownership and use of lands are also recognised but only in so far as they 'do not hinder their [the population's] economic and

[87] *Individual Direct Request*, Panama, 1991.

[88] Author's emphasis.

[89] Article 17.1 of the Universal Declaration provides that 'Everyone has the right to own property alone as well as in association with others'.

[90] On the change from 'property' to 'ownership', see International Labour Conference 40th Session, Report VI(2) (International Labour Office 1957), p. 19.

[91] Article 11. An earlier text proposed by the Committee on Indigenous Populations was much broader – 'The property rights, either collective or individual, as the case may be, of indigenous peoples over the lands they traditionally occupy should be recognised' (International Labour Conference 1957, Report VI(1) (International Labour Office, 1956), p. 31). In reply to Office questions on whether indigenous peoples should be granted property rights, the reply of Brazil was that 'granted' was ill-chosen because it would imply that the State had a prior and overriding property right: Report VIII(2) (International Labour Office 1956), p. 33. It should be emphasised that Article 11 as currently drafted implies that ownership accrues through traditional occupation, and not through cession by the State.

[92] Article 12.1.

social development'.[93] There is no recognition – as in 169 – of the spiritual value of land to the populations, no provision on environmental protection, no requirement to demarcate land, no provision on sub-surface resources and participation in resource management, and no right to return for peoples removed from traditional territories. The use of 'right' in Article 11 has, however, a certain clarity compared to the more ambiguous 'rights' in 169.[94]

The CEACR has reflected on the notion of 'traditional occupation' in Article 11, notably in the context of discussions with India who sought to draw a line between this form of occupation and 'encroachment' on government land.[95] India argued that Article 11 'in no way permits unauthorised occupation of government lands, as such occupation cannot . . . be deemed to be traditional occupation'.[96] In response, the CEACR stated that it:

> cannot fully accept the distinction drawn by the government between traditional occupation and encroachment. Traditional occupation, whether or not it has been recognised as authorised, does create rights under the Convention . . . 'traditional occupation' is imprecise, but it clearly [covers] lands . . . whose use has become part of their [the peoples'] way of life. The Committee is not prepared to judge, in the context of the present discussion, how much time would have to elapse before occupation would become 'traditional'.[97]

This interpretation of Article 11 is capable of carrying over to Convention 169 – the phrase 'traditionally occupy' is used in Article 14 of the later convention. Despite meagre wording, Article 11 of 107 has bite. In the case of Brazil, the fragmentation of Yanomami land into nineteen sections was criticised in the ILCCR by the workers' member for Brazil as violating the integrity of Yanomami territory, and Article 11.[98] The Convention is also deemed sufficiently specific to engage the responsibility of the State in relation to invasions of indigenous territories. In an *Individual Observation* to Brazil in 1996, it was stated that:

> The Committee is bound to deplore the fact that the invasion of indigenous lands, and particularly the lands of the Yanomamis continues year after year, with the serious consequences that such invasions have on the health and survival of these peoples.[99]

In the view of the CEACR, the Convention required that 'outsiders' should be kept out of traditional lands.[100] Similarly in the case of Peru – lands taken

[93] Article 13.1.
[94] See ch. 14 of this volume.
[95] *Individual Observation*, India, 1990.
[96] Para. 15.
[97] Para. 16.
[98] ILCCR, *Individual Observation*, Brazil, 1989.
[99] Para. 6.
[100] 'The Committee urges the Government to take all the necessary precautions to ensure that persons who are not members of these populations cannot use their

by force by large numbers of settlers violated Articles 11 and 12.[101] Land rights provisions are coupled with Article 6 in the CEACR's reminder to Argentina that development projects on indigenous land 'shall be so designed to promote the improvement of conditions of life of the indigenous populations'; the Committee drew attention to the lack of supervision of natural resources on Mapuche territory, which was 'threatening the survival of the . . . communities and is contrary to the spirit of the Convention'.[102] The Committee's recourse to the spirit of the Convention is a modern reading, but no less valid for that; their interpretative strategy reminds us that the Convention is to be read as a whole. The contemporary reading implicates positive action on the part of governments where appropriate, even to resolve land disputes between indigenous groups and non-indigenous settlers.[103] Effective action to secure indigenous rights implicates provision of adequate human and financial resources.[104]

Education

Part VI is devoted to 'Education and Means of Communication'. The text includes single provisions of great potential value for the education of indigenous peoples. The flaws in the overall conception of education and language are the flaws of the instrument as a whole. Article 21 provides that measures shall be taken to ensure that the indigenous 'have the opportunity to acquire education at all levels on an equal footing with the rest of the national community'. This is an excellent provision in itself, but prompts questions on what education and who will educate? Answers are provided by later paragraphs with their clear message that the stress on integration is to be maintained throughout. Thus, the aim of primary education is 'the imparting of general knowledge and skills that will help children to become integrated into the national community'.[105] Article 22 sets out the reasonable concept that education programmes are to be adapted to the populations concerned, but encases it in the language of integration.

[the populations'] traditional lands' (International Labour Conference, 85th session, 1997, Report III (Part 1A), p. 303).

[101] *Observation* 1991.

[102] International Labour Conference, 87th Session 1999, Report III (Part 1a), p. 434.

[103] International Labour Conference, 87th Session 1999, Report III (Part 1A), p. 436 (Bangladesh).

[104] In the case of Brazil, the Committee expressed concern on several occasions at the lack of such resources for FUNAI (National Indian Foundation): see, for example, 85th Session 1997, Report III (Part 1A), p. 304.

[105] Article 24.

The full force of the integrationist agenda emerges in the language clauses. Article 23.1 makes the ostensibly neutral point on teaching reading and writing that the mother tongue will be used in this process 'or, where this is not practicable . . . the language most commonly used by the group to which they [the indigenous children] belong'. This recognises the fact that not all the indigenous will have mother tongue fluency. Some respect for the mother tongue is also manifested by Article 23.3 which requires that appropriate measures shall 'as far as possible', be taken to preserve the mother tongue or the vernacular language. Logically, the requirement to 'preserve' the language may or may not include processes to facilitate its development. The USA objected to draft Article 23 on the grounds that it would require the revival of many languages spoken by only a few persons. The ILO explained that the intention was that the mother tongue should be preserved 'to the extent possible' and not in all cases.[106] A further negative, non-developmental spin is imparted to 'preserve' by the stark language of Article 23.2, which states that

> Provision shall be made for a progressive transition form the mother tongue or the vernacular languages to the national language or to one of the official languages of the country.

The *travaux* demonstrate enthusiastic support for the principle of transition. Replying to a question on this, Haiti took the view that the use of the vernacular language was only 'a preliminary stage before *compulsory* transition to the national language'.[107] For Pakistan, the major effort was to teach the national language; the preservation of the original language was to be considered 'only as subsidiary'.[108] Colombia took the view that, 'after the basic education stage',[109] teaching should be conducted exclusively in Spanish. Ceylon let the assimilationist cat out of the bag by proposing that the transition should be staged by 'a gradual process in co-ordination with other plans for their [the indigenous populations] assimilation with the national population'.[110] A rare caution against changing over completely to the national language was offered by Yugoslavia.[111] Belgium was also sceptical.[112] Part VI concludes with provisions on education of majority

[106] International Labour Conference, 40th Session, 1957, Report VI (2), *Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, pp. 28, 29.

[107] International Labour Conference, 39th Session (1956), Report VIII (2), *Living and Working Conditions of Indigenous Populations in Independent Countries*, p. 85 (present author's emphasis).

[108] *Ibid.*

[109] Report VIII (2) (1956), p. 84.

[110] *Ibid.*

[111] *Ibid.*, p. 86.

[112] *Ibid.*, p. 84.

populations to eliminate prejudices against indigenous populations,[113] and on culturally appropriate measures to disseminate knowledge among the indigenous of their rights and duties, especially with regard to labour and social welfare.[114] On language, the Convention provides that indigenous children 'shall be taught to read and write in their mother tongue'.[115] However, integration is to be further facilitated in the education process through the imparting of 'general knowledge and skills'[116] in primary education: not specifically indigenous knowledge, unless this is contained within the former.

On *education* as elsewhere, the *travaux* appear deeply unmodern. State practice in the field of indigenous education has changed over the period of operation of the Convention. In step with increasing international concern about indigenous issues, significant changes in reports to the ILO on State educational policies are recorded throughout the 1970s and 1980s.[117] The trend has been manifested through recognition of the independent value of indigenous languages and a positive assessment of bilingualism, constitutional recognition of indigenous languages and cultures, caught up in a generally enhanced valuation of cultural and linguistic diversity.[118] Views have also developed in line with newer thinking reflected in ILO 169, lending a new tone and content to comments on Convention 107 by CEACR. Points have been made on programmes undertaken with the participation and agreement (Convention 169 language) of indigenous communities,[119] and stimulation of knowledge of indigenous languages[120] – a more assertive pro-indigenous concept than the preservation of language referred to in the text. Questions have been put on ethno-education,[121] bicultural[122] and bilingual education programmes.[123]

Revision

There is a limit to what can be done to transform a text which is explicit in its overall objectives, and detailed in its project of carrying them through.

[113] Article 25.
[114] Article 26.
[115] Article 23.1.
[116] Article 24.
[117] Thornberry, *International Law*, pp. 362–6.
[118] L. Swepston, 'The Indian in Latin America: approaches to administration, integration, and protection', *Buffalo Law Review* 27 (1978), 715–56.
[119] Colombia.
[120] Peru.
[121] *Direct Request*, Colombia 1991.
[122] *Direct Request*, Costa Rica 1991.
[123] *Ibid.*, and *Individual Direct Request*, Argentina, 1988.

Indigenous groups in non-ratifying countries were sharply aware of the limitations of 107. Thus, according to the government of Sweden:

> The Swedish Sami [*sic*] have long declared in various contexts that they did not demand ratification of ILO Convention No. 107 by Sweden. The reasons are obvious. Since the Convention was adopted, views concerning indigenous populations and their ways of life have changed considerably. The Swedish ILO Committee endorses the view . . . that the assimilation strategy which constitutes the basic idea of the Convention represents a paternalist attitude towards indigenous populations.[124]

A negative expert assessment of the Convention – among many – stated in an ILO document of 1988:

> In the opinion of the Meeting of Experts, the integrationist approach of the Convention manifested itself in two fundamental ways. In the first place, the 1957 Convention assumed that all government programmes should, for the ultimate benefit of the groups covered by the Convention, be directed toward their integration into national society . . . The second aspect of the integrationist approach of the Convention is an inherent assumption of the cultural inferiority of the groups . . . This of course, is the justification of the basic impulse towards integration.[125]

In cases where an older convention is to be updated, the original instrument serves as the basis for discussion of a possible replacement.[126] In 1985, a meeting of experts was convened for September 1986 which recommended that Convention 107 should be revised.[127] The Meeting of Experts was

> unanimous in concluding that the integrationist language of Convention 107 is outdated, and . . . the application of this principle is destructive in the modern world. In 1956 and 1957 . . . it was felt that integration into the dominant national society offered the best chance for these groups to be a part of the development process of the countries in which they live . . . In practice it had become a concept which meant the extinction of ways of life which are different from that of the dominant society . . .[128]

The recommendations eventuated in the drawing up of Convention 169, considered in the next chapter.

[124] *Partial Revision*, Report VI(2), 1988, p. 4.
[125] *Partial Revision*, Report VI(1), 1988, p. 28.
[126] Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference, Article 44.
[127] For the background, see *Partial Revision*, Report VI(1), 1988, Introduction.
[128] *Partial Revision*, Report VI(1) (1988), p. 107.

14

ILO standards II: Convention 169

Emergence of the Convention

In November 1986, the Governing Body of the ILO decided to include on the agenda of the 75th Session of the International Labour Conference in 1988 a first discussion of the partial revision of Convention 107. The International Labour Office prepared a lengthy law and practice report which included the report of the Committee of Experts as an appendix and a questionnaire of eighty questions for governments and representatives of employers and workers.[1] The introduction to the report suggested, in a formula summarised by the International Labour Office, that

> in preparing their replies . . . governments should consult representatives of indigenous and tribal populations in their countries, if any. There is clearly no requirement to do so, but as one of the major objectives of the proposed revision . . . is to promote consultation with these populations in all activities affecting them, this consultation may appear desirable to governments.[2]

A leading commentator describes the suggestion to consult as 'a move unique in the ILO's history'.[3] Other commentators have been less generous, suggesting that the consultation procedures and indigenous input into the revision process as a whole were 'less than adequate': 'The Workers' Delegation to the Committee on the Revision of Convention 107 did include some indigenous peoples. However, there was no direct, ongoing participation by the indigenous peoples sent by their respective organizations specifically to

[1] International Labour Conference, 75th Session 1988, *Partial Revision of the Indigenous and Tribal Populations Convention 1957 (No. 107)*, Report VI(1), 1988, pp. 93–100.

[2] *Partial Revision*, Report VI(1), 1988, p. 2.

[3] L. Swepston, 'A new step in the international law on indigenous and tribal peoples: ILO Convention No.169 of 1989', *Oklahoma City University Law Review*, 15(3), autumn 1990, 677–714, at 685.

lobby the ILO'.[4] A second report[5] analysed and summarised the replies and incorporated a set of seventy-two 'proposed conclusions' for Conference discussion. In 1988, the Conference established a committee to discuss the revision and produce a preliminary set of conclusions. The consultation process was repeated and the report of conference discussion circulated along with a 'Proposed Convention concerning Indigenous and Tribal Peoples (or Populations) in Independent Countries'.[6] Comments were summarised and submitted to the 1989 session of the conference,[7] as well as a further draft from which the term 'populations' had been dropped.[8] The final text of the new Convention was adopted by the Conference with a vote of 328 in favour, 1 against and 49 abstentions.[9] The Convention came into force on 5 September 1991 and has been ratified by fourteen countries:[10] Norway,[11] Mexico,[12] Colombia,[13] Bolivia,[14] Costa Rica,[15] Paraguay,[16] Peru,[17] Honduras,[18] Denmark,[19] Guatemala,[20] The Netherlands,[21] Ecuador,[22] Fiji[23] and Argentina.[24] The Convention is under consideration before national legislatures in some other States.[25] According to the *Guide* to the Convention:[26]

[4] D. Sambo, 'Indigenous peoples and international standard-setting processes: are State governments listening?', *Transnational Law and Contemporary Problems*, 3(1) (1993), 13–47, 20–1. Further: 'the only instances of indigenous input were the few times that indigenous representatives were allowed to make brief statements to the Committee in 1988 and 1989, and the participation of one indigenous person in the closing plenary session of the ILO in 1989. This minimal participation was due to pressure placed on the ILO staff and Committee members' (*ibid.*, n 27).

[5] *Partial Revision*, Report VI(2), 1988.

[6] International Labour Conference, 76th Session 1989, *Partial Revision*, Report IV(1).

[7] *Partial Revision*, Report IV(2A), 1989.

[8] *Partial Revision*, Report IV(2B), 1989.

[9] Swepston, 'A new step', 685.

[10] *Recent Developments Concerning Indigenous and Tribal Peoples*, Report of the International Labour Office to the WGIP, July 2000, p. 2 (on file with author).

[11] June 1990.

[12] September 1990.

[13] March 1991.

[14] July 1991.

[15] April 1993.

[16] August 1993.

[17] February 1994.

[18] April 1995.

[19] 1996.

[20] 1996.

[21] 1998.

[22] May 1998.

[23] March 1998.

[24] 2000.

[25] See ch. 2 in the present volume.

[26] M. Tomei and L. Swepston, *Indigenous and Tribal Peoples: A Guide to Convention No. 169* (International Labour Office and International Centre for Human Rights and Democratic Development, Geneva, 1996).

> in spite of the relatively slow rate of ratifications, this Convention has had significant influence on domestic policies and programmes, as well as the policy guidelines of several funding agencies. This shows that, to induce changes in the perception of the problems and the ways to solve them, ratification, though desirable and, in the long term, necessary, it is not indispensable in the short and medium term.[27]

The *Guide* states that a number of countries which do not have indigenous peoples have debated ratification, partisans of which argue that 'development policies and bilateral aid for the indigenous and tribal peoples would . . . gain in equity and effectiveness'.[28] ILO Convention No. 107 is not open to further ratifications, but remains in force for those countries which ratified it but have not ratified 169; for those parties to 107 who ratify 169, only the latter is in force. As a revision of an earlier text, 169 retains most of the structure of Convention 107 – a new normative Part VII on 'Contacts and Co-Operation Across Borders' is introduced.

The text

Preamble

The preamble to 169 encapsulates the historical and intellectual changes – the 'radical change in attitudes'[29] – in the perception of indigenous rights since 107. And although the declared policy of the previous convention was 'integration', the preamble to 169 assesses the import of the earlier ILO standards in somewhat different terms:

[27] Preface, VIII. The authors cite an agreement, Ethnicity and Indigenous Rights, signed by the Government of Guatemala and the Guatemalan National Revolutionary Unity (Unidad Revolucionaria Nacional Guatemalteca), 'which used Convention No. 169 as part of the conceptual framework in order to arrive at a common ground' (*ibid.*). For background, see P. Wearne, *The Maya of Guatemala* (London, Minority Rights Group International, 1994) and the report of the UN Independent Expert on the Situation of Human Rights in Guatemala, UN Doc. E/CN.4/1995/15. The Agreement was signed on 31 March 1995 and is referred to in UN Sub-Commission Resolution 1995/7, UN Doc. E/CN.4/1996/2; E/CN.4/Sub.2/1995/51, 28–31. See also *The Guatemala Peace Agreements* (New York, United Nations, 1998). The authors of the *Guide* also cite the examination by the Russian Duma of measures for the indigenous peoples of the North, developments in the Philippines, and among European States: *ibid.* Among the funding agencies, the *Guide* (p. ix) mentions the influence of the Convention in the shaping of the Regional Fund for the Development of Indigenous Peoples of Latin America and the Caribbean.

[28] Preface, VIII. At the time of writing, countries contemplating ratification include Brazil, Chile, the Philippines, Sweden and Switzerland: information from the International Labour Office, 11 October 2000.

[29] Speech of the representative of the Secretary-General, International Labour Conference, 76th Session, 1989, *Provisional Record 25*, p. 1.

> Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards.

This paragraph links the change in orientation with developments in general international law, recalling 'the many international instruments on the prevention of discrimination' as well as the UDHR and the Covenants. The pressures exerted by the UN Working Group on Indigenous Populations upon the international community in the direction of recognising the legitimacy of indigenous rights, also rank among the most important developments since 1957. Indigenous organisation had also matured, and groups were in a position to make (limited) input into the ILO revision procedures.

The preamble also refers to indigenous control over 'their own institutions, ways of life and economic development', and the maintenance and development of 'their identities, languages and religions'. Indigenous 'control' and the identity question are absent from the preamble to 107. Both faculties are to be exercised 'within the framework of the States in which they [the peoples] live': there is no mandate for secession in ILO 169. The urge to level up the living conditions of the populations in 107 is restated in terms of fundamental human rights in 169, with the additional observation that besides general human rights deprivations, the indigenous 'laws, values, customs and perspectives have been eroded'. The recognition of indigenous peoples as a factor of enrichment strikes a note which is entirely absent from 107 – the new Convention calls attention to 'the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding'. Again, as with 107, the 169 preamble illustrates the structure of the intergovernmental cooperation at the base of the Convention – in both cases, ILO standards are not aberrant, but can be taken to represent and summarise the *Weltgeist*.

Peoples, not populations

The newer Convention is a text on indigenous and tribal *peoples*, not populations. The significance of the move from populations to peoples has been commented upon previously. The ILO revision process was the site of intensive debates over the move, with drafts at one stage deploying the tentative expression 'peoples/populations'. The use of 'peoples' caused concern to some governments: it was not the unanimous choice of governments on consultation. Bolivia argued that 'populations'[30] would create fewer

[30] *Partial Revision*, Report VI(2), 1988, p. 12.

conflicts than 'peoples'. Canada regarded 'populations' as non-pejorative.[31] Ecuador claimed that the replacement of terms would be 'futile'.[32] 'Peoples' was generally preferred to 'populations' because, according to Australia, it 'would be consistent with the rejection of the integrationist approach'.[33] Gabon stated that 'peoples' 'better emphasises the identity demanded by the persons concerned'.[34] Portugal made a similar observation.[35] Mexico preferred 'peoples' 'in order to use the same language as other international organisations, but above all that used by the Indians themselves'.[36] The USA stated that ' "peoples" should accurately reflect the tribal governments recognised by the United States federal government'.[37] The ILO commentary summarises State views as reflecting 'general agreement that the term "peoples" better reflects the distinctive identity that a revised Convention should aim to recognise '.[38] Most of the objections to 'peoples' centred on the issue of self-determination. In discussions recorded in the report of the Committee on Convention No. 107, the representative of Portugal interpreted the (draft) text 'as having no implications for the universal right of self-determination'.[39] The representative of Peru expressed his government's 'serious reservations' about the use of 'peoples', in the light of its concern 'about the links between this term and the right to self-determination'.[40] The representative of Ecuador noted that the text contained no implications regarding the right to self-determination as understood in international law . . . [and] . . . that this did not diminish the impact of the term in other international instruments'.[41] The representative of Argentina stated that 'while his government was not in favour of the use of the term "peoples", it would have been able to accept its use, provided that a clause was included in the text of the Convention itself which indicated clearly that there would be no implications for self-determination under international law'.[42] On the other hand, the representative of Norway 'welcomed the use of the term "peoples" . . . [and] . . . he did not see the need for a qualifying statement, since the notion of peoples had no clear definition'.[43] A proposed Explanatory Statement asserted that: 'It is understood by the Committee that the use of the term "peoples" in this

[31] *Ibid.*, p. 13.
[32] *Partial Revision*, Report VI(2), 1988, p. 13.
[33] *Ibid.*, p. 12.
[34] *Ibid.*, p. 13.
[35] *Ibid.*, p. 13.
[36] *Partial Revision*, Report VI(2), 1988, p. 13.
[37] *Ibid.*
[38] *Partial Revision*, Report VI(2), 1988, p. 14.
[39] International Labour Conference, Provisional Record 25, 66th Session, Geneva, 1989, para. 36.
[40] *Ibid.*
[41] *Ibid.*
[42] *Provisional Record 25*, para. 38.
[43] *Provisional Record 25*, para. 40.

Convention has no implications as regards the right to self-determination as understood in international law'.[44] This was transmuted into Article 1.3 of the final text, which states that:

> The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Some indigenous representatives were unhappy with this solution. The notion of self-determination for indigenous peoples was already firmly rooted in indigenous claims by this time so that for many,[45] the ILO approach was regressive. It was argued that the Convention was unfair and racially discriminatory in limiting the rights of indigenous as peoples under international law.[46] An ILO view articulated by the representative of the Secretary-General claimed that 'political separatism – which could be implied by the use of "peoples" – should in no way be promoted by the Convention'.[47] A possible interpretation is that the ILO simply stayed out of the self-determination controversy, leaving it to the UN in general and the development of international law outside the ILO to decide which peoples are the subjects of the right. On the other hand, the adoption of 'peoples' by the ILO advanced the case for indigenous employment of the vocabulary of peoples rights, and, ultimately perhaps the discourses of self-determination.[48] In as far as self-determination is increasingly understood to contain an internal aspect, it may be that certain aspects of self-determination can be read into Convention 169 – notably in the area of participation rights and self-government. A first version of the *Guide* to Convention 169 allied a summary of Articles 6 and 7 to a comment on self-determination, noting that many articles, including those on participation, in essence reflect 'elements of self-determination'.[49]

Permanent peoples

The title of 169 drops the reference to 'protection and integration' which appeared in 107. The split between 'indigenous' and 'tribal' in 169 has also been noted, and the new approach to understanding who is indigenous based on self-definition which, according to Article 1.2 of Convention 169 'shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'. In terms of policy and

[44] *Ibid*., para. 31.
[45] See ch. 15 of this volume on the draft Declaration on Indigenous Peoples.
[46] For critical views, see Marcus Colchester, 'Indigenous peoples and the International Labour Organisation', *Interights Bulletin* 4 (1989), 43–5.
[47] International Labour Conference, 76th Session, Geneva 1989, *Provisional Record 25*, p. 1.
[48] Swepston, 'A new step', 677–714.
[49] *Guide* (1995 version), p. 13.

philosophy, the later Convention does not suggest that indigenous peoples have only a temporary existence. On the contrary, it is replete with references which make sense only if the peoples are assumed to have a continued and distinct existence, and a right to it. Article 2 of 169 speaks of 'action to protect the rights of these peoples and to guarantee respect for their integrity', whereas the same article in 107 dealt with the issue of their progressive integration into the life of their respective countries. The new article also refers to 'respect for . . . cultural and social identity . . . customs, traditions and . . . institutions' of the peoples. The safeguarding of the continued existence of indigenous communities is a primordial objective of the Convention. Thus, in the case of Huichol communities of Mexico, their non-recognition in land censuses was one basis of the representation of the National Trade Union of Education workers; besides any implications for land tenure, non-recognition represented a threat to community existence.[50]

The Convention continues the themes of permanence and value of indigenous cultures in Article 5: 'the social, cultural, religious and spiritual values and practices of these peoples shall be protected and recognised. Article 6(c) provides that governments shall 'establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide for the resources necessary for this purpose'. There is no suggestion of the impermanence of indigenous peoples in a provision which looks towards the development of indigenous institutions. Article 7 is crucial in recognising that the peoples

> shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being . . . and to exercise control . . . over their own economic, social and cultural development.[51]

Article 8 looks to the retention of the customs of the indigenous peoples, provided they are not incompatible with fundamental defined by the national legal system and with internationally recognised human rights. In another sphere, the Convention previews the continuance of indigenous language use in providing that measures 'shall be taken to preserve and promote the development and practice of . . . indigenous languages'.[52] There is no equivalent suggestion to that of the phasing out of indigenous languages proposed in Convention 107.

Collective rights

Consonant with the move from populations to peoples, 169 is more strongly engaged with collective rights, incorporating them explicitly. Convention

[50] International Labour Conference, 87th session 1999, Report III (Part 1A), p. 570.
[51] Cf. the preambular reference above.
[52] Article 28.3.

107 hovered among the descriptors 'populations', 'members of the populations' and 'persons belonging to the populations'. None the less, the deployment of 'populations' in the earlier text stands as recognition of collective language in the international law of human rights. In the statement of coverage of 107, the application of the text was to 'members of [indigenous or tribal] populations'; in 169 the scope of application is simply to indigenous or tribal 'peoples'. On the other hand, 169, like 107, employs a mix of language, with prominence given to collective rights. The phrase 'the peoples shall have the right' is used on a number of occasions in the text.[53] In the articles which measure the gap between the indigenous and the general society in terms of rights, the emphasis is on 'members of these peoples'. In the section on employment, the phrase 'workers belonging to the peoples' is adopted. In the education part, 'children belonging to the peoples' is preferred. The individual rights provisions should not however be ignored in assessments of the character of the Convention. In areas such as wage discrimination, justice and due process, guarantees of individual rights are of primary importance.[54]

As with 107, articles dealing with land rights represent the clearest expression of the collective right. Thus, the Convention is not 'purist' on the collective–individual rights divide. Rights are stated to apply to individuals or the collective as appropriate to the matter in hand. Collective rights appear prominently in the section on land rights because that reflects the nature of the relationship of indigenous peoples to lands and resources. In the vocabulary of some indigenous peoples as they elaborate their relation to the land, the collective imprint is strong, not always expressed as rights, but just as frequently in terms of responsibilities, guardianship, stewardship, trusteeship or equivalents. It seems entirely logical that the choice of language should bend to the specifics of the right to be exercised and by whom. In this connection the remarks of the Governing Body to the government of Peru, following an Article 24 representation are of interest.[55] One issue raised by the General Confederation of Workers of Peru (CGTP) was that legislation purported to sell community land to individuals: this 'violated the very essence of the Convention and was contrary to its basic concepts' including the need to maintain their cultural identities.[56] The Governing Body recalled

[53] Articles 3, 7, 8.1, 14, 15, 16.3, and 27.3.

[54] See, for example, the claims of the Mexican Authentic Labour Front on the use of torture and other violations of dignity and due process against indigenous peoples in the criminal justice system, including lack of provision for interpretation as required by Article 12: International Labour Conference 1999, Report III (part 1A), pp. 569–70.

[55] Summary in International Labour Conference, 87th session 1999, Report III (part 1A), pp. 573–4.

[56] *Ibid.*, p. 573. The government replied that individual ownership was a better guarantor of economic development in the region in question.

Articles 13 and 17.2, and observed that required consultations with the community appeared not to have taken place, and that

> the ILO's experience was that, when lands held collectively by . . . peoples are divided and assigned to individuals or those who are not members of their communities, the exercise of their rights by the community or by indigenous peoples tends to be weakened and, in general, they ultimately lose all or most of their lands . . . The Governing Body found that, while it was not its function to determine whether collective or individual property was the most appropriate arrangement in any given situation . . . involving these peoples in the decision as to whether this form of ownership would change was extremely important.[57]

Non-discrimination

The principle of non-discrimination appears at various points in the text, commencing with the recall in the preamble of the UDHR, the Covenants on human rights, and 'the many international instruments on the prevention of discrimination'. The recitations of non-discrimination apply to the peoples, and to individuals, including 'male and female members of these peoples'.[58] The non-discrimination context is important, especially in view of the work of CERD and the HRC, some of whose insights may inform the interpretation of Convention 169.[59] Discrimination may be a factor in the failure of some governments to recognise the existence of indigenous groups, or to recognise some and not others, and in policies in general.[60] The principle of non-discrimination may also be relevant in assessing the merits of land tenure systems operated by the general law for the benefit or detriment of indigenous peoples. CERD has intimated that the balance between indigenous and the non-indigenous systems is a factor in judging whether so-called *sui generis* systems of native title are genuinely distinctive, or simply inferior to other forms of title.[61] Wage discrimination is also a fertile field of concern.[62] The elaboration of the non-discrimination principle in Convention

[57] *Ibid.*, pp. 573–4. Cf. the Committee's observations on Honduras, International Labour Conference, 88th Session 2000, p. 448: acquisition of coastline land by private individuals.

[58] Article 3.1 – see below for discussion of gender issues in the Convention.

[59] And who, in turn, have been influenced by Convention 169.

[60] Daes, *Indigenous Peoples and their Relationship to Land*, E/CN.4/Sub.2/2001/21.

[61] See ch. 8 of this volume. Outside the context of Australia, questions could be asked in this respect of the *Delgamuukw* case in Canada: aboriginal title appears inferior to ordinary and simple title, is a burden on the Crown and cannot be alienated except to the Crown. Further, the land cannot be used in a manner which is irreconcilable with the nature of the claimants' attachment to the land: *Delgamuukw v British Columbia*, 3 SCR (1997), pp. 1010–1141.

[62] See for example comments of the CEACR on Article 20 issues in the case of

169 encompasses special measures for the specific purpose of safeguarding 'the persons, institutions, property, labour, cultures and environment' of the peoples.[63] The participation/consent ethos of the Convention is maintained by the provision that the measures shall not be contrary to the freely expressed wishes of the peoples concerned.[64] The provision in Article 3.1 that the full measure of human rights and freedoms shall be enjoyed 'without hindrance' as well as without discrimination strongly suggests that positive State action to remove obstacles in the way of such enjoyment is envisaged.

Participation and decision-making

The Convention contains extensive references to participation. The preamble introduces the notion of control:

> *Recognising* the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live. . . .

The self-identification principle as expressed in Article 1[65] is a powerful contribution to the idea of participation since it plays a role in determining the whole applicability of the principles to the peoples concerned. The explicit participation theme is commenced in the substantive text with Article 2:

> Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

Articles 6 and 7 are central to the implementation of the Convention. Article 6 is explicit on the requirement of participation. In Article 6(a) the duty to consult the peoples through their representative institutions is mandated in connection with consideration of legislative or administrative measures

Paraguay: International Labour Conference, 88th Session 2000, Report III (Part 1A),

p. 450, which incorporate a reference to the Labour Inspection (Agriculture) Convention 1969 (No. 129). See also the comments on Mexico, 88th Session 1999, Report III (Part 1A), pp. 571–2: 'the Convention . . . states that Governments must do everything possible to prevent any discrimination between workers that are members of indigenous peoples and other workers' (*ibid.*, p. 572).

[63] Article 4.1.

[64] The report of the Tripartite Committee set up to examine a representation by the National Trade Union of Education on behalf of Huichol communities in Mexico considered that special measures 'to safeguard the existence of these peoples as such and their way of life' might be appropriate in the particular circumstances: International Labour Conference, 87th Session 1999, Report III (Part 1A), p. 570.

[65] 'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply: Article 1.2.

which may affect them directly. Governments, in applying the Convention, are also required to

> establish means by which [indigenous peoples] can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.

The requirement to consult in Article 6(a) is hardened in Article 6.2 to consultation intended to achieve a result: 'The consultations . . . shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'.[66] Article 7 is also extensive on participation. Article 7.1 includes powers of decision, participation and control, providing that the peoples:

> shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation of . . . plans and programmes for national and regional development which may affect them directly.

The motif is carried on to Article 7.2, promising participation and cooperation in improving health and education through development. Article 7.4 mandate measures, in cooperation with the peoples concerned, to protect and preserve environments. The *Guide* digresses on the meaning of Article 7, posing the question of whether it gives a right of veto to indigenous peoples over development plans, and suggesting that there while is no right of veto, there must be

> actual consultation in which [indigenous and tribal] . . . peoples have a *right to express their point of view* and a *right to influence the decision*. This means that governments have to supply the enabling environment and conditions to permit indigenous and tribal peoples to make a meaningful contribution. This can consist for instance, of helping these peoples acquire the skills and capabilities needed to understand and decide upon the existing development options.[67]

On the other hand, from the perspective of some indigenous groups,[68] 169 'did not properly recognize the crucial requirement of indigenous consent'.[69]

[66] Governments have been criticised for going through the motions of consultation, and then ignoring results: see remarks on the representation by the Mexican Authentic Workers' Front (FAT) alleging inattention to the results of consultations on constitutional reform: International Labour Conference, 88th Session 2000, Report III (Part 1A), p. 449.

[67] *Guide*, p. 9, emphasis in the original.

[68] *Guide*, p. 8.

[69] Statement by an indigenous observer to the UN Working Group on Indigenous Populations, UN Doc. E/CN.4/Sub.2/1990/42, para. 47.

Further elements of participation include Article 15 – in the management and conservation of resources,[70] in benefits from exploration and exploitation of resources[71] Article 16 qualifies relocation as requiring free and informed consent; Article 17 requires consultation whenever consideration is being given to their capacity to alienate lands to those outside the community. The adoption of special measures for employment, etc., is subject to the principle of cooperation[72] and special programmes of vocational training are to be ensured with the participation of the peoples.[73] The administration of matters covered by the Convention by governmental authorities is also on a cooperation basis.[74] The participation and other Convention elements raise important issues of representation – who speaks for the peoples? It is clearly possible for governments to 'choose' their interlocutors for the purposes of obtaining consent, etc., to development projects. In addition to the above cases, consultations are mandatory prior to exploitation of mineral and other resources,[75] and prior to the design and launching of vocational training programmes.[76] The CEACR insists on allowing indigenous groups space for decision. For example, in a *Direct Request* to Bolivia in 1994, the Committee noted that

> there is some conflict between the notion of respect for the principle of ethnodevelopment and cultural diversity, and the tendency to assimilate traditional organizations and institutions into the dominant culture. The Committee would like to emphasize that the Convention recognizes the right of indigenous and tribal peoples to make their own decisions in this regard.

In a general sense, the institutionalisation of dialogue between indigenous peoples and governments is likely to be applauded by the Committee: for example, consultations between the government of Norway and the Saami Parliament on the application of the Convention have been warmly welcomed.[77] The dialogue should be genuine, not simply asserted: following a trade union representation against Mexico on behalf of indigenous communities of the Uxpanapa Valley,[78] the Governing Body of the ILO has expressed concern over the lack of real dialogue between governments and

[70] Article 15.1.
[71] Article 15.2.
[72] Article 20.1.
[73] Article 22.2. See also Article 23 on handicrafts and community-based instruments, etc., and assistance on the request of the peoples.
[74] Article 33.
[75] Articles 19, 20 and 21.
[76] Article 22.
[77] International Labour Conference, 82nd Session, 1995, Report III (Part 4A), p. 399. See also 85th Session, Report III (Part 1A), 1997, p. 405 (Mexico) – nationwide process of consultation on the rights and participation of indigenous peoples.
[78] By the Radical Trade Union of Metal and Similar Workers.

indigenous communities 'in the consultative spirit on which this Convention is based'.[79]

Land rights

> No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home' . . . does not match the Aboriginal word that may mean 'camp', 'hearth', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre', and much else. Our word 'land' is too spare and meagre. We can scarcely use it except with economic overtones unless we happen to be poets.[80]

Terminology

The section on Land (Part II) commences with Article 13 which refers to the need for governments to respect 'the special importance for the cultures and spiritual values' of the peoples concerned of their relationship with lands and territories when applying the Convention. There is no analogous provision in Convention 107. The new provision, while general in import, is nevertheless couched in mandatory language and must be given some meaning. The effect should lead to a weighting in favour of the special indigenous relationship with land in any contest with State authorities on the interpretation or application of the specific provisions in this part, when other considerations are evenly balanced. The importance of lands to the spirituality and identity of indigenous groups should not be underestimated in making assessments of competing interests.[81] Article 13 also offers a definition of lands which, 'in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use'. The arguments about lands and territories were among the most difficult in the drafting process. The direct inclusion of 'territories' in Articles 15 and 16 was resisted by States, so that their definition instead in Article 13 was accepted as a drafting compromise – though the term 'territories' still governs the two articles. Some governments favoured a drafting

[79] International Labour Conference, 88th Session 2000, p. 449.

[80] W. E. H. Stanner, *White Man Got No Dreaming, Essays 1938–73* (Canberra, Australian University Press, 1979) p. 230.

[81] A UN Special Rapporteur on land rights cites the example of the Limbu peoples of Nepal, for whom the Kipat land tenure system 'provides a means of belonging to a place and to a distinctive community'. The Rapporteur cites one authority to the effect that Kipat is fused with and articulates the culture . . . any assault on Kipat is seen as a threat to the very existence of the Limbu as a separate community within the society': Daes, *Indigenous Peoples and their Relationship to Land*, para. 13. Of course, land may be 'sacred' in formal and informal ways to the non-indigenous, and wars may be fought to safeguard the territory. For many indigenous peoples, the land may be physical and spiritual space; many are 'bounded communities' in this sense – bounded by and bound to their lands.

Working Party proposal for 'lands or territories, or both, as applicable'.[82] India would have preferred 'areas'. Many governments pointed to the difficulties for ratification in keeping 'territories', which term invited confusion with, and perhaps a challenge to, 'the national territory'.[83] The specific reference to territories for application in Articles 15 and 16 suggests that a narrower view should be taken of the meaning of 'lands' in Article 14, where the extension to 'territories' does not apply. On the other hand, no further definition of lands is offered, nor was it in Convention 107. The Conference Committee of the ILO, referring to Recommendation 104 rather than Convention 107, stated that it was agreed that: 'the term "land" as used in this Part was generic and should be understood to include rivers, lakes and forests'.[84] If this is the case, Article 14, and *a fortiori* Articles 15 and 16, includes the traditional use of freshwater areas, as well as 'land' in the narrow sense.

Basic rights

The key provision on land is Article 14 which demands recognition of the 'rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy'. In the Convention perspective, land rights are not granted by the State,[85] which must recognise them as a matter of international obligation arising from traditional occupation; nor must they be cut back arbitrarily. [86] Key words in Article 14 which strengthen it – notably the use of 'shall', which is mandatory; guarantee – meaning that the result is underwritten by the government and will be achieved in fact; 'effective' – the rights must be effected in fact. 'Adequate' is not usually the strongest of terms – but here the 'adequacy' is to achieve a particular result – i.e., the procedures established must be capable – up to the task – of resolving claims. The interpretation in the *Guide* is along the following lines:

[82] International Labour Conference, *Provisional Record 25*, esp. paras. 144–63.

[83] These issues have resurfaced in the drafting of the UN Declaration on the Rights of Indigenous Peoples; see ch. 15 of this volume.

[84] Cited in *Provisional Record 25*, International Labour Conference 1989, para. 162.

[85] See the remarks of Brazil in relation to Convention 107, at ch. 13 of this volume.

[86] While not expressed as such in the Convention, the merely formal attribution of rights without substance is insufficient. Precarious indigenous 'rights' figure in the opinion of the Chief Justice of the Canadian Supreme Court in *Delgamuukw* (at p. 1111), listing examples where aboriginal title could be infringed: 'the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are . . . can justify the infringement of aboriginal title'. Such a doctrine would not meet the standards of the HRC, let alone the specifics of Convention 169. For a critique, see Ö. Ülgen, 'Aboriginal title in Canada: recognition and reconciliation', *Netherlands International Law Review*, XLVII (2) (2000), 146–80.

(1) the provisions were drafted with regard to variable situations in different countries;
(2) 'rights' is used in the plural, because in many cases, indigenous peoples do not have full title to their lands;
(3) rights to possession and use of lands traditionally occupied satisfy the Convention, as long as there is 'a firm assurance that these rights . . . continue';[87]
(4) the phrase 'traditionally occupy' does not imply that there must be a continued and present occupation; rather, 'there should be some connection with the present' [88] – so the phrase 'traditionally occupy' includes a relatively recent expulsion from these lands, or a recent loss of title;
(5) 'traditionally occupy' does not mean 'in a traditional manner' – indigenous peoples develop and change their lifestyles and traditions;[89]
(6) as an additional right, in the case of lands not exclusively occupied but to which the peoples have traditionally had access, governments shall in appropriate cases take measures to safeguard the right to use the lands;[90]
(7) governments shall 'take steps' to identify lands traditionally occupied and guarantee effective protection;[91]
(8) the establishment of procedures to resolve land claims is mandatory.[92]

Traditional occupation

The time span for traditional occupation is contestable, as it is in the case of Convention 107. The USA considered that the phrase 'traditionally occupy' does not mean all the lands that the tribes have historically occupied, and wanted it narrowed down to lands reserved or currently occupied.[93] The reading in the *Guide*[94] of this present-tense term is a compromise between two extreme positions: (1) rights over land whenever occupied; or (2) only

[87] p. 18.
[88] *Guide*, p. 18.
[89] *Guide*, p. 19. Cf. the *Länsman* cases under the ICCPR.
[90] On 'appropriate cases', the *Guide* refers to grazing, hunting or gathering rights, and links the obligations of the article to Article 23 which calls for the recognition and strengthening of traditional activities, including hunting, etc. The point is that 'indigenous and tribal peoples should not lose their use rights when those lands are developed' (*Guide*, p. 19).
[91] 'Note the word "effective". This means that there has to be real and practical protection and not just protection in law' (*Guide*, p. 19).
[92] Article 14.3.
[93] 76th Session, *Partial Revision*, Report IV (2A), p. 35; see also remarks of Canada, *ibid.*, p. 34. The International Labour Office commented that the term 'traditionally occupy' 'would not grant rights to any territory ever occupied' (*ibid.*, p. 36).
[94] pp. 18–19.

rights over land presently occupied.[95] The first of these would privilege history; the second the depredations of history. Writing in relation to the Saami, Hannikainen supports a narrow view: 'The words "traditionally occupy" appear to mean that the Saami (1) must have traditionally occupied those lands, and (2) must *also at present occupy* them'.[96] This seems harsh. it would mean, for example, that cases of recent so-called ethnic cleansing would effectively negate rights based on traditional occupation. If a right is to mean anything, it should mean the right to claim back when expelled from traditional territories; international law should at least have the capacity to address cases of historically recent grievance.

'Right' and 'rights'

The point in the *Guide* about 'rights' giving flexibility may be taken, certainly for the benefit of governments. It also benefits the indigenous who, in many cases, will not have been granted formal titles: the Convention makes no demand that they have such titles before it becomes applicable. The nature of the conjunction of 'rights of ownership and possession' requires comment. ILO Convention 107 used 'right of ownership', whereas indigenous peoples often attach as much importance to possession as to ownership.[97] The plural 'rights' in 169 links the concepts of ownership and possession, leading to Swepston's conclusion that

> the provision's wording argues against the simplistic interpretation that both ownership and possession would have to be recognized simultaneously for the Convention to be considered applied; the use of the word 'rights' in the plural indicates that these two rights are to be considered as separate and complementary. [98]

On the other hand, proposals to include rights of ownership, possession *or* use were not accepted, since, presumably, the grant of only one right would be all that is required to satisfy a government's obligations.[99] In the drafting of the Convention, the International Labour Office expressed the view that 'to assimilate the term "use" to ownership and possession would weaken the revised Convention by comparison to Convention No. 107, which recognizes

[95] Canada noted, nevertheless, that 'the term "traditionally occupy" remains ambiguous. It does not take into account . . . situations where indigenous populations have relinquished rights over traditional lands, for example through treaties . . . or of situations where there are overlapping claims over the same lands' (*Partial Revision*, Report IV (2A), 1989, p. 34).

[96] L. Hannikainen, 'The status of minorities, indigenous peoples and immigrant and refugee groups in four Nordic states', *Nordic Journal of International Law* 65 (1996), 1–71, at 53 (emphasis in original).

[97] 75th Session, 1988, Report VI(2), p. 48.

[98] Swepston, 'A new step', 700–1.

[99] International Labour Conference 76th Session 1989, *Partial Revision*, Report IV(2A), p. 33.

the right to ownership'.[100] In case of doubt, it should be taken that Convention 169 has moved on from the principles in Convention 107. In Convention practice, Norway maintained the view that usufruct rights are capable of satisfying the Convention; the Saami Parliament disagreed.[101] The ILO Committee of Experts did not pronounce definitively on this question in its *Direct Request* (1995) to the Norwegian government, though it did observe that 'the recognition of ownership rights by these peoples over the lands they occupy would always be consistent with the Convention',[102] and left the question for final determination in Norway. Perhaps, in view of the fact that land formalities are not the ultimate issue, some functional equivalent of ownership and possession, a common *substratum*, is what is indicated. Such a functional concept would respect the exigencies of indigenous activity, in line with the recognition of their special relationship with land in Article 13. It would incorporate, through the prism of local terminology, the legal empowerments that underpin ownership/possession.[103]

There is a distinction in Article 14 between the ownership and possession rights in the lands of traditional occupation (first sentence), and the rights of use to lands not exclusively occupied (second sentence): the latter is clearly an additional right. The syntax may suggest that the greater rights accrue only to lands *exclusively* occupied by the peoples. This would be a difficult factual case to sustain in most instances. Despite possible *a contrario* readings of the article as a whole – full rights for land occupied, less for land not exclusively occupied – the first sentence of the Article does not explicitly demand that occupation must be exclusive and such a stringent requirement should not be read in.[104] On the right of use in the second sentence of Article 14, this is a right rather than a permission, and is to be 'safeguarded', so that its scope will be linked to the nature and extent of the traditional access for subsistence, etc.[105] The demarcation requirement in Article 14.2 is

[100] International Labour Conference, 76th Session 1989, *Partial Revision*, Report IV(2A), p. 36.

[101] J. B. Henriksen, 'The legal status of Saami land rights in Finland, Russia, Norway and Sweden', unpublished paper, 22 March 1996, pp. 18ff.

[102] Henriksen, The legal status', pp. 18–19.

[103] This also appears to be the view of the Norwegian Saami Rights Committee, whose report 'points out that, even if Article 14 para. 1 does not demand that the Saami have to be given title to the land they have traditionally occupied, they have to be given at least most of the powers that an "ordinary" land owner has': cited by J. Gauslaa, 'Land rights articles of ILO Convention No. 169 and the Nordic countries', paper delivered at the Seminar on ILO Convention 169 and its Ratification by Norway, Finland and Sweden, Rovaniemi, May 2001, p. 5.

[104] The *Guide* (p. 18) does refer to shared use in discussion of this aspect of Article 14. In the drafting, a proposal by the delegate of Australia to accord exclusive rights of 'ownership, possession and control' to the peoples was rejected: *Partial Revision*, Report IV(2A), pp. 33–6.

[105] The provision should be read in the context of Article 23, calling for the strengthening of traditional activities including hunting and grazing.

expressed to apply only to the lands the peoples traditionally occupy in order to protect their ownership and possession rights. According to a UN study, 'the greatest single problem today for indigenous peoples is the failure of States to demarcate indigenous lands', adding that 'Purely abstract or legal recognition of indigenous lands . . . can be practically meaningless unless the physical identity of the property is determined and marked'.[106] On demarcation, the Convention's injunction to 'take steps' may be adapted to the methodology of the Committee on Economic, Social and Cultural Rights, which requires, in the context of that instrument, the taking of steps that are 'deliberate, concrete and targeted' as clearly as possible towards meeting the required goals.

Resources

Article 15 provides for special safeguard of the rights of peoples to natural resources pertaining to their lands, including participation in use, management and conservation. The phrase 'their lands' must be read subject to Article 13.2 referring to lands the peoples 'occupy or otherwise use' – and so is not confined to lands owned or possessed. According to the prescriptions of Article 13, Article 15 reaches out to the total environment. If 'land' in Article 14 can be extended to traditional freshwater resource exploitation, then it can include sea area resources in Article 15. The natural resources context of Article 15 makes such an extension appropriate, and a resource base for fishing and hunting activities at sea may be vital for the survival of traditional cultures. If this is the case, indigenous peoples may participate in the 'use, management and conservation' of such resources equally with other natural resources. Where ownership of sub-surface resources is retained by the State, governments are required to consult with peoples affected before permitting programmes, and the peoples 'wherever possible' are to participate in the benefits.[107] Compensation for damage ensuing is also envisaged. The language of this article is weak. The envisaged consultation may not amount to much in practice;[108] the 'participation in benefits/profits' principle is only 'wherever possible'. Reading the Convention as a whole, the provision may be strengthened by referring to Articles 6 and 7, which are stronger

[106] Daes, *Indigenous Peoples and their Relationship to Land*, para. 50.

[107] The Committee has stressed the importance of environmental impact studies which should involve indigenous communities prior to the granting of environmental licences – International Labour Conference, 87th Session 1999, Report III (Part 1A), p. 567 (Colombia).

[108] The record reveals a lively debate on a draft proposal that governments were to 'seek the consent' of populations likely to be affected by mineral, etc., exploitation. Colombia preferred 'obtain consent' to 'seek consent' (*Partial Revision*, Report IV (2A), p. 38), whereas Australia observed that '"seek the consent" could be perceived as a veto power' (*ibid.*, p. 37); the subsequent Office's wording 'intended to convey that an attempt should be made in good faith to obtain the consent of the peoples concerned before undertaking activities . . . without indicating that they should have a veto power over government decisions' (*ibid.*, p. 41).

on participation and the necessary guarantees of participation – the *Guide* reminds us that 'the individual articles do not stand alone'.[109]

Relocation

Article 16 of the Convention deals with relocation, which is prohibited subject to possibilities of removal as an exceptional measure. Article 16 is subject to Article 13.2 – the provision that 'lands' includes total environment – so exclusive occupation by the peoples is not necessary to trigger the operation of principles.[110] Barriers to relocation are procedural rather than substantive: it may be questioned whether this allows too much scope to governments, though substantive barriers require careful choice of language.[111] It may be significant for the operation of the article that the operative term is 'relocation', not 'removal'. Essentially the peoples have the minimum right to present their case against the relocation,[112] a right to return whenever possible, as soon as the grounds for relocation cease to exist; where return is not possible, they have the right to equivalent lands or compensation. The substitute lands should be at least equal 'in quality and legal status'.[113] The article strongly suggests that those seeking a population relocation must actively seek the consent of the indigenous community. It is clear that the right to remain in the territories traditionally occupied is not secure in all circumstances. Although removals are envisaged essentially as temporary, some may be permanent. Indigenous peoples have suffered disproportionately in recent decades from mega-projects – as Swepston notes, 'almost no major hydroelectric project anywhere in the world has been built without removing indigenous peoples from the land to be flooded'.[114]

On inalienability

Article 17 deals with procedures for the transmission of land rights. Customary procedures shall be respected. The effect of transmission of rights

[109] 20. See Representation against Bolivia, GB.272/8/1; 274/16/7.

[110] *Guide*, p. 21. There is however a certain lack of fit between the covering clause in 13.2, dealing with lands the peoples 'occupy or otherwise use', and 16.1 (prohibition of relocation) which refers only to 'lands which they occupy'.

[111] Article 12 of 107 permitted removals on grounds of national security, national economic development and health; the development criterion in particular offers little protection against a determined government. Swepston comments that the International Labour Conference 'decided . . . that to spell out cases would be to grant license for them, one of the weaknesses of Convention No. 107' ('The ILO Indigenous and Tribal Peoples Convention . . . eight years after adoption', in C. P. Cohen (ed.), *Human Rights of Indigenous Peoples* (Ardsley, N. Y. Transnational Publishers, 1998), pp. 17–36, at p. 26).

[112] Through public enquiries where appropriate, where they should have effective representation – Article 16.2.

[113] Article 16.4.

[114] Swepston, 'The ILO Convention', *ibid.*

within the indigenous group must therefore be judged against the customs and conceptions of the people concerned. There is no absolute protection against alienation, but the peoples shall be consulted when there is consideration of their capacity to alienate lands or otherwise transmit rights outside the community.[115] Many but not all indigenous NGOs in the drafting of the Convention argued that the lands of indigenous peoples should be made inalienable. This was rejected on the grounds that it would have removed decision-making power from indigenous peoples in this one critical domain. Accordingly, to render lands inalienable would have hindered economic, wealth-generating activities of leasing, sale, etc. The reference to procedures for transmission should be read together with Article 8, on customary laws. On the alienability question. Swepston[116] notes that in many countries capacity to alienate is restricted, usually for protective purposes, and that the article states that consultation is required before such schemes are put into place. The article is more open-ended, and could apply to all cases where 'consideration is being given to their capacity to alienate'. This could apply to cases where new possibilities of alienation are considered, as well as introduction of protective restrictions to make lands inalienable. The considerable freedom of the State to permit alienation outside the community – subject only to a right of consultation – raises its own perils.[117] The possibility of alienation should not damage the community's capacity for survival. The question of who has the authority to conclude a transmission agreement to those outside the community depends whether the rights are individual or collective.

Traditions and rights

The Convention is replete with references to indigenous cultures, customs, traditions and to customary law.[118] Examples of indigenous customs are potentially legion, and could range from ancestor worship and earthbound spirituality, through distinctive forms of economy and resource exploitation, clothing, languages and systems of customary law. The peoples of the Convention are defined in part by reference to 'own customs' for the tribal peoples, and 'own institutions' for the indigenous. Article 2 demands respect for the peoples' 'social and cultural identity, their customs and traditions and their institutions'. Article 4 looks to special measures to safeguard cultures

[115] Article 18 requires the establishment of legal penalties for unauthorised intrusion on the lands of the peoples concerned, and measures by governments to prevent such offences.

[116] 'A new step', 709.

[117] See the summary of information presented to the CEACR by the FAT of Mexico describing the community vulnerability attendant on losing inalienability rights: International Labour Conference, 88th Session 2000, Report III (Part 1A), p. 449.

[118] See in particular Articles 8, 9 and 10.

and institutions. Article 5 for respect for 'values, practices and institutions'. To that point, the Convention is very pro-indigenous customs and practices. In relating these to a wider universe of norms, Article 8.2 is key: the peoples

> shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights procedures shall be established, whenever necessary, to resolve conflicts which many arise in the application of this principle.

Similarly in Article 9, traditional methods of dealing with offences are to be respected 'to the extent compatible with the national legal system and internationally recognised human rights'.[119] Education programmes (below) are to incorporate, *inter alia*, indigenous 'value systems'.[120] The demeaning reference in 107 to the populations being 'allowed to'[121] retain their customs and institutions is replaced by a right to do so. The potential to restrict forms of cultural self-expression is related to national law and internationally recognised human rights[122] – and is not left to the vagaries of the integration programmes of Convention 107.

The provisions of Article 8 in particular prompted debate in the drafting process. Some States argued simply that 'Indigenous populations should abide by the national legal system': [123] in other words, there would be no place for indigenous customary law. A few States pointed to some undesirable aspects of tribal custom. Sweden observed that both national law and customary law may put women at a disadvantage, arguing that, from 'an equal opportunity point of view, customary laws which do not disfavour women should be retained as far as possible'.[124] The United States also noted that 'such unacceptable practices as slavery or wife-selling were at one time among the customs and institutions of some tribes'.[125] On the other hand, a number of participants – including Gabon,[126] suggested deleting

[119] Cf. the Greenland Criminal Code of 1954, whereby guilt is determined by the general law, but punishment has to respond to the individual situation, including the indigenous context: cited in *Guide*, p. 6. The application of mandatory sentencing laws to indigenous peoples in Australia has been criticised by several UN human rights treaty bodies for ignoring the effects on individual and community; *de minimis*, any such practices would be difficult to square with the provisions on Article 10.1 of Convention 169.

[120] Article 27.1.

[121] Article 7.2.

[122] See Article 171 of the Bolivian Constitution 1994 – dealing with the powers of traditional authorities and the application of customary law which must not be contrary to the Constitution and the laws.

[123] *Partial Revision*, Report IV (2A), 1988, p. 24. See also Japan, *ibid.*, p. 25.

[124] *Partial Revision*, Report VI(2), 1988, p. 38.

[125] *Ibid.*

[126] *Partial Revision*, Report IV(2A), 1988, p. 24.

references to the national legal system as a control on indigenous customary law. In the language of a Workers' organisation: the 'requirement of compatibility with national law is a licence for cultural genocide and allows assimilationist policies'.[127] The International Labour Office summarised the position:

> the degree of respect to be paid [to customs and customary law] is difficult to define. Clearly the principle of equality before the law does not in itself respond to the need expressed here. It is equally inappropriate to include the principle of primacy of customary law . . . The present wording is intended to allow the gradual incorporation of the concept [of customary law] into national law without damaging the established legal system.[128]

The Office did not consider that the reference to 'national law' in Article 8 devalued the principle of paragraph 1 because of references to fundamental human rights and to internationally recognised rights.[129]

Indigenous women

Bearing in mind the Swedish observation that national as well as tribal law may disadvantage women, it may be noted that Convention 169 addresses women in the context of Article 3 on discrimination, whereby the provisions of the Convention 'shall be applied without discrimination to male and female members of these peoples'.[130] The other provision appears in Part III on 'Recruitment and Conditions of Employment' wherein governments are pledged to adopt special measures to ensure 'that workers belonging to [indigenous and tribal] peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment'.[131] In the drafting of Convention 169, proposals on the rights of women presented in 1988 were rejected on the gender-blind ground that 'international conventions apply equally to men and women and that it would [therefore] be superfluous'.[132] The 1989 draft text[133] did not contain a reference along the lines of Article 3.1 but did contain what became Article 20.[134] The drafting record states that an amendment to the original Article 3 of the draft Convention was submitted by government members of Sweden, Canada, Denmark, Finland, the United States and Norway. It was opposed by the employers' members on the ground that since the amendment stressed

[127] The representative of the IPWG, *Partial Revision*, Report IV (2A), 1988, p. 24.
[128] *Partial Revision*, Report IV(2A), 1989, p. 25.
[129] For discussion of Article 9, see in particular *Partial Revision*, Report IV(2A), 1989, pp. 26–7.
[130] Article 3.1.
[131] Article 20(3)(d).
[132] Office commentary, *Partial Revision*, Report IV (2A), 1989, p. 16.
[133] *Partial Revision*, Report IV(1).
[134] See also *Partial Revision*, Report IV(2B), 1989.

discrimination on the ground of sex alone 'it could create the impression that the Convention had a special focus on this subject'.[135] They also recalled the provisions of Article 2 which already called for the observance of human rights on a basis of equality.[136] The government member of Canada, on the other hand, stated that the amendment

> concerned the widespread nature of sexual discrimination and the fact that this form of discrimination was often the most pervasive and the least recognised. She considered that the amendment would serve as a reminder . . . that special efforts were required to avoid sexual discrimination in areas such as vocational training, social security and health.[137]

The provisions on discrimination against women constitute a further brake on some species of national law and tribal custom. The reference to 'internationally recognised human rights' as a standard for testing the compatibility of customary law most pertinently includes the rights of women. Articles 3 and 8 also protect benefits gained from human rights as a whole. The text leans towards procedural resolutions of conflict between customary law and fundamental human rights, bearing in mind that the retention of customs and laws is a right of peoples, not a privilege. The requirement in Article 8.2 that procedures shall be established 'whenever necessary' suggests that resolution of conflicts will be on a case-by-case basis. This application of this provision would be enriched by the prior development of broad institutions and procedures to resolve conflicts before a specific conflict arises. The Convention exhibits a certain bias towards national rather than international procedures, bearing in mind the preambular reference to the position of the peoples 'within the framework of the States in which they live'.

Education and means of communication

In the education section as elsewhere, the newer Convention more or less retains the structure of 107, but conveys a different message. In the light of radical differences between the instruments, Swepston's comment that the education and language provisions occasioned discussion, but little real disagreement, is at first sight surprising.[138] But it is a further demonstration of the sea-change in attitudes between 1957 and 1989. Article 26 of 169 retains the text of Article 21 of 107, with the addition of words so that education 'on an equal footing' with the rest of the national community now reads 'on

[135] *Provisional Record 25*, International Labour Conference, 76th Session, 1989, para. 49.

[136] The employers' members later withdrew their objection and Article 3 was adopted by consensus.

[137] *Ibid.*

[138] Swepston, 'A new step', 711.

at least an equal footing'. The new text postulates equality as a minimum and allows space for differential treatment. This was made clear by the International Labour Office following an observation by the USA that the phrase 'equal footing' 'will not affect the special treatment afforded United States Indians by treaty or legislation'.[139] The Office remarked that the provisions of Article 34 would be relevant in accommodating to special circumstances.[140] The clarification was not entirely necessary: contemporary readings of 'equality' almost inevitably offer more than the flat equality insinuated in the US statement.[141]

The provisions of Article 27 entirely transform Article 22 of 107. Article 27.1 requires that educational programmes for the peoples 'shall be developed and implemented in co-operation with them' and shall incorporate 'their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations'. The provision represents the most demanding requirement for an indigenous or minority-sensitive educational programme generated by an international treaty.[142] The total education programme requires a very high level of indigenous participation and suggests a broad indigenisation of relevant educational processes in concept, administration and delivery. Indigenous participation in educational planning is insufficient; it must also subsist in its implementation.[143] The incorporation of indigenous 'aspirations' into the programmes will entail continuous State–indigenous dialogue on the nature of the aspirations and their compatibility with the aspirations of the national community as a whole. It does not represent a freewheeling claim on the State to resource any ambition of indigenous communities – the privileged aspirations are 'social, economic and cultural' rather than political. The aspirations to be programmed in should include enjoyment of the rights set out in the Convention. The combination of Articles 26 and 27 is designed to remedy the double handicap of the indigenous – lack of access to education, and when education is accessed, lack of attention to or denigration of the peoples' own traditions and values.[144] Article 27.2 carries on the participation concept to require that the 'competent authority shall ensure the training of members of these peoples' and their involvement in programmes 'with a view to the progressive transfer of responsibility for the conduct of these

[139] International Labour Conference, 76th Session 1989, *Partial Revision*, Report IV(2A), p. 59.

[140] *Ibid.*, p. 60.

[141] Expressed, for example, in General Comment 18 of the HRC, para. 10, text in *Manual on Human Rights Reporting* (New York, United Nations, 1991), pp. 117–19, at p. 118.

[142] Compare Article 12 of the FCNM of the Council of Europe, discussed in ch. 12 of this volume.

[143] See the observations of Mexico in *Partial Revision*, Report VI(2), 1988, p. 84.

[144] M. Tomei and L. Swepston, *ILO Manual on Convention 169* (1996), p. 24.

programmes' to the peoples 'as appropriate'.[145] The requirement is modestly described by Swepston as 'far-reaching'; there is no properly comparable provision in other international instruments.[146]

The provisions of Article 27 are completed by the set of principles in 27.3 – again using mandatory language, the governments 'shall recognize' the peoples right to establish 'their own educational institutions and facilities' provided only that they meet minimum standards established in consultation with the peoples. The paragraph does not avoid the crucial question of resources, but establishes that 'Appropriate resources shall be provided for this purpose'. This contrasts vividly with the bleak negation of any State financial responsibility for such institutions in the FCNM[147] and the more guarded freedom to seek public contributions in the OSCE Copenhagen Document.[148] 'Appropriate resources' may consist in financial subventions but are not limited to them. As elsewhere, 'appropriate' is among the less stringent qualifications on the exercise of a right inasmuch as it could stimulate public dialogue on what is appropriate without the cards being stacked in favour of governments. Canada expressed concern about the implications of such a provision, arguing that 'it would not be realistic to impose an open-ended obligation on governments to provide resources for any educational institution an indigenous group may choose to establish'.[149] Canada's proposal to replace the last sentence of 27.3 with 'Where appropriate, governments shall assist the [peoples] in giving effect to [the own institution's] right',[150] was not accepted. Chile articulated the view – which has resource and other implications – that education plans 'cannot consider particular sectors of the population in isolation. They should be included in the country's general education plans'.[151] But the planning process is strictly beside the point; however the process is structured, the resources must be made available.

Language

The language provisions commence in Article 28 with an adaptation of Convention 107's Article 23, and commences with the provision that indigenous children 'shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong'.[152] The major difference between the two

[145] See the comment of the USA, *Partial Revision*, Report VI(2), 1988, p. 84.
[146] Swepston, 'A new step', 712. Nevertheless, the USA noted the absence of the term 'control' in 27.2 – *Partial Revision*, Report IV(2A), 1989, p. 61.
[147] Article 13.2.
[148] Para. 32.2.
[149] *Partial Revision*, Report IV(2A), 1989, p. 60.
[150] *Ibid*.
[151] *Ibid*.
[152] Article 28.1.

texts is the deletion of the 107 reference to a 'progressive transition' from the indigenous to the national language. A less aggressive, less assimilationist approach is advocated by Article 28.2 which provides that 'Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency' in the national language or in one of the official languages. In relation to the indigenous languages, the commitment to 'preserve' in 107 is amplified by adding 'and promote [their] development and practice'. Swepston considers that Article 28 endorses bilingual education on the basis of initial literacy in the mother tongue.[153] Canada raised issues on the strictness of the obligations, bearing in mind the number of indigenous languages, the existence of languages with only a small number of speakers, and the absence of standard grammars.[154] Colombia and others argued against the 107 transition approach in favour of bilingualism – the peoples should master two languages: 'the official language for legal and administrative matters and the native language for life within the community'.[155] In the case of some isolated groups, this nostrum may not be completely appropriate, but it expresses the reality for most groups, even if contact with authorities is minimal. Indigenous groups usually need to master the language of law and administration in order to avoid being severely disadvantaged. Sweden advanced elements of an intellectual critique against the 107 view, observing that it

> assumes that the transition from the mother tongue to the national language is desirable or at all events inevitable. Since a people's own language forms an essential part of their own culture, the aim must be to preserve the [indigenous language] and promote bilingualism.[156]

Paragraph 28.3 on the practice of indigenous languages was diluted in the drafting process. The Convention requires only that 'Measures' shall be taken to preserve, etc., the indigenous languages. An earlier draft required 'effective measures'; Canada proposed 'appropriate measures', arguing that the effectiveness of measures could depend upon many factors outside the control of a government.[157] The International Labour Office accepted the validity of the Canadian argument without accepting the invitation to employ the term 'appropriate'.[158] The concordance of views leads one to suppose that 'appropriate measures' and 'measures' express equivalent obligations.

Article 29 on imparting general knowledge and skills to indigenous children is a redraft of Article 24 of 107, with major modifications. States arguing for the retention of the earlier article included Ecuador for whom

[153] 'A new step', 711.
[154] *Partial Revision*, Report VI(2), 1988, 85; IV(2A), 1989, p. 62.
[155] *Partial Revision*, Report VI(2), 1988, p. 86. See also the comment of Mexico, *ibid.*
[156] *Partial Revision*, Report VI(2), 1988, p. 87.
[157] *Partial Revision*, Report IV(2A), 1989, p. 63.
[158] *Ibid.*

its omission would have prejudiced the national interests of member States 'especially those which are less developed, whose legitimate aspirations towards national integration, and possibly their internal and external security, would be seriously jeopardized'.[159] Convention 107 refers only to primary education; 169 deals with 'education'. In Convention 107, the expressed motive for imparting knowledge and skills was facilitating integration into the national community. In Convention 169, the objective is to help children 'to participate fully and on an equal footing in their own community and in the national community' – 'participation' replaces 'integration', and the 'community' is both local and national. The changes have a knock-on effect for some other ideas in Convention 169. If the aim of education is participation in one's own community as well as the national community, the education will differ in character and content from an education directed only to participation (or integration) in the national community. The primary assessment of what constitutes an appropriate package of skill and knowledge for a particular community will be made by the community itself. Hence the importance of the related principle – in Article 27.2 – of the progressive transfer of responsibility for education programmes to the indigenous. Article 29 has another effect: whereas Article 27.1 suggests a high level of indigenisation of curricula, Article 29 points towards a more open and perhaps less ethnocentric education content – if indigenous children are to participate in the national community, they will have to understand that community and be receptive to its concerns.[160]

A note on interpretation

Article 34 provides that 'The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country'.[161] Van Boven makes the critical observation that

[159] *Partial Revision*, Report VI(2), 1988, p. 89. The USA objected (*ibid.*) to the deletion of Article 24 for different reasons, proposing that the article should be amended 'to establish the goal of providing the quality and quantity of educational services and opportunities which will permit the concerned populations to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their economic, social and cultural well-being'.

[160] On the translation of ILO Convention 169 itself into indigenous languages, see *Manual*, p. 63; the Project for the Promotion of ILO Policy on Indigenous and Tribal Peoples engages in ongoing translation for the benefit of a range of indigenous groups. Attempts are made to cater for indigenous groups with oral traditions by the production of audio tapes: *ibid.*

[161] Irrespective of the particular issue, the CEACR favours the adoption and practical implementation of policies, and not merely the undertaking of 'theoretical work' – observations on Colombia, 87th session 1999, Report III (Part 1A), p. 568.

> It appears that there is . . . some element of contradiction. On the one hand, the Convention recognizes the particular requirements of indigenous peoples whose rights and well-being are to be promoted and protected under the aims and the operation of the instrument. On the other hand, the article referring to the conditions characteristic of each country may be interpreted as serving the interests of the State with the possible effect of reducing the level of protection.[162]

The author later describes this as 'the conceivable contradiction',[163] and argues for its resolution by utilising the general rule of interpretation of treaties under the Vienna Convention on the Law of Treaties: they 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of their object and purpose*'.[164] The *Guide* reads the requirement to mean that the provision 'takes account of the fact that there are tremendous differences in the situation of indigenous and tribal peoples in different countries', and that it 'does not mean the governments are allowed to act any way they like';[165] the point is reiterated later that there is '*no single solution* to the problems of indigenous peoples in Brazil, Canada, India, Russia, Philippines, and many others'.[166]

Comment

The record of the ILO in dealing with indigenous peoples is treated at many points in the present work. A notable feature is the intellectual journey travelled between ILO Convention 107 and Convention 169, from the despair at the end of history to a new affirmation of indigenous presence and continuity. Many indigenous groups are wary of Convention 169 and contemptuous of 107. Neither Convention has been widely ratified, but the influence of ILO standards in the general consciousness of indigenous rights cannot be overestimated. The underestimation of 169 in particular may be for the wrong reasons and damaging to indigenous interests. While groups may be disappointed by its failure to address self-determination through evasive wording, the text of the Convention is radical by the standards of the human rights canon. In particular, its commitment to collective rights is

[162] T. van Boven, 'General course on human rights', in *Collected Courses of the Academy of European Law* IV(2) (The Hague, Kluwer Law International, 1995), pp. 1–106, at pp. 20–1.

[163] *Ibid.*, p. 21.

[164] Article 31.1 of the Vienna Convention on the Law of Treaties (cited author's emphasis).

[165] *Ibid.*, p. 26.

[166] *Ibid.*, p. 29.

remarkable and thoroughgoing. The Convention is strong on land rights and resources, customary law, education and participation. Ratification of 169 commits the States to move beyond recognition of groups to positive action and respect for the indigenous world. The approach is pragmatic, without the dramatics of the draft Declaration, and the instrument is capable of application in a variety of contexts through its broad statement of coverage. Another advantage of ratification is the considerable back-up provided by the implementation procedures of the ILO and its capacity for technical assistance.

Part V

Emerging standards specific to indigenous peoples

15

The UN draft Declaration on the Rights of Indigenous Peoples

An antidote for a troubling reality (Matthew Coone Come)[1]

An explanation of the chapter

The draft Declaration on the Rights of Indigenous Peoples has been referred to at many points in the present text, and the content has been briefly summarised in an earlier chapter. *Inter alia*, it has been utilised as a statement of indigenous claims, a guide to understanding the indigenous concept, and a 'heuristic' or standard to measure the development of international human rights law. The present chapter takes the Declaration as a potential future global standard for indigenous peoples – 'emerging law' – and appraises its principal characteristics. The chapter is not intended as a full commentary: it should be remembered that, at the time of writing, it remains an uncompleted document, so that exegesis of an eventual Declaration is the stuff of another study. However, the text is too important to indigenous groups to be dismissed as merely another draft: it is part of the common currency of discussion of indigenous rights; is widely addressed in the literature; and is resolutely defended by indigenous groups in the Drafting Group of the Human Rights Commission.[2] Within its regional context, approximately similar claims could be made for the proposed American Declaration. However, the drafting process has been much less open to indigenous participation, and the eventual text may not adequately reflect indigenous views. It will be important for indigenous peoples that the two eventual

[1] Grand Chief of the Grand Council of the Crees, cited by S. Pritchard in *The United Nations Draft Declaration on the Rights of Indigenous Peoples: An Analysis* (ATSIC, June 1996), p. 10.

[2] At the Commission Drafting Group, some indigenous groups set out criteria which might be used in reviewing proposed changes to the text: proposals 'should be reasonable, necessary, and improve or strengthen the texts, and . . . should be consistent with the fundamental principles of equality, non-discrimination and the prohibition of racial discrimination' (E/CN.4/2000/84, para. 123).

declarations stand opposite each other in a mutually supportive way, buttressing standards of indigenous rights, not tearing them down.

Getting there

The mandate given to the WGIP by the UN Economic and Social Council[3] included the closely connected tasks of reviewing developments concerning the human rights of indigenous populations and giving special attention to the evolution of standards concerning the rights of such populations. The agenda item 'review of developments' continues to provide the WGIP with information on the parameters of indigenous life – experiences for good or ill, grievances, aspirations, reflections, proposals, challenges to the home State, appeals to the international community, etc., as well as providing the factual matrix through which standard-setting exercises are shaped. This is despite the repeated assertions that 'the Working Group is not a chamber of complaints and cannot act upon specific allegations concerning violations of human rights'.[4]

At its 4th session in 1985,[5] the WGIP decided that it should aim to produce a declaration on indigenous rights for adoption by the General Assembly of the UN,[6] and set out some draft principles in preliminary wording.[7] The seven principles included the right to full and effective enjoyment of universally recognised human rights,[8] the right to equality and freedom from discrimination,[9] the collective right to exist and to be protected against genocide as well as the individual right to life,[10] rights in relation to religious ceremonies and access to sacred sites,[11] the right to all forms of education,[12] the right to preserve cultural identity and traditions and to pursue their own cultural development[13] and the right 'to promote intercultural information and education, recognizing the dignity and diversity of their cultures'.[14] While the draft principles do not approach contentious issues such as self-determination, the Plan of Action contained in annex I to the Report promised 'consideration

[3] ECOSOC resolution 1982/34, 7 May 1982.
[4] UN Doc. E/CN.4/Sub.2/AC.4/1998/1/Add.1, para. 6.
[5] For a concise history of the draft Declaration in terms of key documents, see E/CN.4/Sub.2/AC.4/1998/1/Add.1.
[6] E/CN.4/Sub.2/1985/22, annex II.
[7] *Ibid.*
[8] Principle 1.
[9] Principle 2.
[10] Principle 3.
[11] Principle 4.
[12] Principle 5.
[13] Principle 6.
[14] Principle 7.

of the right to autonomy, self-government and self-determination, including political representation and institutions'. The 1985 Report annexed two more dramatic declarations prepared by indigenous peoples.[15] In the draft prepared by the World Council of Indigenous Peoples,[16] the first principle asserts that 'all indigenous peoples have the right of self-determination', and, *inter alia*, that treaties 'shall be given full effect under national and international law'.[17] The second set of draft principles deployed the language of 'indigenous peoples and nations' rather than just 'peoples', and besides the claim to self-determination, asserted also that 'Discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples'.[18] The contrasts between the Working Group draft principles and the indigenous drafts are striking. The Working Group document is largely devoted to the elaboration and application of 'recognised' human rights principles; the indigenous drafts question the extent of that recognition, and seek to open out a broader juridical space for indigenous groups.

At the fifth session in 1987, the WGIP adopted 14 draft principles in preliminary wording.[19] At the sixth session in 1988, the Chairperson produced a working paper on a draft Universal Declaration on Indigenous Rights.[20] The draft does not approach the issue of self-determination, although the autonomy principle in part V is extensive: the indigenous have

> the collective right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions.[21]

Revised drafts followed. The First Revised Text of the draft Universal Declaration on the Rights of Indigenous Peoples[22] does not broach the question of self-determination, although the preamble recites that 'nothing in this declaration may be used as a justification for denying to any people,

[15] Annex III sets out the Declaration of Principles adopted at the 4th General Assembly of the World Council of Indigenous Peoples in Panama, September 1984; annex IV contains the Draft Declaration of Principles proposed by the Indian Law Resource Centre, Four Directions Council, National Aboriginal and Islander Commission, National Indian Youth Council, Inuit Circumpolar Conference and the International Indian Treaty Council.

[16] Both of the annexed drafts are set out in Anaya, *Indigenous Peoples in International Law*, pp. 188–91.

[17] Principle 17.

[18] Principle 6.

[19] E/CN.4/Sub.2/1987/22, annex II.

[20] E/CN.4/Sub.2/1988/25.

[21] Para. 23.

[22] E/CN.4/Sub.2/1989/36, annex II.

which otherwise satisfies the criteria generally established by human rights instruments and international law, its right to self-determination'. In 1990, the WGIP divided into three drafting groups. Drafting Group II took the boldest stand on self-determination.[23] The first reading of the whole draft was completed in 1992.[24] The WGIP members agreed the final text of the draft Declaration in 1993,[25] and it was adopted by the Sub-Commission – following a technical review by the Secretariat[26] – at its forty-sixth session in 1994.[27] The text discards all equivocations on the right of indigenous peoples to self-determination.[28]

General Assembly resolution 49/214 of 23 December 1994[29] entitled 'International Decade of the World's Indigenous People'[30] encouraged the Human Rights Commission to consider the draft Declaration on the Rights of Indigenous Peoples with the participation of representatives of indigenous peoples,[31] on the basis of procedures to be determined by the Commission. In its resolution 1995/32 of 3 March 1995,[32] the Commission on Human Rights decided to establish an open-ended inter-sessional working group of the Commission to elaborate a draft declaration 'for consideration and adoption by the General Assembly within the International Decade of the World's Indigenous People'.[33] The participation of indigenous organisations not in consultative status with the Economic and Social Council in the Working Group was the subject of a separate annex to the resolution of the Commission, paragraph 3 of which provided that: 'Organizations of indigenous people not in consultative status wishing to participate . . . may apply to the Coordinator of the International Decade of the World's Indigenous People. Such applications must include the following information' – there follow references to the name, aims and purposes and activities of the organisation in question.[34] On receipt of this basic information, the Coordinator

[23] Paragraph 1 of their draft provided that 'Indigenous peoples have the right to self-determination, by virtue of which they may freely determine their political status, pursue their own economic, social, religious and cultural development, and determine their own institutions' (E/CN.4/Sub.2/1990/42, annex IV).

[24] E/CN.4/Sub.2/1992/33, annex I.

[25] E/CN.4/1993/29, annex I.

[26] The 'technical review' is in E/CN.4/Sub.2/1994/2; the 'technically reviewed' draft is E/CN.4/Sub.2/1994/2/Add.1.

[27] Resolution 1994/45, 26 August 1994.

[28] See especially chs. 4 and 5 in the present volume.

[29] A/RES/49/214, 17 February 1995; resolution adopted (on the report of the Third Committee A/49/613/Add.1) on 23 December 1994.

[30] Proclaimed by General Assembly resolution 48/163 of 21 December 1993.

[31] Para. 5.

[32] Commission on Human Rights, 51st Session, *ECOSOC Official Records 1995*, Supplement No. 4, pp. 111–13.

[33] Paragraph 1.

[34] Annex, para. 3.

should consult with the State concerned and forward the documentation to the Council Committee on NGOs for its decision.[35]

The procedures and concepts set out in Commission resolution 1995/32 caused concern among indigenous organisations. At the Working Group on Indigenous Populations, some representatives sensed that attempts would be made to limit their participation in the new group. According to the Chairperson of the Aboriginal and Torres Strait Islander Commission, the Commission resolution 'clearly showed the hand of some governments who will continue to obstruct the international recognition of our rights and status'.[36] More sanguine views of the Commission resolution were expressed by the governments of New Zealand[37] and Australia[38] and by the Chairperson-Rapporteur of the Working Group on Indigenous Populations.[39] In any case, Commission resolution 1995/32 does not specify that the permission of States shall be a prerequisite to indigenous participation in the intersessional drafting group, only that the Coordinator of the Decade 'should consult' with the States concerned.[40] The Drafting group has held seven sessions without approving a final document.[41] Questions on the modalities of indigenous participation have occasionally troubled the proceedings.[42]

Conceptual and legal framework

The draft declaration positions itself in the firmament of international law and organisation, human rights and the rights of peoples. The preamble,[43] and the operative text engage the language of rights and iconic documents of international law: the Charter of the UN, and the International Covenants on Human Rights in as far as they make reference to the principle of

[35] Annex, para. 4.

[36] Statement of 24 July 1995 (on file with author).

[37] *Report of the Working Group on Indigenous Populations on its Thirteenth Session*, E/CN.4/Sub.2/1995/24, para. 39.

[38] *Ibid*., para. 40.

[39] *Report on the Thirteenth Session*, paras. 19 and 20.

[40] Annex, para. 4.

[41] At the time of writing the Group has held seven sessions; reports are contained in E/CN.4/1996/84; E/CN.4/1997/102; E/CN.4/1998/106 and Corr.1; E/CN.4/1999/82; E/CN.4/2000/84; E/CN.4/2001/85. In 1999, the Sub-Commission on the Promotion and Protection of Human Rights appealed (resolution 1999/19) to the Human Rights Commission to consider ways and means of accelerating work on the draft.

[42] See the discussion concerning the formalisation of informal government meetings in E/CN.4/2000/84, paras. 18–24; E/CN.4/2001/85, paras. 19–55.

[43] The preamble is 'beautifully drafted . . . it contains many of the sentiments and values that mankind holds highest' – intervention of the representative of the Grand Council of the Crees of Quebec, *Commission Drafting Group*, 25 October 1996 (on file with author).

self-determination. One preambular paragraph emphasises 'that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples'. As noted, there is no preamble reference to ILO Convention No. 169; some indigenous peoples opposed a reference[44] on the ground that ILO Convention No. 169 cannot be considered as a universal standard.[45] The International Labour Office has defended the relevance of Convention 169.[46]

The draft claims to develop existing international law and draw out its implications.[47] It is important to recall the legal context in view of occasional assertions that the text is not 'really' situated in the Western-centred universe of international law but is somewhere else – perhaps in a parallel and unconstrained universe of indigenous law. As Sayers and Venne put it: 'In indigenous time, those rights [of indigenous peoples] will be recognized, with or without a declaration from the United Nations'.[48] The characteristic indigenous intervention at UN level takes the line that indigenous peoples need a dedicated UN document with high legal significance and more immediate possibilities of achievement – 'the floor, not the ceiling of indigenous peoples' aspirations and entitlements'.[49] As one observer noted, no human rights instrument would have existed 'if all participants had held fast to their highest aspirations'.[50] The potential for change is sometimes undervalued by indigenous speakers galvanised by a zeal to reconstruct. There is no more 'radical' document in the field of international human rights. In the spectrum from reform to revolution, the text reaches towards the upper revolutionary end, among to passionate colours. The draft may become less passionate as drafting proceeds through the UN and is clothed in the organisation's uniform blue.

[44] E/CN.4/1996/84, para. 40.

[45] *Ibid.*

[46] 'The ILO's primary concern . . . is that any standards which may be adopted by the United nations should not . . . be lower than those already adopted . . . by the ILO. This principle is provided for in . . . resolution 41/120 . . . It will be evident that a Declaration should not contain lower standards than an international convention; and in particular one that was adopted very recently with the participation of the entire UN system' (E/CN.4/1995/119, para. 6).

[47] Finland has argued that the language of the draft is not incompatible with UN instruments on human rights: E/CN.4/1997/102, para. 45. According to an indigenous observer (the International Organisation for Indigenous Resource Development), 'the draft was an accurate statement of customary international law' (*ibid.*, para. 60). However, these are matters for investigation rather than simple assertion.

[48] J. Sayers and S. Venne, 'Eleventh session of the UN Working Group on Indigenous Populations', *Fourth World Bulletin*, 3(1), (1993) 20, at 20.

[49] Joint statement of Australian Aboriginal groups to the 2nd Session of the Commission Drafting Group, E/CN.4/1998/106, para. 25.

[50] D. Marantz, 'Issues affecting the rights of indigenous peoples in international fora', in International Centre for Human Rights and Democratic Development, *People or Peoples; Equality, Autonomy and Self-Determination: The Issues At Stake of the International Decade of the World's Indigenous People* (Montreal, 1996), pp. 9–77, at p. 15.

Peoples, practices, membership

The preamble sets out indigenous peoples as coeval with and equal to all other peoples – indigenous peoples are peoples existing in our space and time.[51] Cultural diversity rather than evolutionary scale are the key notions, expressed in preambular affirmations that 'indigenous peoples are equal in dignity and rights to all other peoples' and that they 'contribute to the diversity and richness of civilizations and cultures'. The preamble also asserts that 'doctrines, policies or practices' of racial superiority are 'scientifically false, legally invalid, morally condemnable and socially unjust' – here it seems that the language of the UNESCO Declaration on Race and Racial Prejudice[52] influenced the drafting. Unlike ILO Convention 169, the draft declaration does not contain a definition or 'statement of coverage' of the indigenous peoples under its remit, but as befits a UN Declaration, the reach is understood as global. If that is the case, then a variety of peoples should have the possibility of benefiting from its provisions. Textual indicators of indigenousness were canvassed in a previous chapter on the definition issue. There are enough parameters of indigenousness in the draft to enable groups to pull out descriptions to suit their situation on an '*à la carte*' basis. However, some authorities question the scope of the text. In somewhat unfortunate language, a journal commentary makes the point that

> In the first cut, those peoples who are clearly observable as 'tribals' or 'primitives' (e.g.: Yanomamis, Penan, Maasai, Nagas, etc.) will be viewed as the subjects of the rights of indigenous peoples. The fact is indisputable, however, that there are progressively fewer peoples who fall neatly into such categories.[53]

What then becomes of those whose ancestors were tribal, etc., but who now have more in common with 'the mainstream' than with 'their own people'.[54] The argument is in part about whether any indigenous group undergoing processes of cultural adaptation or development, technological or otherwise, remains within the purview of the draft. The other aspect concerns individuals or groups who have experienced a radical metamorphosis, those who were subject to 'cultural diffusion, true (bilateral) acculturation, directed culture change . . . genocidal wars . . . invasions . . . depletion on resources and habitat', etc.,[55] and who therefore may feel indigenous by self-identification rather than through attachment to a traditional community. The text offers

[51] Tennant, 'Indigenous peoples, international institutions, and the international legal literature from 1945–93', *Human Rights Quarterly* 16 (1994), 1–57, 23.
[52] 27 November 1978. Discussed in this volume.
[53] *Fourth World Bulletin*, 3(3) (July 1994), Commentary, 1–3, at 1.
[54] *Ibid.*, 2.
[55] *Ibid.*

clues to resolve the dilemmas and there may be enough in it to soften the doubts. The first aspect of the question is easier to answer – human rights instruments do not attempt to freeze processes of cultural development.[56] In the draft Declaration, the preamble refers to *the right to development* of the peoples 'in accordance with their own needs and interests', and 'in accordance with their aspirations and needs'. The preamble and Article 3 set out the overarching right of self-determination to include 'economic, social and cultural *development*'. Article 12 refers to 'future' as well as past and present manifestations of cultures. Article 19 entitles indigenous peoples 'to maintain *and develop* their own indigenous decision-making institutions'. Articles 21, 23, 26, 29, 30, 33, 35 and 38 make similar 'development' points. The message is that groups can count as indigenous even when they take development by the throat.

But this is only a partial answer to the commentator's question. While groups who are now indigenous can engage in self-development, is there enough here to accommodate those with thinner attachments to tradition? The commentary is correct in that the text of the draft Declaration is heavily structured on the idea of the traditional community, with its claims to territory and resources, its 'juridical customs',[57] community institutions, etc. But there are indications that the communal closure is incomplete. The option of participation in the life of the State is open to indigenous who choose it. The extra-communal cultural and language education of indigenous children is provided for in Article 15.[58] Labour rights are guaranteed by Article 18, including the right of indigenous individuals 'not to be subjected to . . . discriminatory conditions of labour, employment or salary'. Article 21 recognises rights in the field of 'traditional *and other* economic activities'; the citizenship referred to in Article 32 is shared.[59] There and elsewhere in the text, the non-traditional economic area is not fatally neglected

[56] See chs. 5 and 6, of this volume on the work of the HRC, including the *Länsman* cases, and General Comment No. 23.

[57] Article 33.

[58] Article 15 reads, in part – 'Indigenous children living outside their communities have the right to be provided access to education in their own culture and language'. Government proposals would rephrase this to 'Indigenous children living outside their communities should, where practicable, have access to education in their own culture and language' (E/CN.4/2000/84, annex I).

[59] Article 32 refers to indigenous citizenship but also to the citizenship of the State; Argentina regarded the use of citizenship to denote membership of an indigenous community as 'inappropriate': E/CN.4/1995/WG.15/2, p. 5. Other controversial terms include 'nation' in Article 9: at the first session of the Commission Drafting Group, Argentina, Australia, Chile, France, Malaysia and the Russian Federation, found the term problematic; the USA would read it as 'community' rather than 'nation-State' – a brief summary of the debate is set out in E/CN.4/1996/84, para. 68 (original statements on file with author).

and there is some recognition of groups and individuals who live, as the commentator says, in the mainstream. While the draft Declaration focuses largely on the traditional and the territorial, there is enough to make their prescriptions relevant also for those who have been marginalised from their communities and the dominant society by social processes.

Self-identification

The draft Declaration also incorporates self-identification: the formula in Article 8 of the draft Declaration is collective, though the construction is curious:

> Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

The article applies the collective and individual right to peoples. A commentator offers the explanation that the article 'implicitly safeguards the option not to identify as indigenous'.[60] If so, perhaps a symmetrical right not to identify could be inserted in the text, though it is likely that this would be opposed by indigenous peoples. Article 8 may be compared to Article 9 – where the right to belong to an indigenous community or nation is accorded to peoples and individuals 'in accordance with the traditions and customs of the community or nation concerned'. Again, the syntax could be cleared up in order to address discordant messages on individual and group rights – though it seems clear that the communal right is the stronger. As things stand, any clearer individual right of self-identification would come rather from a reading of Article 1 of the draft Declaration, which protects (subject to arguments set out below) rights and freedoms gained under 'international human rights law' – wide enough the include the individualistic formula preferred by CERD.[61]

Individual and collective rights

The above discussion takes us to the deployment of individual and collective rights in the Declaration. The draft Declaration takes a stance in favour of collective rights[62] – those rights which, according to France, 'did not exist in

[60] Pritchard, *United Nations Draft Declaration*, p. 54.
[61] See ch. 8 in this volume.
[62] The Netherlands has expressed 'concern about a possible imbalance between individual and collective rights' in the draft: UN Doc. E/CN.4/1997/102, para. 109.

international human rights law'.[63] The formula 'indigenous peoples have the right' characterises the draft. Variants include 'indigenous peoples have the collective right',[64] 'indigenous peoples are entitled to',[65] and 'indigenous peoples shall not be' (forcibly removed from lands or territories).[66] There is also a smattering of rights phrased as individual and collective rights[67] and purely individual rights.[68] Article 15 commences with 'indigenous children have the right'. Article 22 demands that special attention shall be paid 'to the rights and special needs of indigenous elders, women, youth, children and disabled persons'. While the ascription of rights to the peoples is clear in intent, the conjunction of the individual and the collective right – as in Articles 8 and 9 above – creates ambiguities. Article 6 states that indigenous peoples 'have the collective right to live in freedom, peace and security as distinct peoples' and additionally '*they*' (the peoples) 'have the individual rights to life', etc. What the text tries to say is that individuals belonging to the peoples have the latter right, not the peoples as such. Such unclear grammatical constructions can be cleared up without too much difficulty. More serious questions involve the place of individuals within the structure of communal rights.[69] Many indigenous would agree with the representative of the Grand Council of the Crees of Quebec:

> Indigenous peoples need the recognition and protection of their collective rights. When human rights are attacked, when racial discrimination is practised, it is directed against groups. Individuals suffer the pain, that is true. But they suffer because they are perceived by their attackers as members of a group.[70]

Some provisions appear to place a great deal of power in the communities. According to Article 34: 'Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities'. States which in general support the Declaration have expressed caution – Australia suggested that: 'it be made clear that this text cannot provide the basis for action inconsistent with recognized human rights and fundamental freedoms'.[71] Many have made critical points on Article 34 at sessions of

[63] UN Doc. E/CN.4/1997/102, para. 108. See also the remarks of Japan, *ibid.*, para. 112, and Sweden, para. 113.
[64] Articles 6, 32 and 34.
[65] Article 29.
[66] Article 10.
[67] Articles 6, 7, 8 and 9.
[68] Articles 5 and 43.
[69] Although Pritchard takes the view that 'the Draft Declaration, as presently formulated, safeguards virtually all the rights of indigenous individuals', *United Nations Draft Declaration*, p. 171.
[70] Intervention of 25 October 1996 (on file with author).
[71] Commission Drafting Group, 29 November 1995.

the WGIP and the Commission Drafting Group.[72] According to France, the article 'seemed to deprive citizens of rights before the law'.[73] The USA supported the thrust of the article, but qualified it in the name of human rights:

> indigenous people living in defined communities should have the ability to adopt legislation defining the responsibility of the individual to the community, provided that it was consistent with internationally recognized human rights standards.[74]

The text incorporates restrictions on communal rights. In preambular paragraph 16, States are encouraged 'to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned'. This is a provision of wide scope, and includes the notion that indigenous peoples have a role (consultation and cooperation) in questions of State compliance with and implementation of human rights instruments. It is important for many indigenous peoples that such a notion should be retained, so that they have a role in transforming the implementation of rights into culturally specific local contexts: if human rights represent a universal project, they are also in the ownership of indigenous peoples. The role of the peoples is expressed widely enough to include the principle of States paying attention to indigenous readings of particular rights. As elsewhere, the force of Article 1 is diluted by difficult syntax: it is 'indigenous peoples' who are recognised by Article 1 as holding rights under the UN Charter, the UDHR, and international human rights law. But while peoples rights loom large in the UN Charter, they figure much less in the canon of human rights generally, and not at all in the UDHR. What the text perhaps tries to say or should say is that nothing therein should be interpreted to lower existing standards on the rights of peoples and individuals.[75] A number of States have expressed support for the principle or 'intent'[76] of

[72] See in particular the many attributed government remarks in the report of the 2nd Session of the Commission Drafting Group, E/CN.4/1997/102, especially in paras. 103–29. At the 1998 meeting of the drafting group, Argentina perceived a breach in the monolith of individual human rights, stating that 'human rights by nature were individual and expressed concern that collective rights might be exercised in a manner that would be detrimental to the enjoyment of individual rights. Nevertheless, [the representative] maintained that the collective stake-holding of rights, such as land rights, was not denied' (E/CN.4/1999/82, para. 49).

[73] E/CN.4/1997/102, para. 329.

[74] E/CN.4/1997/102, para. 325. See also the remarks of Canada, Brazil, Japan and Argentina, paras. 332, 334, 338 and 340 respectively.

[75] Article 22 of the Council of Europe's FCNM is a good example of such a savings clause. At the Drafting Group, The Netherlands proposed Article 8.2 of the UN Declaration on Minorities as a model: E/CN.4/1997/102, para. 109.

[76] New Zealand, E/CN.4/1997/102, para. 104.

Article 1, which, according to Finland, was one of the articles in the draft which 'were acceptable without . . . amendments',[77] subject, in the view of the USA, to 'satisfactory resolution of the use of the term "peoples"'.[78]

A more specific guarantee for individual rights, if limited in scope,[79] is provided by Article 33 of the draft Declaration:

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.[80]

Article 33 has been opposed by some representatives of indigenous peoples, on the grounds, *inter alia*, that it would limit the exercise of self-determination[81] and constitute discrimination in that other peoples were not subjected to such a requirement.[82] It has also been opposed by the Cuban member of the WGIP – who suggested that the words be deleted since they subjected the customary law of indigenous peoples to non-indigenous standards.[83] But there are other, more persuasive arguments. If the intention reflected in that article is to make sure that individual human rights are respected among the collective rights, the wording is too limited, and it should clearly apply to all the rights in the Declaration. Reasons to resist general human rights references based on self-determination do not carry far. Self-determination is not a vehicle for the destruction of individual rights.[84] Rather, accepting a general human rights reference demonstrates to governments[85] that the indigenous do not intend to trample on rights. In assessing the relationship between the priorities of the collective and those of the individual, international bodies use the vocabulary of necessity and proportionality, equity and balance of rights.[86] Indigenous peoples can also trade in that currency.

[77] *Ibid.*, para. 105 – others were Articles 2, 42, 43, 44 and 45.

[78] *Ibid.*, para. 103.

[79] The Netherlands suggested Article 8.2 of the UN Declaration on Minority Rights as the model of a 'general safeguard clause' for individual rights in the draft Declaration: E/CN.4/1997/102, para. 109.

[80] Compare Article 8.2 of Convention 169.

[81] Pritchard, *United Nations Draft Declaration*, pp. 170–1.

[82] E/CN.4/1997/102, para. 224.

[83] In amendments to the report of the 1993 WGIP, E/CN.4/Sub.2/1993/29/annex II, para. 1.

[84] See the essay by the present author in C. Tomuschat (ed.), *Modern Law of Self-Determination* (The Hague: Martinus Nijhoff, 1993).

[85] Many governments have made specific points in favour of Article 33 – see, for example, the remarks of the representatives of France, Sweden, Canada and Brazil, E/CN.4/1997/102, paras. 225, 228, 231 and 233, respectively.

[86] See the discussion of *Lovelace* and other ICCPR cases, in ch. 6 of this volume.

Self-determination

The struggle over self-determination in ILO 169 has been noted.[87] At the 1991 and 1992 sessions of the WGIP, self-determination was brought forward strongly, though attempts were made to clarify that it was not to provide a mandate for secession, and related essentially to internal self-determination: forms of self-governance within existing States. Operative paragraph 1 of the 1991 draft provided:

> Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of co-existence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.[88]

The self-determination envisaged in this article was clearly internal in operation, with separatism apparently discouraged. Draft operative paragraphs 23 and 24 dealt with aspects of autonomy. The autonomy right was not specifically connected to self-determination. A new formula was produced at the tenth session of the Working Group. Operative paragraph 1 of the draft provided:

> Indigenous peoples have the right of self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic social and cultural development. An integral part of this is the right to autonomy and self-government.[89]

Autonomy is included in the paragraph but is expressed as only 'an integral part' of self-determination, implying that there are other aspects. As in 1991, a qualifier was inserted in operative paragraph 4 referring to the UN Declaration on Friendly Relations. That Declaration is commonly interpreted to reflect the notion that the territorial integrity of the State is not guaranteed when groups are systematically denied rights of representation within the State, or when the State engages in massive violations against particular groups on its territory.[90]

The current draft does not mention the Declaration on Friendly Relations, nor is there an explicit internalisation of self-determination. However, preambular paragraph 12 provides that 'indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect'.[91] This mutuality could be interpreted as

[87] See ch. 14 of this volume.
[88] UN Doc. E/CN.4/1991/40, Report of the Ninth Session of the Working Group.
[89] Report of the Working Group on Indigenous Populations on its Tenth Session, E/CN.4/Sub.2/1992/33, annex I, 46.
[90] For other interpretations, see the discussion in chs. 4 and 5 of this volume.
[91] See also preambular paras. 14 and 15.

militating against exercises in secession, though the right to 'determine . . . relationships' is firmly in indigenous hands.[92] The key provision in the operative part is Article 3:

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

This is an unqualified adaptation of the basic formula on self-determination in the UN Covenants on Human Rights. Self-determination is connected to autonomy by Article 31:

> Indigenous peoples, *as a specific form of exercising their right to self-determination*, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry any non-members, as well as ways and means for financing these autonomous institutions.[93]

Governments have not directed too much of their fire against the autonomy provision – although the USA stated that Article 31 'went too far', and Brazil and Japan were among States expressing concern about its implications.[94] Canada 'generally accepted the proposed range of matters over which self-government should extend' and observed that this right 'should be implemented through negotiated arrangements with states'.[95] However, the right of self-determination has been the subject of extensive polemics at many stages in the life of the present draft. Indigenous peoples continue to insist on the retention of the right, stressing that the concept expresses the spirit of the instrument and is absolutely fundamental to the whole enterprise of building respect for indigenous rights.[96] They have opposed restrictions on the self-determination right, while (generally) making it clear that secession is not the aim.[97] The statement made by the representative of the Aboriginal and Torres Strait Islander Commission reflects the understanding of many indigenous groups:

> self-determination is an aspirational concept which embraces a widening spectrum of political possibilities, from self-management by indigenous peoples

[92] Canada has interpreted Article 45 of the draft as including the Declaration on Friendly Relations: E/CN.4/1997/102, para. 117.

[93] Present author's emphasis.

[94] E/CN.4/1997/102, paras. 325, 334 and 338, respectively.

[95] Para. 332.

[96] 'It is the position of the indigenous delegates . . . that self-determination is the critical and essential element of the draft . . . Declaration [and] . . . is the *sine qua non* of our participation in the drafting process': position of the Indigenous Delegates, WGIP, 11th Session, 1993, cited in Pritchard, *United Nations Draft Declaration*, p. 23.

[97] See remarks of the World Council of Indigenous Peoples, UN Doc. E/CN.4/1997/102, para. 327.

> of their own affairs to self-government by indigenous peoples of their own communities or lands . . . recognition of self-determination does not provide a mandate for secessionist separatism . . . rather, self-determination represents the conceptual basis for the progressive empowerment of indigenous peoples.[98]

At the 1996 Drafting Group, Colombia agreed that self-determination 'was the cornerstone' of the draft and that 'it did not clash with State sovereignty'.[99] The Philippines supported a concept of self-determination 'which could only be exercised within a defined area (ancestral domains)' and which 'must respect a State's territorial integrity'.[100] To 'achieve brevity and clarify the right of self-determination', Venezuela proposed a rewording of Articles 3 and 31 to the effect that by virtue of self-determination, indigenous peoples 'have the right to autonomy, or self-government in matters relating to their internal and local affairs'.[101] Chile understood Article 3 'to refer to internal self-determination'. The USA distinguished between its use domestically and internationally; in the latter case its use 'went beyond existing law'. This suggests that 'existing law' has rigid parameters, though the representative added, rather inconsistently, that the meaning of self-determination in international law was not clear, and enjoyed no international consensus.[102] France argued that self-determination 'seemed to create a State within a State'.[103] Fiji 'unequivocally supported' Article 3.[104] Canada offered perhaps the most sophisticated view, drawing attention to the changing context of international relations and contemporary opinion:

> International law did not clearly define 'self-determination' or 'peoples'; it was traditionally understood as the right of colonized peoples to statehood. However, a survey of State practice and academic literature suggested it was an ongoing right which was expanding to include the concept of an internal right for groups living within existing States, and which respected the territorial and political integrity of the State . . . Canada accepted a right of self-determination for indigenous peoples which respected the political, constitutional and territorial integrity of democratic States and which was implemented through negotiations between States and indigenous peoples.[105]

[98] WGIP 1993 (on file with author).
[99] E/CN.4/1997/102, para. 312.
[100] *Ibid.*, para. 314.
[101] E/CN.4/1997/102, para. 318.
[102] *Ibid.*, para. 325. The USA has from time to time advocated the UN Declaration on the Rights of Persons belonging to Minorities as an appropriate model for the draft Declaration: see for example the statement in E/CN.4/1999/82, para. 40.
[103] E/CN.4/1997/102, para. 329. For a more positive appreciation by France of the significance of self-determination, see E/CN.4/2000/84, para. 77.
[104] *Ibid.*, para. 330. Denmark also supported the present text of Article 3.
[105] E/CN.4/1997/102, para. 332. For a restatement of this view, see the Report of the 1999 Session, E/CN.4/2000/84, para. 50.

The proceedings of the 1999 Drafting Group evidenced some narrowing of positions,[106] but not consensus. The USA developed earlier points distinguishing domestic and international usage, arguing, *inter alia* that there was not yet an international consensus on the concept of internal self-determination.[107] Brazil noted the evolution of the concept, the importance of indigenous participation in decisions affecting them, and the territorial integrity of the State.[108] Guatemala was satisfied that no State had expressly rejected the inclusion of self-determination in the draft[109] – this was not quite so, as Australia, in a sharp reversal of previous positions, indicated that it was unable to accept the term because 'it implied the establishment of separate nations and laws'.[110] Ecuador argued that the concept in the draft was not equivalent to the international law right of self-determination, but was a means of preserving indigenous cultures and communities.[111] The Chairperson-Rapporteur drew attention to the fact that participants were generally agreed that self-determination was the cornerstone of the Declaration, and that no indigenous representative had spoken of secession.[112] Government speakers favouring indigenous self-determination sent out strong signals that it should not disrupt territorial integrity.[113] There is evidence in all this that governments contemplate the emergence of indigenous-specific concept of self-determination, which takes its strength from developments in international law such as the work of the HRC,[114] but which may be distinguished from peoples' rights in general.[115]

[106] Statement of the Chairperson-Rapporteur, E/CN.4/2000/84, para. 83.

[107] E/CN.4/2000/84, para. 49. The representative expressed a hope that the Drafting Group 'would be able to draft a declaration in which States were encouraged to consider a broad range of autonomy for indigenous groups in managing their local and internal affairs, including economic, social and cultural matters'. However, 'there was no international practice or instrument that accorded indigenous groups everywhere the right to self-determination' (*ibid.*); the draft's references would have to be considered carefully to see if they could meet the tests of clarity and consensus. In response to the claim of no international practice, the representative of the Saami Council (para. 71) referred to developments in the HRC. Commenting on a similar statement by the USA at a previous meeting, a representative of the Indian Law Resource Centre categorised the US position as 'based on a narrow-minded interpretation' of self-determination: E/CN.4/1999/82, para. 28.

[108] Para. 53.

[109] Para. 73.

[110] Para. 62.

[111] *Ibid.*, para. 56.

[112] Paras. 82–5.

[113] See observations of the Russian Federation (para. 61); Argentina (para. 63); Finland (para. 70; Mexico (para. 74); France (para. 77); New Zealand (para. 78); Venezuela (para. 80); and Norway (para. 81).

[114] See chs. 5 and 6 of this volume.

[115] Indigenous groups on the other hand, tended to emphasise general international law applying without discrimination to indigenous as to other peoples (for

Cultural protection

Principles concerning indigenous cultures pervade the text.[116] The present section is not a complete statement concerning such issues, but fastens on principles and concepts which provide the draft with its distinctive edge. The provisions of Part IV[117] of the draft on education and language, the elimination of prejudice against indigenous peoples, media and labour standards, may be counted as among its least controversial elements.[118] The close relationship between the principles espoused therein and human rights standards deriving from ILO instruments and instruments on minority rights buttress possibilities of ready acceptance.[119] The Drafting Group has noted a developing consensus on the underlying principles of Part IV, even if there is no consensus on final wording.[120] Part III of the draft may also be regarded as relatively uncontroversial.[121]

Prospects of ready consensus appear less likely for the draft's incorporation of elements of international criminal law, notably genocide and analogous concepts. Signals concerning the theme of genocide and ethnocide are given at various points in the text. The underlying concept of the acceptance and respect of the continued existence of indigenous peoples is correlated with protection of the basis for the protection of that existence. If 'all peoples contribute to the diversity and richness of civilizations and cultures, which constitutes the common heritage of human kind',[122] then threats against the persistence of this diversity are to be deplored. In

example in paras. 57–9); a representative of IWGIA cited Article 20 of the African Charter on Human and Peoples' Rights.

[116] Specific references to culture are made in preambular paras. 2, 3, 6, 7, 8, 9 and 14; and in Articles 3, 4, 7, 12, 13, 15, 16, 17, 29, 30, 31, 35 and 38; there are also references to 'customs and traditions'.

[117] Articles 15–18.

[118] Elements of Part IV articles are briefly introduced above. See E/CN.4/2000/84, annexes I, II and II for a range of proposals on Articles 15, 16, 17 and 18. The substantive discussion in E/CN/1997/102, paras. 153–72, is particularly instructive.

[119] See for example the citations of the UN Declaration on Minorities and ILO 169 in E/CN.4/1997/102, paras. 153 (Estonia) and 160 (Peru).

[120] E/CN.4/2000/84, para. 118. On the other hand, annex II – proposals by indigenous representatives – presented only the original text, without amendment.

[121] Articles 12, 13 and 14 – but see pp. 391–2 in this volume on Article 12. The focus is on manifestations of indigenous culture and spirituality. The Article 13 reference on indigenous access in privacy to religious and cultural sites recalls *Hopu and Bessert* under the ICCPR. Canada supported the principle of access to sacred sites, while expressing concern for the legal rights of others: E/CN.4/1997/102, para. 80. See also the (supportive) remarks of Australia (para. 83), the USA (para. 90), and Norway (para. 94) on Article 13. Norway suggested that Part III was the least controversial part of the draft declaration (*ibid.*).

[122] Preambular para. 2.

the substantive articles, the key references are Article 6, whereby 'Indigenous peoples have the collective right . . . to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext'; and Article 7 which provides that

> Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
> (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
> (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
> (e) Any form of propaganda directed against them.

The Convention on the Prevention and Punishment of the Crime of Genocide 1948 does not refer to cultural genocide, nor to 'ethnocide', though the terms are not without precedent. In the Convention, that crime is defined as involving a range of acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[123] In the drafting of the Convention, attempts were made to include cultural genocide among the variants of that crime. A formulation of cultural genocide was presented by an Ad Hoc Committee created by ECOSOC resolution 117(VI).[124] The attempt did not succeed. Instead, the Convention is devoted to physical and biological genocide, though a provision on 'forcibly transferring the children of the group to another group' reflects a concern with cultural genocide, since the children – as carriers of culture – are not envisaged as being killed, but as losing their culture, ensuring the disappearance of the group. 'Ethnocide' appears in, for example, the Declaration of San Jose, Costa Rica, December 1981, the product of a UNESCO meeting of experts on ethno-development and ethnocide. In the Declaration, ethnocide was defined as the condition under which an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language.[125] The San Jose Declaration equates ethnocide and cultural genocide:[126] the participants at the meeting 'declare that ethnocide, *that is, cultural genocide*,[127] is a

[123] Article 2.
[124] E/734, 3 March 1948.
[125] Technical Review of the draft Declaration, E/CN.4/Sub.2/1994/2, para. 36.
[126] For an attempt to distinguish cultural genocide from ethnocide, see the observations of the Chairperson of the WGIP, E/CN.4/Sub.2/1993/29, para. 48.
[127] Present author's emphasis.

violation of international law equivalent to genocide'. The USA has offered the view that neither concept is clear enough to 'be usefully applied in practice'.[128]

The terms of Articles 6 and 7 are extremely broad. Some States have objected to the blanket prohibition on the removal of children. Mexico stressed the necessity of allowing the authorities 'to remove indigenous children if . . . they were being abused sexually'. Under such circumstances 'the State was obliged to separate the children from their families . . . whether they were indigenous or not'.[129] Japan suggested bringing the language of the draft into line with the CRC,[130] which allows for separation of children from their families in different contexts.[131] Forms of ethnocide and cultural genocide in draft Article 7 are illustrative and not exhaustive. In contrast, the list in the Genocide Convention is exhaustive – amendments designed to secure a merely illustrative list of genocidal acts in the Convention were defeated.[132] The draft article appears as a catch-all provision. The range of threats is extraordinarily broad, and the inclusion of effects as well as aims of various forms of action against indigenous peoples opens up the 'criminal' portfolio to an unprecedented degree. The Rome Statute for the International Criminal Court nominates only *forcible* transfer of population as a crime against humanity, and then only as part of 'a widespread or systematic attack' with knowledge of the same.[133] The Statute also indicates that crimes against humanity must descend to a level of persecution against defined groups to gain admittance to the annals of crime.[134] The draft Declaration's criminalising of forms of propaganda,[135] and imposed assimilation and integration is draconian. Finally, while there is no objection to 'prevention' in Article 7, the notion of 'redress' is vague. It needs to be more clearly specified what exactly is sought in the case of genocide: prevention,

[128] E/CN.4/1997/102, para. 188. See the reflection on 'international practice' by the Special Rapporteur on Religious Intolerance of the Commission on Human Rights, A/CONF.189/PC.1/7. He writes that, while the International Tribunal for the former Yugoslavia 'makes no reference to the concept of "cultural genocide" . . . There is nevertheless a feeling that the idea is taking hold in the Karadzic and Mladic case where the tribunal makes several references'. The matter is discussed at some length in paras. 40–5: *ibid.*

[129] E/CN.4/1997/102, para. 176.

[130] *Ibid.*, para. 184.

[131] See, for example, Articles 9, 20, 21, 22 and 40.

[132] Thornberry, *International Law*, p. 70. On the other hand, General Assembly resolution 96(I) (above) leaves open the list of actions which infringe its general principles.

[133] Article 7.

[134] *Ibid.*

[135] Compare Article 20 of the ICCPR, which prohibits propaganda for war, and incitement to racial, etc., hatred.

prosecution, punishment, compensation? Pressing the notion of 'redress' for past genocides raises severe problems.[136]

Heritage/cultural property

According to a Special Rapporteur of the Sub-Commission, the historical expropriation of indigenous territories was accompanied by the expropriation of their knowledge. Thus, 'Indigenous peoples were, in succession, despoiled of their lands, sciences, ideas, arts and cultures',[137] and 'the process is being repeated today'.[138] In the draft Declaration, a number of paragraphs and articles address the heritage/cultural property of indigenous peoples.[139] The question is introduced in the preamble, which links indigenous knowledge, etc., with sustainable development.[140] Article 12 provides that indigenous

[136] Compare the prescriptions in *Report of the Expert Seminar on Remedies Available to the Victims of Racial Discrimination, Xenophobia and Related Intolerance and on Good National Practices* (Geneva, 16–18 February 2000), A/CONF.189/PC.1/8, especially paras. 51–9.

[137] Study by E.-I. A. Daes, *Protection of the Heritage of Indigenous People* (United Nations, New York and Geneva, 1997), para. 18; 'European empires . . . acquired knowledge of new food plants and medicines . . . which made it possible to feed the growing urban concentrations of labourers needed to launch Europe's industrial revolution. As industrialization continued, European States turned to the acquisition of tribal art and the study of exotic cultures' (*ibid.*). The Study was prepared by its author as Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights.

[138] The author (para. 19) refers to fresh interest in the acquisition of the arts, cultures and sciences of indigenous peoples, the growth of tourism, the 'Green Revolution', the growth of biotechnology and demand for new medicines resulting 'in a renewed and intensified interest in collecting the medical, botanical and ecological knowledge of indigenous peoples' (para. 20).

[139] At the first session of the Commission Drafting Group, some governments considered that all provisions on cultural and intellectual property of indigenous peoples should be consolidated into one section: E/CN.4/1996/84, para. 72.

[140] 'Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment'. Compare Article 8(j) of the Convention on Biological Diversity, which provides that each Contracting Party shall 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities . . . relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and encouragement of the holders of such knowledge . . . and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices'. Simpson is critical of the conceptual basis of the Convention, arguing that biodiversity is a non-indigenous concept and is not founded on respect for indigenous rights. He notes that rather than being concerned with fundamental respect for life processes, bio-diversity is concerned with variability among living organisms, etc.: *Indigenous Heritage and Self-Determination* (Copenhagen, IWGIA, 1997), pp. 55–7.

cultural rights include the right to maintain, protect and develop, *inter alia*, 'artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs'.[141] Discussions on the article in the Commission Drafting Group have related to the role of national property laws,[142] the relationship between customs and human rights,[143] and the issue of restitution.[144] The broadest provision in the draft Declaration is contained in Article 29:

> Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

The terminology of cultural and intellectual property has been challenged by the Special Rapporteur of the Sub-Commission who argues that, 'it is both simpler and more appropriate to refer to the collective 'heritage' of each indigenous people',[145] pointing out that

> indigenous peoples do not view their heritage in terms of property at all – that is, something which has an owner and is used for the purpose of extracting economic benefits – but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the

[141] There are essentially two thoughts in Article 12: the first is in essence an expansion of Article 27 ICCPR; the second is a claim to restitution. The complexity of the article was adverted to by Canada – E/CN.4/1997/102, para. 80. Argentina (*ibid.*, para. 85) suggested replacing 'their' laws with 'the' laws, suggesting that this would produce greater clarity. However, the change would effectively eliminate the role of traditional laws as a matrix through which illegality could be judged. See also Article 24, referring to the right to traditional medicines and health practices, and the protection of vital medicinal plants, animals and minerals.

[142] Remarks by the representatives of Brazil, E/CN.4/1997/102, para. 66; Japan (para. 68); Malaysia (para. 75).

[143] Notably by the representatives of France, Sweden, Switzerland, The Netherlands and the Russian Federation: E/CN.4/1997/102, paras. 67, 76, 69, 78 and 91.

[144] E/CN.4/1997/102, paras. 66–102.

[145] Daes, *Protection of Heritage*, para. 23. Heritage is elsewhere defined (in part) as comprising 'all objects, sites and knowledge including languages, the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory of traditional natural use. The heritage of indigenous peoples also includes objects, sites, knowledge and literary or artistic creation of that people' (*Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People*, E/CN.4/sub.2/2000/26, annex 1).

> human beings, animals, plants and places with which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights. The 'object' has no meaning outside the relationship . . . To sell it is necessarily to bring the relationship to an end.[146]

The draft Declaration, however, utilises concepts of cultural and intellectual property and not the generic 'collective heritage' or 'heritage'. Article 12 makes a strong demand for 'restitution' of property; Daes instances a number of cases of restitution claims, successful and otherwise.[147] The existence of claims for the return of various forms of cultural property, including the return of human remains, is now a matter of common knowledge among concerned persons in the non-indigenous world.[148] The article also incorporates reference to property taken in violation of indigenous laws and customs, etc. Some States recognise the legal validity of traditional legal systems; some do not, and culture would be regarded as national patrimony, not specific to the indigenous peoples who originated it. Private international law has worked successfully in some cases, less so in others.[149] Recovery of the past is always likely to be a difficult option. In Article 29, the reference to 'human and genetic resources' is aimed in part at the sampling of human genetic material from indigenous peoples for purposes of scientific research.[150] The Article relates to an aspect of heritage of indigenous peoples which is not confined to 'new' manifestations: much of the focus of protection in existing international patent law is on protection of the 'new'. In copyright, patent law, etc., indigenous concepts may be difficult to interpolate.[151] Daes takes the following example drawn from Australian sources:

> Traditional motifs are not the sole property of individual artists, to sell or withhold freely as they pleased, but are subject to layers of group rights, at the family, community and tribal levels. Many different individuals may have to be consulted about he disposition of a design, or objects that bear it. Copyright laws do not make such fine distinctions, but only recognize a single owner.[152]

[146] *Ibid.*, para. 26.

[147] The USA took the view that 'the open-ended obligation of restitution of cultural and similar property . . . was not a rule of international law': E/CN.4/1997/102, para. 90.

[148] Concerning scholarly research, etc., the *Principles and Guidelines* provide that following inventories (para. 27), 'Researchers and scholarly institutions should return all elements of indigenous peoples' heritage to the traditional owners upon demand, or obtain formal agreements with the traditional owners for the shared custody, use and interpretation of their heritage' (para. 28).

[149] Daes, *Protection of Heritage*, paras. 154–8.

[150] The *Principles and Guidelines* provide that 'No research or research application concerning the human genome should prevail over respect for the human rights, fundamental freedoms and human dignity of indigenous individuals and peoples' (para. 32).

[151] Simpson, *Indigenous Heritage*.

[152] Para. 130.

The interface between indigenous peoples and heritage or intellectual property is one instance of a wider debate on indigenous rights, albeit one with its own parameters and details. Much of indigenous understanding and claiming on the issue consists in spelling out of the further implications of self-determination; indigenous peoples frequently link heritage to this fundamental concept. Fundamental antinomies may exist between indigenous and non-indigenous perceptions of culture: through a globalising lens, culture can be little more than a saleable commodity; to indigenous peoples it is the essence of their distinctiveness.[153] The nature of indigenous society, or at least of many such societies with collective as opposed to individualist orientations, can sit ill with notions of individual ownership of fragments of a culture – songs, plays, designs. Further, indigenous concerns for the *acquis* of historical wisdom and spirituality do not fit with time-limited intellectual property systems – indigenous representatives often employ an inter-generational discourse, and need not empathise with the kaleidoscopic, constantly self-inventing, Enlightenment or postmodern individual and society, so beloved of contemporary theorists. In matters covered by the intellectual property field, many peoples will lack a concept of property, but know only relationship, stewardship an guardianship. The draft Declaration would add indigenous control or at least a right to it.

Land and resources

Articles 25, 26, 27, 28 and 30 in Part VI of the draft represent a concentrated set of Articles on rights to land and resources. However, there are many references to such rights in the draft as a whole. The theme is set by the preamble which links the lack of enjoyment of human rights by indigenous peoples with the historical truth of their dispossession:

> *Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions and traditions, and to promote their development in accordance with their aspirations and needs.

Land rights are, in this perspective, indispensable for the effective exercise of human rights and fundamental freedoms, and, as noted, dispossession is related to processes of ethnocide and cultural genocide by Article 7(b). In preambular paragraph 6, the rights of indigenous peoples 'to their lands, territories and resources', are linked to the 'inherent' rights and characteristics of the peoples. Lands need demilitarisation according to preambular paragraph 10, as a contribution to, *inter alia*, friendly relations among nations and peoples. Other land elements in the draft are found in Articles 10 and

[153] A. Xanthaki, 'Indigenous cultural rights in international law', *European Journal of Law Reform* 2(3) (2000), 343–67.

11, and in Article 13, which concerns access to religious sites and the preservation of burial sites. Part VI commences with Article 25, whereby the peoples have the right to

> maintain and strengthen their distinctive material and spiritual relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations.

Article 26 refers to their right to 'own, develop, control and use' lands, etc., with full recognition of their customs including land-tenure systems, and the right to measures to prevent interference or alienation of these rights; Article 27 deals with the right to restitution or compensation for lost or damaged lands; Article 28 is a complex statement of rights to environmental conservation, including assistance for the same, prohibition of military activities on indigenous lands, except by agreement, and a blanket prohibition of storage or disposal of hazardous materials; finally, Article 30 deals with the right of indigenous peoples to determine and develop priorities and strategies for the development or use of their lands, including 'free and informed consent' prior to any projects affecting their lands, etc.

Only a brief account of controversies is possible here. In the first place, the scattering of references suggests a need for consolidation – a 'technical' problem highlighted by some States.[154] Second, the scope of Article 25 has been queried, in particular for its potential historical sweep (lands which indigenous peoples have traditionally owned, etc.). The delegation of Australia at the first session of the Commission Drafting Group commented that the words 'have traditionally owned or otherwise occupied or used' are potentially very broad. Native title in Australia is recognised in relation to land '*currently* traditionally owned'.[155] In similar vein, Canada observed that the application to lands and territories traditionally owned or otherwise occupied or used was very far-reaching, and may not take into account historical or contemporary treaty-making, land claim settlements or other arrangements between indigenous peoples and States.[156] A third issue relates to terminology: Canada observed that in the draft Declaration

[154] Remarks of the USA at the second meeting of the Drafting Group (on file with author), noting in particular the overlaps between articles 27, 7, 10 and 26. The USA supported clear recognition of rights of ownership and possession.

[155] Statement by Australia on Part VI of the draft (on file with author) – emphasis in the original.

[156] Delegation of Canada, preliminary comments on Part VI of the draft Declaration to the Commission Drafting Group (on file with author). Cf. the remarks of the representative of the FAO on Article 27: 'Without provision for analysis of the specific situation nor any reference to the time frame for defining "traditionally owned", the potential for new conflicts would be significant, even between differing indigenous groups who have at various times in history occupied land in consecutive periods' (E/CN.4/1995/WG.15/3, p. 5, para. 1).

> no distinction is drawn between 'lands and territories', or the term 'other resources', nor is it clear whether these terms are intended to mean only those lands or territories or resources over which indigenous peoples have or can establish legal rights, or all lands and territories or resources which they claim.[157]

A fourth issue is that of restitution and compensation: the former term is not used in ILO Convention 169; minimally, States will wish to explore further the implications of the Declaration's terminology. The question of environmental standards has also been raised – notably in terms of State resistance to the notion of separate or higher environmental standards applying to indigenous territories.[158] ILO Convention 169 safeguards lands not exclusively occupied by indigenous peoples but to which they have access. There is no equivalent provision in the draft Declaration.

Nomadic peoples

The identification of a relationship with lands and territories in the draft Declaration is broad enough to encompass nomadic peoples:

> Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.[159]

Logically, the text encompasses two categories of indigenous peoples: those divided by international borders, who have the right to link up across the borders with other peoples; and those who are not so divided – who have an equal right to links with other peoples, perhaps for purposes of developing platforms of solidarity, engaging international bodies, etc. The text omits to mention the same 'people' divided by international borders – as opposed to peoples linking with 'other peoples'. The language of the draft does not appear to limit the contacts to *indigenous* peoples – a point made by Canada.[160] The language of draft Article 35 has been broadly supported by States,[161] subject

[157] *Ibid.*

[158] E/CN.4/1996/84, para. 85. See the substantive discussion of 'Environment, land and sustainable development' at the 15th Session of the WGIP, E/CN.4/Sub.2/1997/14, paras. 55–74. A lengthy analysis of issues was prepared at the request of the World Wide Fund for Nature (WWF) for Nature International for presentation to the 15th Session by M. Castelo under the title *United Nations Conferences, Instruments and Policy on Human Rights and Environment relevant to Indigenous Peoples* (published by WWF, 1998).

[159] Article 35 (part omitted).

[160] E/CN.4/1997/102, para. 303.

[161] In the view of the USA 'trans-boundary contacts were important and should be encouraged, subject to non-discriminatory enforcement of custom and immigration laws' (E/CN.4/1997/102, para. 304).

to various demands and suggestions as to the need for 'clarification'.[162] Drafting suggestions by States tended to focus on the peoples 'divided by . . . borders'.[163] And whereas Article 35 provides that States were to 'take effective measures' to 'ensure' the exercise of the right, Canada preferred the softer State obligation to 'facilitate' it.[164]

Revisiting history

The draft Declaration contains one other provision which is without parallel in international legal instruments on minorities and indigenous peoples. Article 36 provides that

> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties [etc.] . . . Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

The provision raises a number of interlinked issues. The first is the question of the international or domestic character of the treaties for States which have such agreements. Canada emphasised that 'treaties with the indigenous peoples of Canada were domestic rather than international agreements and disputes over their interpretation or implementation should be dealt with in domestic forums'.[165] Similarly, the United States supported the principle of honouring agreements, though the indigenous treaties 'in general were not enforceable in international tribunals, owing to the fact that they did not give rise to rights under international law'.[166] The second is the 'spirit and intent' provision. Canada had reservations with 'spirit and intent' as the fundamental criterion for the interpretation of treaties – 'it should be made clear that 'spirit and intent" was only one of a number of factors that needed to be considered when dealing with such treaties'.[167] The third is the question of who decides disputes – if the treaties are international, then it appears natural that an international body of some kind should deal with disputes. The case for international determination of treaty disputed was made eloquently be the representative of the Grand Council of the Crees:

[162] At the 2nd Session of the Commission Drafting Group, E/CN.4/1997/102, France (para. 298), Chile (300), Venezuela (301), Australia (302), and Canada (303), called for such clarification.
[163] *Ibid*., paras. 299 (Colombia) and Brazil (para. 305).
[164] *Ibid*., para. 303.
[165] E/CN.4/1997/102, para. 285.
[166] *Ibid.*, para. 292; see also the remarks of Venezuela, at para. 288.
[167] E/CN.4/1997/102, para. 285.

> The importance of Article 36 was that it required States to respect their legal obligations and it provided for a means to settle treaty disputes at the international level. This was important because at present States acted as the judges of their own acts . . . the sheer number of broken treaty provisions suggested that the State was a very lenient judge of its own acts.[168]

The UN Special Rapporteur on indigenous peoples and their relationship to land has raised the issue of discrimination in respect of State–indigenous treaties: a determination which does not depend on the claim that the treaties are international.[169]

Comment

The draft Declaration incorporates a far-reaching ensemble of pro-indigenous concepts. The process of drafting and debating has contributed to and been the beneficiary of a broad and ongoing process of indigenous sensitisation in the international community. The prospects for the survival of the draft in anything like its present form are unclear. However, despite the difficulties in reaching accommodation, there has been a narrowing of differences between indigenous peoples and governments in key respects over the whole process. This 'narrowing' includes the principle of self-determination, though the emergence of an unconstrained and freewheeling formula for its exercise remains unlikely. The draft is separatist and institutionally autonomist in character, more so than Convention 169. The draft's paragraphs take the international community to the outer limits of principle; the sustaining of indigenous societies poses acute questions for the human rights enterprise and its capacity to cope with radical diversity.

[168] E/CN.4/1997/102, para. 294.

[169] E.-I. A. Daes, E/CN.4/Sub.2/2000/25, para. 48: 'Treaties have been used . . . as mechanisms for gaining cessions of indigenous land and for ostensibly guaranteeing rights to the remaining lands . . . The problem of discrimination arises when the State later abrogates or violates the treaty . . . Certain States . . . do not believe a remedy under international law is necessarily appropriate. The question, in such cases, remains whether a just remedy is provided for treaty violation or abrogation, and whether the use of the treaty mechanism in domestic law is non-discriminatory'.

16

The Proposed American Declaration on the Rights of Indigenous Peoples

Emergence of the Proposal

Following a resolution of the OAS General Assembly – itself prompted by the Inter-American Commission on Human Rights[1] – the IACHR began consultations in 1992–93 'Concerning the Future Inter-American Legal Instrument on Indigenous Rights',[2] having recognised the need for such an instrument from the late 1980s.[3] The consultations eventuated in a 'Draft of the Inter-American declaration on the Rights of Indigenous Peoples', approved by the Inter-American Commission on Human Rights on 18 September 1995,[4] revised to a 'Proposed American Declaration on the Rights of Indigenous Peoples', approved by the Commission on 26 February 1997.[5] A draft was presented to the OAS General Assembly at Lima in 1997,[6] which requested the Permanent Council to study it and governments to submit observations.[7] The text was analysed by the Inter-American Juridical Committee which presented its analysis of the proposed text to the Permanent

[1] AG/RES.1022 (XIX-0/89).

[2] *Annual Report of the Inter-American Commission on Human Rights 1992–1993*, OEA/Ser.L/V/II.83, Doc. 14, corr.1, 12 March 1993, 263–310. For the initial questionnaire to States, see *First Consultation on the Content of a Future Inter-American Legal Instrument on the Rights of Indian Peoples*, OEA/Ser.L/V/II.81, Doc. 54, 13 February 1992.

[3] O. Kremer, 'The beginnings of the Inter-American Declaration on the Rights of Indigenous Peoples', *St Thomas Law Review*, 9 (1996), 271–93.

[4] OEA/Ser/L/V/II.90, Doc. 9 rev.1, 21 September 1995.

[5] Approved by the Commission at its 1,333rd Session, 95th Regular Session.

[6] Organisation of American States, News Release, 31 October 1996.

[7] AG/RES.1479, 5 June 1997. There is a short critique of developments – primarily on the limited participation of indigenous peoples in the OAS processes – by the Indian Law Resource Centre in their intervention to the 1998 WGIP on agenda item 7 – standard-setting (on file with author). See p. 398 in this volume for developments enhancing such participation.

Council (Committee on Juridical and Political Affairs).[8] In February 1999, the Committee on Juridical and Political Affairs convened a meeting of government experts at OAS headquarters.[9] Indigenous groups participated in the meeting – the decision to permit indigenous access was reached only a week before the meeting, and was innovative in the OAS context.[10] In June 1999, the OAS General Assembly decided to establish a Working Group of the Permanent Council (the Working Group) to continue consideration of the proposed Declaration;[11] the resolution invites the Working Group 'to provide for appropriate participation . . . by representatives of indigenous communities',[12] and requests the Inter-American Indian Institute to provide advisory services.[13] The Working Group met from 8–12 November 1999;[14] the mandate was renewed by resolution of the General Assembly in June 2000.

Synopsis[15]

The preamble to the proposed American Declaration differs in significant respects from the UN draft. The fundamental premise of the American draft is that indigenous peoples are 'entitled to be part of' the identity of American States, an inclusive, less separationist notion than in the UN text: the first preambular heading is 'Indigenous Institutions and the *Strengthening of Nations*',[16] and there is reference to 'the improving of democracies' in the Americas. Hence the language of self-determination does not appear in the

[8] The report of the Permanent Council is contained in Doc. CP/CAJP-1489/99. For the comments of the Committee, see Doc. CJI/RES.1/LII/98.

[9] The conclusions of the meeting are published in the final report – RECIDIN/doc.10/99.

[10] Direct participation was limited to part of the meeting, though a number of indigenous representatives sat as government delegates.

[11] AG/RES 1610 (XXIX-0/99), 7 June 1999.

[12] Para. 3.

[13] The resolution (para. 4) also requested the Institute to prepare a report on the actions taken by other international organisations to promote the rights of indigenous populations. A 'Report on the actions taken by other international organizations to promote the rights of indigenous peoples' was presented to the Working Group.

[14] The *Report of the Chair of the Working Group* is contained in Docs. OEA/Ser.K/XVI, GT/DAdin/doc.5/99, 1 December 1999. The report contains a detailed account of procedures for indigenous participation.

[15] The text commented upon here is the 1997 text submitted by the IACHR. The various bodies processing the draft have retained its essential structure while modifying details, but fundamental modifications of structure cannot be ruled out.

[16] Present author's emphasis. Cf. Article 4 of the Mexican constitution amended to 1998: 'La Nacion mexicana tiene una composicion pluricultural sustentada originalmente en sus pueblos indigenas'.

preamble or elsewhere in the American text.[17] As a matter of nuance, the American preamble is more 'individualised' than that of the UN,[18] though it recognises more clearly that indigenous peoples 'are a subject of international law',[19] and possess collective systems for control of land use, etc.[20] Collective rights language (indigenous *peoples* . . .)[21] also appears throughout the main text. The American preamble focuses on the elimination of poverty and the right to development (though the phrase 'sustainable development' is not used) – both perhaps implying a greater role for the State, as contrasted with the UN emphasis on the self-organisation of the peoples. In a notable departure from the UN text, the American preamble finds space to recall ILO Convention 169.[22]

The account of the relevant peoples in Section One is in essence an adaptation of the formulae in Convention 169, including the reference to self-identification:[23] this marks a radical departure from the text of 1995 which explored alternative definitions.[24] Section Two on human rights is a more

[17] The *Report of the Chair* of the OAS Working Group (p. 4) recorded that a number of government delegations considered that the concept of self-determination was still evolving 'and that this term should be defined on the basis of agreements reached by the States and the indigenous populations at the national level'. Proposals for articles on self-determination are recorded in appendix A (p. 29), including those from the delegations of Brazil and Mexico.

[18] This will become even more so if various proposals of the USA to the Working Group were followed – almost exclusively they focus on anti-discrimination as the sovereign remedy for the sufferings of the indigenous. Many of the proposals suggest an inspiration from the UN Declaration on Minority Rights; in comments on the 1995 draft, the USA drew extensively on Article 27 ICCPR: *USA Comments*, 19 December 1996 (on file with author).

[19] I take this from two aspects of the preamble: on the 'application of international human rights to all individuals', and the reference to the collective exercise of rights in phrases which recall texts on minorities.

[20] Cf. Article 89 of the Constitution of Nicaragua 1987: 'The State recognises the communal forms of land ownership of the Communities of the Atlantic Coast'.

[21] The use of 'peoples' is also common in the laws and constitutions of American States, including the USA. The inter-American Juridical Committee preferred the term 'populations': OEA/Ser.Q, IJC/doc.29/98, para. 3.4.

[22] It is unlikely that the reference will appear in the final version: cf. the version in OAS Working Group, *Report of the Chair*, appendix A, pp. 25–8.

[23] In a comment which made no reference to use of the phrase in ILO 169, the USA stated that it would 'actively oppose' self-identification language in the face of claims by non-indigenous to indigenous status, including claims by hate groups: *Letter from US Department of State to the Executive Secretary of the Inter-American Commission*, 16 December 1997. The USA proposed a substantive definition following *Montoya v US*, 180 US 261, 266 (1901), noting its similarity to the Martinez-Cobo definition (See ch. 2 of this volume).

[24] Article I provided

> In this Declaration indigenous peoples are those who embody historical continuity with societies which existed prior to the conquest and settlement of their territories by Europeans. (alternative 1) [, as well as peoples brought involuntarily to the New World

amplified account of the individual dimension of rights than in the UN draft, and protects the human rights *acquis.* Artificial or enforced assimilation is prohibited, but there is no repetition of the language of cultural genocide and ethnocide found in the UN draft.[25] Article IV on the 'Legal Status of Communities' insists that the peoples 'have the right to have their legal personality fully recognised by the States within their systems' – a provision that resonates with domestic law provisions in the Americas.[26] Article VI on 'special guarantees against discrimination' includes a sentence on enabling 'indigenous women, men and children' to exercise range of human rights without discrimination. The reference to rights of women in this context compensates for its absence elsewhere.[27] The American draft does not appear to express undue concern on the minority within the minority. Working Group discussions on this section of the draft were much exercised by terminology questions – the 's'question, etc., and by self-determination. On the former, indigenous representatives indicated that

> they were neither ethnic minorities nor racial minorities nor populations . . . They defined themselves as peoples, or collectives, autonomous entities, with

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who freed themselves and re-established the cultures from which they have been torn]. (alternative 2) [, as well as tribal peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or be special laws or regulations].

In a set of initial comments on the 1995 draft (January 1997), Canada objected to the reference to those involuntarily brought to the New World in the context of a reading of 'indigenous': *Canada Comments*. Such a view could presumably exclude groups such as the Saramakas who 're-established' African communities in the Americas – cf. the *Aloeboetoe* case, and ch. 11 of this volume. Canada continued to oppose the definition section in the draft which borrows from Article 1.1(a) of Convention 169 – *Comments of February 1997*, p. 5. Definitions have been proposed to the OAS Working Group which focus on a heritage of cultural traits from pre-European settlement: *Report of the Chair*, appendix A, p. 28.

[25] Canada suggested that the obligations of States under the Genocide Convention could be accounted for in Article V: *Initial Comments*. The National Congress of American Indians suggested a lengthy Article 5 commencing with 'indigenous peoples have the collective and individual right not to be subjected to ethnocide or cultural genocide' (*Report of the Chair*, pp. 7–8). Brazil also proposed a reference to genocide: *ibid.*, appendix A, p. 31.

[26] Examples include Article 89 of the Constitution of Peru 1993; Article 27 Section VII of the Constitution of Mexico; Article 8 of the Nicaraguan Statute for the Atlantic Coast 1987; Article 75 (17) of the Constitution of Argentina 1994. On the other hand, the *Report of the Chair* records (p. 6) the reservations of some delegations about recognising a parallel legal system within a single State. Other government delegations 'accepted the idea of indigenous law provided that it did not conflict with the legal order of the State and was framed by respect for human rights' (*ibid.*, p. 14).

[27] A proposal of the USA included a point on gender-based violence: *Report of the Chair*, appendix A, p. 32.

> age-old languages, whose organization, shaped by lands, waters, forests, and other natural resources, afforded them a special world view and a unique social structure ensuring their continuity.[28]

In an apparent departure from UN positions, some indigenous delegations suggested that a clearer definition of basic concepts would be a step forward.[29] Others argued that terminology and self-determination could not be separated, and that 'self-determination could not be defined by those outside the community . . . this being the exclusive province of the community'.[30] A recurring feature of some indigenous positions within the Working Group was a willingness to add 'and individual right' to the basic collective right of indigenous groups where appropriate.

A lengthy Section Three on cultural development focuses on issues such as right to cultural integrity, philosophy, outlook and language, education, spiritual and religious freedom, family relations and family ties, health and well-being and the right to environmental protection.[31] The emphasis on cultural integrity recalls the arguments on the merits of focusing on this concept as opposed to self-determination.[32] There is noticeable specificity compared to the UN draft on issues such as indigenous names, use of language in contacts with the authorities, education: 'When indigenous peoples so decide, educational systems shall be conducted in the indigenous languages and incorporate indigenous content, and they shall also be provided with the necessary training and means for the complete mastery of the official language or languages'.[33] The phrase 'complete mastery' appears to place greater emphasis on learning official languages than on indigenous mother tongues, tilting the balance in favour of the former. In the area of religious freedom, positive state action is envisaged to protect indigenous sacred sites and return sacred objects.[34] The views of indigenous peoples including those

[28] *Report of the Chair*, p. 4.

[29] *Ibid*.

[30] *Report of the Chair*, p. 5.

[31] The *Report of the Chair* (p. 9) cites views of indigenous representatives to the effect that 'efforts by the State to merely prevent discrimination based on culture [are] not sufficient, and that mechanisms to promote these cultures . . . should be put in place'.

[32] Article VII provides (1) that 'Indigenous peoples have the right to their cultural integrity, and their historical and archaeological heritage, which are important both for their survival as well as for the identity of their members'.

[33] Article IX 2.

[34] The provision in Article 10 drew forth a number of interesting drafts from indigenous groups, focusing on sacred sites, and included the proposition from the Indian Law Resource Centre that the prohibition of forcible conversion in Article X 2 be replaced by a prohibition of conversion of the peoples 'without their free and informed consent'; the same group proposed an adaptation of Article 18 ICCPR which included freedom to change religion: *Report of the Chair*, pp. 11–12.

of individuals, families and communities, are to be taken into account in determining the best interests of the child in matters pertaining to protection and adoption of children. The UN text does not address such issues, which recall provisions in the Convention on the Rights of the Child. In Article XIII on environmental protection there are strong rights to participate in the formulation, etc., of plans for conserving indigenous 'lands, territories and resources'. In particular, there can be no resource development therein without the informed consent of indigenous peoples – though the limitation only applies when a State has declared the indigenous territory to be a protected area: States are not apparently obliged to make such declarations.

Section Four on 'organizational and political rights' includes an article on basic freedoms of association, assembly, freedom of expression and freedom of thought, followed by an article on the right to self-government. This is the nearest approach to self-determination in the American text: a right to 'autonomy or self-government' in relation to a non-exhaustive list of matters including culture, religion and education.[35] There is also a right of indigenous participation in decision-making affecting them, 'if they so decide' – an application of the notion on the UN draft that integration depends on group choice and accommodation, and cannot be mandatory. Protection for indigenous law and custom is envisioned in Article XVI,[36] and an imaginative Article XVII envisages the adaptation of State structures to reflect the indigenous imprint.[37]

Section Five on social, economic and property rights contains a major Article (XVIII) on land rights. The text is far-reaching – to recognition of 'property and ownership rights with respect to lands, territories and resources which they [indigenous peoples] have historically occupied, as well as the use of those to which they have historically had access for their traditional activities and livelihood'. In cases of property and user rights which pre-exist the creation of the State, the latter shall recognise the titles as 'permanent, exclusive, inalienable, imprescriptible and indefeasible',[38] and they can be changed only through mutual consent in full knowledge.[39] The

[35] Canada made the point that 'self-government for indigenous peoples need not be territorially-based' (*Initial Comments*, equating self-government with autonomy (*ibid.*)). As might be expected, a number of indigenous delegations to the Working Group proposed self-determination language: *Report of the Chair*, pp. 14–15.

[36] Canada expressed its concern that a separate legal system for indigenous peoples would be contrary to Article 14 ICCPR: *February 1997 comments*, p. 19.

[37] Canada supported a realistic version of this article: 'institutions which implement programmes designed for indigenous people . . . should reflect and support, to the extent possible, their culture, organization and identity and should be designed to facilitate their participation in the institution and its programmes' (*February 1997 comments*, p. 19).

[38] Article XVIII 3(i).

[39] *Ibid.*, sub-para. (ii).

text also contains protective provisions on participation in the benefits of resource exploitation, and relocation of indigenous peoples – which must only be on the basis of their 'free, genuine, public and informed consent',[40] including a right to return. There follow articles on workers rights, intellectual property rights,[41] and the right to development[42] into which a significant 'right to be different' is inserted.[43]

The concluding Section Six on general provisions makes reference to 'treaties, acts, agreements and constructive arrangements'.[44] The article is similar to Article 36 of the UN draft Declaration, with the important omission of an explicit international dimension to dispute resolution – disputes are to be submitted to 'competent bodies' (American draft), rather than 'competent *international* bodies' (UN draft); and the instruments are to be interpreted 'according to their spirit and intent' (American), not 'according to their original spirit and intent' (UN). Of course it may be the case that the competent body will turn out to be an international body – especially in view of the American draft's affirmation of the international legal personality of indigenous peoples.[45] The American draft is ambiguous on cross-border

[40] The requirement of 'public consent' is an addition to the 1995 draft. Relocation or transfer is only to be undertaken in 'exceptional and justified circumstances . . . in the public interest' (XVIII 6); this represents a modest strengthening of protection compared with 1995, when relocation was permitted in exceptional cases. However, one indigenous representative at the OAS Working Group suggested that a clearer standard was required, more than 'mere public interest': *Report of the Chair*, p. 17. A number of States proposed the deletion of Article XVIII 5 – with its references to indigenous participation in the exploitation of resources and compensation in accordance with the standard of international law: *ibid*., appendix A, p. 44.

[41] In the 1995 draft, recognition was accorded to 'such intellectual property rights as they have' in cultural heritage; the phrase 'as they have' is replaced in a much redrafted paragraph (XX 1). Canada considered that the intellectual property question was one requiring much further consideration: *Initial Comments*. An indigenous delegate to the OAS Working Group observed that the draft lacked a specific reference to traditional know-how – citing the Convention on Biological Diversity: *Report of the Chair*, p. 16.

[42] Articles XIX, XX, and XXI.

[43] According to Article XXI 1, the peoples have the right to decide democratically 'what values, objectives, priorities and strategies will govern and steer their development course, even where they are different from those adopted by the national government or by other segments of society'. It is not clear if this allows for different conceptions of the democratic decision.

[44] Article XXII.

[45] The 1995 American draft referred to 'competent international bodies (agreed to by all parties concerned)'. In the OAS Working Group, there were predictable divergences between governments and indigenous peoples. Some government delegations doubted whether Articles 22 and 27 should be included in the instrument, distinguishing between the Declaration and an obligatory instrument. Indigenous groups proposed moving nearer to the UN draft Declaration, with one delegation suggesting that there should be some reference to historical agreements concluded by

contacts: while Article XIV 2 promises a right 'to full contact and common activities with . . . members [of indigenous peoples] living in the territory of neighbouring States'; Article XXV includes the rather negative stipulation that nothing in this instrument 'is to be construed as granting any rights to ignore boundaries between States'.[46]

Comment

This brief description of an emerging instrument suggests that the final text may differ considerably in form and content from the UN draft. In particular, the text appears to be more integrationist than the draft Declaration, focusing on cultural integrity rather than self-determination. The admixture of individual and collective rights is notable, and the acceptance of the relevance of ILO Convention 169: the text 'integrates' more deliberately with existing principles of international law. The American proposal is also pragmatically adapted to regional conditions. The problem with the text for some indigenous activists is the limited ambition it represents compared to the UN draft; for others, this limited ambition may represent a strength.

indigenous populations and based on their oral traditions: *Report of the Chair*, pp. 17–18. A proposed USA amendment would devolve the treaty implementation process to domestic law: *Report of the Chair*, appendix A, p. 48.

[46] In the OAS Working Group, Canada proposed that indigenous peoples 'have the right to maintain and develop contacts, relations and undertake activities with their members, and with other indigenous peoples, across borders, which may be subject to reasonable and non-discriminatory customs and immigration regulation' (*Report of the Chair*, appendix A, p. 40).

Part VI

Indigenous peoples and human rights

17

Indigenous peoples and the discourses of human rights: a reflective narrative

The system of human rights is not closed. It is theoretically possible that forms of closure of normative categories will in time descend on indigenous groups, disabling the groups (normatively) from accessing minority rights, just as minorities are not encouraged to access indigenous rights. Such an outcome is not certain, and appears improbable in the present state of international law and relations. Closing off categories is also dubious morally and practically for indigenous groups; it would deny commonality with other vulnerable groups, other tortures, other sufferings and reduce complex questions of identity to a single track. The 'parallel universe' aspect of some indigenous activism ('no law but our law), or what Brownlie refers to as 'the total preservation syndrome' does not resonate in the echo-chamber of human rights.[1] While a little ethnocentrism may do everyone good,[2] exclusively ethnocentric approaches to rights seem implausible paths to the future. The existing decentred normative structures of human rights allow for thought, calculation and action on what kind of society, what world we wish to inhabit, and on what kind of people we are. Indigenous groups have vigorously utilised existing structures, while continuing to agitate for a more focused legal regime. The exposition of rights avenues in previous chapters has sought to report on human rights in the context of international law, respecting the integrity of the various instruments examined and the domains of discourse they incorporate. Chapters have appraised the texts holistically,

[1] Brownlie, *Treaties and Indigenous Peoples*, p. 74: Brownlie refers here to a notion that if other normative standards conflict with 'indigenous norms', the non-indigenous norms must (simply?) give way.

[2] Instilling loyalty to nation, State, locality, etc. See discussion in C. Geertz, *Available Light* (Princeton, NJ, Princeton University Press, 2000); ch. IV (the uses of diversity), on (p. 73) the temptations of 'relax-and-enjoy-it' ethnocentrism, warning (p. 74) against 'easy surrender to the comforts of merely being ourselves'.

in line with the approaches of treaty bodies and other interpreters. The present narrative addresses some generic issues raised in the work as a whole, in line with the 'elementary questions' raised at the outset.[3]

Coherence

On homogeneity

The first question posed was whether 'indigenousness' constituted a coherent notion in international human rights law. Chapter 2 offered a preliminary review of thought and practice on the conceptualisation issue, and on the importance of indigenous self-organisation and participation in the apparent sensitisation of international law. The subsequent chapters reinforce the points made. International practice as manifested through the 'treaty bodies' and other sources increasingly demands acknowledgement by governments of 'the state of the nation' as complex and differentiated in ethnic, religious and linguistic terms. Claims to national homogeneity appear to be treated with scepticism. Such claims may be taken by treaty-bodies to reflect prescriptive rather than cognitive approaches, and as omitting necessary dialogues between the State authorities and self-identifying groups. National identity is conceived ideally as an outcome of dialogic processes – hence the widespread presence in the normative *corpus* of the principle of participation: peoples can speak for themselves, and say who they are.[4] The peoples can also name themselves, and many would regard appropriate naming as part of their rights to self-determination and identity.[5] The naming of places is an emerging aspect of recognition processes: the Maya Atlas is only one project which seeks to reclaim locality through community-based cartography.[6] Creative acts of naming can stimulate transforming educational processes and contribute to community empowerment; the right to name territory is reflected in human rights[7].

[3] See ch. 1 of this volume.

[4] For example in chs. 5 and 6 on the ICCPR – on the pairing of participation and sustainability as conditioning policy towards indigenous groups.

[5] Discussion in G. Alfredsson, 'Minimum requirements for a new Nordic Saami Convention', *Nordic Journal of International Law* 68 (1999), 397–411, at 400.

[6] *Maya Atlas: The Struggle to Preserve Maya Land in Southern Belize* (Berkeley, California, North Atlantic Books, 1997).

[7] The clearest formulation is found in Article 11 of the FCNM – see ch. 12 of this volume. Of course, rival concepts of self-determination can also stimulate political competition over names: the competition between Greece and the Former Yugoslav republic of Macedonia over 'Macedonia' springs to mind.

Disaggregation and definition

The persistent demand in treaty monitoring for disaggregated statistics is common, and is part of the package of statistical accounts – including gender disaggregation – increasingly expected from governments.[8] Formal definitions of indigenous peoples have not been essayed by the treaty bodies dealing with general human rights: their less explicit epistemologies relate to intuitions about indigenousness or simply assert it. Background definitions such as Martinez-Cobo may also be influential, and indigenous solidarity networks have had galvanising effects. Despite this lack of formality, there appears to be little reluctance in treaty implementation to identify indigenous groups, even if, in some contexts, indigenous concerns are subsumed into a catch-all category of 'vulnerable groups', and the groups are not named.[9] International law underpins group recognition by insisting that existence is a question of fact, to be judged objectively.[10] It remains unpredictable whether emerging specific texts will include definition. Cross-references to ILO 169 or the Martinez-Cobo definition sporadically appear in Committee deliberations, and we hear echoes and whispers of these definitions and descriptions in comments, recommendations and observations of treaty bodies and rapporteurs.

Not all countries are assumed to contain indigenous peoples: in practice, the unarticulated approaches assume an indigenous presence in obvious and documented cases – Australia and New Zealand, the Americas, circumpolar countries, etc. The contested images of indigenousness in African States produce a certain caution about identification of relevant groups, and the African Commission on Human and Peoples' Rights has not been definitive. The HRC may have grasped the essence of African dilemmas in appearing to differentiate between Rehoboth Basters and indigenous groups in *Diergaardt*.[11] Hunter-gatherers, pastoralists, and some forms of agriculturists are frequent subjects of description; indigenous-descended groups are more difficult to pick out. Some States such as Bangladesh[12] persist with the characterisation of the whole population of the State as 'indigenous', a

[8] The Committee on the Elimination of Racial Discrimination (see ch. 8 of this volume) and the Committee on Economic, Social and Cultural Rights (see ch. 9) have perhaps been the treaty bodies most concerned with demographic issues, though the demand for statistics is general.

[9] See particularly ch. 9 in this volume, on the CRC.

[10] See chs. 2 and 6 of this volume. Instruments on minority rights have been notable for insisting on the mundane nature of group existence, even if 'existence criteria' are not specified.

[11] See chs. 5 and 6 of this volume.

[12] See among many comments by NGOs and others on this claim: *Written Statement of the Society for Threatened Peoples*, E/CN.4/Sub.2/1999/NGO/17, 28 June 1999; *Written Statement by the South Asia Human Rights Documentation Centre*, E/CN.4/2000/NGO/16, 20 January 2000.

characterization which is increasingly likely to be challenged. The category of *tribal* peoples appears to have little international currency outside the ILO, though it may possess national or regional appeal, and the potential usefulness of terms other than 'indigenous' is worth exploring in contexts where the term is particularly contentious. Analogously, *minority* carries better in some contexts than others on account of assertions that it is too 'European' to travel; like 'indigenous' it is a difficult notion in the African context, if for different reasons.[13] While the final piece of the descriptive jigsaw – whether to use 'peoples' or 'people' – remains contentious, the essence of this dispute is in the realm of self-determination.[14] Overall, it is abundantly clear that recognition of indigenous groups is growing in the 'mainstream' of human rights.

Indicia of indigenousness

On the 'indicia' of indigenousness as perceived in international practice, it is clear that the land–spirituality nexus is a highly influential factor for recognition purposes, perhaps more so than other forms of distinctiveness. The HRC dissected this relationship in *Diergaardt*, distinguishing between cultural relationships and the simply economic.[15] The continued survival of groups in the face of continuing oppression also impresses commentators and stands as a mark of distinctiveness. While the issue of compensation for historical wrongs was at the forefront of attention in the World Conference against Racism, treaty bodies have paid little attention to historical questions, except in the case of ongoing despoliation of traditional lands, and failure to demarcate.[16] The same is true of using the colonial experience as a mark of indigenousness. In cases where historical treaties – such as the Saramaka treaties – come before human rights bodies, they are as likely to be judged by contemporary norms as by canons of inter-temporal law.[17] The existence of State–indigenous treaties cannot be used as a general criterion for the existence of indigenous groups, though in specific cases, the treaty nexus is a helpful historical validation of indigenous presence and claims.[18] International

[13] Largely on account of recent historical experience of white minority domination in the colonial context, and under apartheid.

[14] See Joint Written Statement submitted by the Indigenous World Association and other indigenous organisations concerning the 'position of indigenous peoples in regard to the use of the term indigenous peoples in the United Nations draft declaration for the rights of indigenous peoples' (E/CN.4/2000/NGO/120, 22 February 2000).

[15] See ch. 6 of this volume.

[16] Cf. The discussion of the time span for 'traditional occupation' of lands in chs. 14 and 15 of this volume.

[17] See ch. 11 of this volume.

[18] See ch. 2 of this volume, on the Treaty Study by Special Rapporteur M. Alfonso Martinez.

bodies are more impressed by the existence of a living, breathing constituency of indigenous peoples hammering at the doors of international law, whose interruption of the flow of inter-State discourse will not be waved away by intellectual flourishes or attempts to drown the noise.

Membership

There is less clarity on the issue of membership. This is to be expected in the general texts of human rights which are premised on personal rather than collective rights. Self-definition is a favoured human rights solution to the membership question, explicitly built into Convention 169, though it is not entirely clear in that context if we are dealing with self-definition by group or individual or both. The self-definition criterion is not absolute in any realm of discourse – general human rights, minority rights or indigenous right.[19] The approach of CERD – self-identification as a member of a racial or ethnic group is the primary datum, and it is up to those who contest it to prove their case – appears to be capable of generalisation, but it does not explicitly include a role for the indigenous community.[20] The ICCPR is positive in its incorporation of respect for the view of the *community* on membership and other questions, to be weighed where necessary against the desires of the *individual*. The legal debates evoke scholarly analyses of a right of individuals to exit from communities as a conceptual defence to critics of community rights. *Lovelace* demonstrates that 'leaving the community' is not an easy choice, perhaps an impossible one for many.[21] The position in the general human rights instruments (and those on minority rights) appears to be that just as individuals may not be compelled by communities to embrace minority/community membership, neither can the community be compelled to receive wandering individuals. The membership question ultimately looks like a three-cornered hat: individual, community and State. There are realms where one voice should predominate, but exactly where is not clear; what is clear is that from the normative standpoint, States do not have the last word on intimate questions of identity. One may regard the underdetermination of results as a legal *lacuna*; more charitably, international law can be seen to open up – as elsewhere – developmental,

[19] Except in the literally inconsequential sense that individuals may self-identify in peace, but cannot demand that others accept any 'result' of their self-referential exercise.

[20] The 'justification to the contrary' referred to in CERD General Recommendation VIII could of course include 'the response of the community' to the self-identification exercise of an individual.

[21] C. Kukathas, 'Are there any cultural rights?', in Kymlicka (ed.), *Rights of Minority Cultures*, pp. 228–56. See also the dramatic portrayal of dilemmas by S. Saharso, 'Female autonomy and cultural imperative: two hearts beating together', in W. Kymlicka and W. Norman (eds.), *Citizenship in Diverse Societies* (Oxford University Press, 2000), pp. 224–42.

dialogic spaces for the deployment of arguments about who is 'indigenous'. The point for indigenous groups is to secure *locus standi* – hence, as observed,[22] the development of dialogic institutions such as the Permanent Forum for Indigenous Issues is critical.

On the 'point' of specific indigenous rights

On general/undifferentiated human rights

Questions on the utility of a specific canon of indigenous rights cannot be answered in the abstract. Legal answers depend on what the non-specific rights offer to indigenous groups, and the 'value added' by specific texts.[23] Then there is the moral/political argument as to which peoples should write their names on the pages of international law. In broad legislative terms, there is always tension between the general and the specific. The difficulties of a politics of recognition bear this out in practical terms, and examples abound in the human rights canon: tensions between group and State or official languages, between 'flat' equality and special measures for disadvantaged groups, between the elimination of discrimination and the claims of diversity,[24] between special participation and the participation in the democracy of majority rule, between integration and assimilation as policy objectives of a human rights instrument, between concern for the many and concern for the few. Specific indigenous rights struggle to emerge from this network. There are also many limitations and restrictions in the human rights canon, the outlines of which were detailed in chapter 4. The general limitation is

[22] See ch. 1 of this volume.

[23] For a careful analysis of the difficulties of crafting a category of rights against a background of existing principles, see J. Merrills, 'Environmental protection and human rights: conceptual aspects', in A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon press, 1998), pp. 25–41.

[24] The tension between elimination of discrimination (and the need to avoid institutionalisation of segregation) and recognition of diversity was graphically summarised by the former Aboriginal and Torres Strait Islander Commission Social Justice Commissioner, M. Dodson, who wrote that 'in my view there has been an insidious . . . process of appeal to a notion of equality which denies any rights which attach to cultural differences and, particularly, the identity of Aboriginal and Torres Strait Islander peoples as the indigenous peoples of this country. The claim to human rights which attach to such identity as regarded, ironically, as racist and discriminatory. Hence we arrive at a situation where "equality" and "non-discrimination" are converted into instruments to strip Aboriginal and Torres Strait Islander peoples of appropriate recognition and protection of our rights. In the process grossly racist attitudes find apparent shelter' (from *Fourth report of the Aboriginal and Torres Strait Islander Social Justice Commissioner* (Commonwealth of Australia, 1996), cited in E/CN.4/2000/NGO/30, 1 February 2000, para. 16).

that one set of rights may not impair another, and there are specific limitations built into the texts. Some of the latter employ generalist criteria of well-being, planning, aesthetics and progress to discount the value of an indigenous view – the ECHR is a case in point, with ethnic specificity in general unable to trump the margin of appreciation recognised for States, even in the case of oppressed groups such as Roma.[25] In the 'balance' between the indigenous and the general welfare, the indigenous tend to lose out, a loss that can only be mitigated if indigenous 'welfare' is accounted for in calculations of general benefit. Undifferentiated human rights can have a tendency to work against the grain of validating the indigenous world. The 'victim rule' in the vindication of human rights claims is another case in point: while normatively, the concept of harm to communities is recognised by international human rights norms, grasping the notion of damage to the community through the prism of individual claims is often a difficult exercise, though some human rights institutions such as the African Charter on Human and Peoples' Rights, have taken a relatively open approach.

Claims about the ultimately homogenising effect of general human rights need careful examination. We are addressing tendencies and forces in human rights rather than absolutes, as States struggle to control and hierarchise contending forces, attempting to subordinate and contain them through a 'State-protecting' barrage of concepts and norms. The explicit acknowledgement of indigenous groups in human rights instruments also produces effects on the interpretation of norms. In the first place, the line between the general, undifferentiated human rights norms and specific indigenous norms is not always sharp: some systems of human rights accept 'evidence' from a wider world of norms. The inter-American system is an example of a relatively open normative order capable of taking in influences from outside; the African Charter specifically bases itself on international as well as regional norms: in both cases, norms specific to indigenous peoples are capable of entering the equation and transforming the normative substance. Beyond such systemic connections, general norms on human rights and the prohibition of genocide are explicit on the protection of existence and individual and *group identity*, even if, as noted, there is a lack of explicit hierarchy in favour of 'community' perspectives. The differential impact of human rights violations on indigenous groups is widely recognised in the general texts – this

[25] The references in ch. 12 of this volume to *Buckley v UK* are supplemented by reference to the cases of *Beard v UK* (No. 24882/94), *Chapman v UK* (No. 27238/95), *Coster v UK* (No. 24876/94), *Lee v UK* (25289/94) and *Jane Smith v UK* (25154/94), all of which subordinated the claim of Roma/Gypsies in the UK under (mainly) Article 8 of the ECHR to station caravans on their own land to planning regulations; various environmental and 'general welfare' criteria were utilised to reinforce the planning legislation: ch. 12 in the present volume.

extends to all aspects of rights, including the economic and social rights. Starting from the basic right to life, it is true that many basic notions of human rights have been subjected to a process of normative expansion' – they have been 'expounded' in Steiner's term.[26] The boundaries of rights are not determined in advance by a panoptical intelligence, but, as seen in the chapters above, 'the right to life' moves into assessments of the effects of environmental degradation and conditions of existence;[27] international law has developed potentially indigenous-friendly elaborations of family rights and custom,[28] including the crucial nexus between culture and land;[29] participation rights hint at the appropriateness of special community arrangements;[30] the criterion of enhancing communal sustainability is widely accepted as a goal and limit on government action in many fields; the connection between land loss and economic marginalisation is a staple of thinking on economic rights, as is the connection between population health and economic displacement; the right to take part in 'cultural' life includes one's 'own' culture and not necessarily State culture or high culture, and so on. Developing principles in the fields of education,[31] religion[32] and language also show their indigenous-friendly face.[33] Nation-building through assimilation is an increasingly questionable policy from a rights perspective. While assimilation is not outrightly regarded as illegitimate, it cannot be forced, and assessments of what constitutes 'force' in this context are potentially stringent. The 'engineering' of an environment unfavourable to group cultural development can seriously diminish the element of freedom in those who 'choose' assimilation.[34] The rights can be seen as elements of a developing contract between indigenous groups and international human rights, bearing in mind the belated incorporation by States of whole peoples whose voices were submerged in the original national social contract. The conclusion of the inter-American system is that indigenous peoples are entitled to an adequate institutional order to promote their rights;[35] the undifferentiated rights furnish some of the contract terms. Even where there are restrictions on rights, derogations and reservations, etc., and while indigenous rights are not exempt, some 'community-orientated' rights may not be derogated

[26] 'Individual claims in a world of massive violations: what role for the HRC?', in Alston and Crawford (eds.), *Future of UN Human Rights*, pp. 15–53.

[27] 1995, Ser. A No. 303-C (ECHR).

[28] For example, *Hopu and Bessert v France*; see ch. 5 of this volume.

[29] Notably in General Comment 23 of the HRC; see ch. 6 of this volume.

[30] *Mikmaq Tribal Society v Canada*; see ch. 5 of this volume.

[31] General Comment on the right to education of the Committee on Economic, Social and Cultural Rights; see ch. 7 of this volume.

[32] The *Länsman* cases; see ch. 6 of this volume.

[33] *Ballantyne et al. v Canada*; see ch. 5 of this volume.

[34] *Lopez Ostra v Spain* (ECHR).

[35] *Ibid.*

from. The HRC has listed the identity norms of Article 27 as among those possessing protected status:[36] the exploitation of this article by indigenous groups will be recalled.[37]

The 'model' of minority rights

The model of minority rights has been 'offered' to indigenous groups as a way forward to the satisfaction of their claims at the universal level; the model could impliedly represent the limits of State concessions to indigenous groups in a 'community' direction. Thus, on various occasions, the UN Declaration on the Rights of Persons Belonging to Minorities is presented as an adequate instrument for indigenous peoples – examples include the statement of Sweden to the 1993 session of the UN Working Group:[38]

> Indigenous rights, even when exercised collectively, should . . . be based on the non-discriminatory application of individual rights. One way of assuring this is to use the expression 'rights of persons belonging to indigenous peoples'. A similar approach was adopted in the Declaration on the Rights of Persons Belonging to . . . Minorities. It was also stated that such persons may exercise their rights individually as well as in community with other members of their group.[39]

Elements of this 'model' can be distilled from the brief examination of the UN Declaration on Minorities in the present work, together with the comments on Article 27 of the ICCPR, Article 30 of the CRC, and the Council of Europe's FCNM. Clearly a *first element* in the 'model' is the preference for individual rights, though a limited 'collective dimension' is elaborated in terms of group description, protection of group identity and existence, and exercise of rights individually as well as collectively, freedom to form associations, and contact rights for members of minorities within and across borders. The collective dimension to the rights suggests itself as a *via media* between rights of individuals and 'full' collective or group rights. It thus differs in degree and explicitness from other individual human rights – if only to a limited extent. The general instruments on minority rights also omit reference to autonomy as a right, though it may be commended as a way of dealing with particular issues; self-determination is simply out of the question. Thus, General Comment 23 of the HRC on Article 27 of

[36] General Comment No. 24 on reservations to human rights treaties.

[37] See ch. 5 of this volume.

[38] The author offers this statement merely by way of example, and does not claim that Sweden prefers the same approach in 2001.

[39] Statement of Sweden to Agenda Item 4 on Standard-Setting Activities, 20 July 1993, 3.

the ICCPR does not employ the language of autonomy, and there is no specific right to autonomy in the UN Declaration, despite attempts to insert one.[40] Opponents of autonomy language based their arguments largely on the need to be consistent with the individualist style of the (draft) Declaration on Minorities and on the need to conserve State sovereignty. What the Council of Europe's FCNM reveals, the ruling idea, is demarcation of local space. This is analogous to the cultural–spatial–use concepts deployed by the HRC in relation to indigenous groups. The minorities do not own the space in public law, but their presence is to be manifested through a series of public permissions and possibilities set out in the Convention. The concepts recognise attachment, historical presence, tradition, force of numbers, needs and spatial integrity. The minorities do not have explicit control, but rights to defend and resist forced alterations of character, to print their names and make their mark on the territory along with the names and marks of their non-minority neighbours. As a *second element*, rights to *existence and identity* figure explicitly in many of the basic texts of minority rights; from these, minority rights range over key aspects of *culture*, *religion and language*. A *third element* is that the texts of minority rights explicitly do not threaten territorial integrity and national unity.[41] Compared to general human rights texts, those on minority rights tend to rise further up the scale in restrictions and limitations on rights, betraying the nervousness of the drafters about setting up constituencies to rival the State. While there is no specific restriction of rights in the terms of Article 27 but only the restrictions applying to the ICCPR as a whole, the HRC explicitly considers that the 'enjoyment of the rights to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party';[42] as observed, Article 8 of the UN Declaration on Minorities elaborates this principle further, while for example the FCNM cuts back on any enthusiasm that the obligations in the field of minority schools entail financial liabilities for the State.

Accordingly, minority rights instruments incrementally develop human rights norms in a more group-specific direction, a move that has frequently

[40] The following proposal was offered by the Minority Rights Group to the drafting group of the Human Rights Commission charged with the preparation of the Declaration: 'Persons belonging to minorities have the right to create their own associations and institutions in order to exercise their rights embodied in the present Declaration. By agreement with the States in which they live, measures for self-management and autonomy in matters internal to the minority may be established' (4 December 1991 (on file with author)).

[41] In this respect, it may be that some aspects of the model of minority rights appeal to States more than do others: see remarks of Finland endorsing Article 8.4 of the UNDM as appropriate for the draft declaration on indigenous peoples: E/CN.4/2001/85, para. 76.

[42] Para. 3.2.

been contentious.[43] Perhaps the most consequential facet of minority rights in the present context is their role as vehicles through which a group agenda has been inscribed in politics and law. They have served to focus the attention of the international community on the cultural dimensions of human rights, developing this culturalism within the interstices of sovereignty. Further elaboration of minority rights may be expected from bodies as diverse as the HRC and the Committee on the Rights of the Child, the Working group on Minorities and the Advisory Committee under the FCNM of the Council of Europe. Dramatic elaboration in the direction of group rights may not be expected from these bodies. Despite the modesty of the provisions, they continue to be opposed by some States, and are still charged with political electricity. Indigenous groups have used the rights as a window of opportunity. As Eide observes, minority rights are less autonomist than indigenous rights, and serve the purposes of some if not all indigenous groups.[44] The negative aspect of using minority rights is that they may result in a certain loss of a loss of visibility and self-confidence for indigenous groups, especially in view of their frequent claim that they are 'more than' minorities.[45] As with 'undifferentiated' human rights, minority rights should be appraised for their potential to augment the human rights strategies of indigenous groups.

Specific instruments on indigenous peoples

The provisions of ILO Conventions 107 and 169 represent the international community's first forays into specific indigenous rights. Enough has been said of a critical nature on Convention 107 and its conception of indigenous populations as a dying race. On the other hand, the contemporary face of the Convention is not as forbidding to indigenous groups as it was in 1957. Given the limiting nature of the text, the ILO appears to have moved beyond the text's strong assimilationist orientation towards more nuanced readings which respond better to indigenous positions. The ILO's approach to 107 is particularly robust on the notion that traditional occupation creates international rights, and on the responsibility of government to deliver indigenous rights; it is also capable of dealing with quotidian forms of

[43] However, for a claim that the UNDM is more 'individualist' than Article 27, see remarks of Sub-Commissioner Bengoa at the 4th Session of the UN Working Group on Minorities, E/CN.4/Sub.2/1998/18, para. 45.

[44] See comments of Eide, in A. Eide and E.-I. A. Daes, *Working Paper on the Distinction between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, E/CN.4/Sub.2/2000/10, 19 July 2000.

[45] For a reflection on indigenous human rights strategies in the context of Africa, see S. Saugestad, 'Contested images: indigenous peoples in Africa', *Indigenous Affairs*, 2/99, 6–9.

discrimination in the labour market, etc. The newer Convention 169 is a formidable instrument and meets many of the criteria advanced by groups towards an appropriate regime of indigenous rights. The definition aspect is broad and not excluding. The 'tribal' terminology troubles some peoples but not others – the employment of 'peoples' and not 'people' in the Convention is of the highest significance; government consciousness on the people–peoples issue may even have sharpened since 1989, so that 'getting the Convention through' in retrospect looks more and more like a considerable achievement. Then there are the collective rights: the Convention is suffused with the notion, as it is in effect with autonomy, even if it does not explicitly use autonomy language. There is also its respect for customary law, land and environmental rights and the provision for cross-border contacts. The spatial dimensions of indigenous spirituality are accounted for – dimensions vividly expressed by Sakeh Henderson:

> the Aboriginal vision of property was ecological space that creates our consciousness, not an ideological construct or fungible resource . . . Their vision is of different realms enfolded into a sacred space . . . It is fundamental to their identity, personality and humanity . . . self does not end with their flesh, but continues with the reach of their senses into the land.[46]

While the language provisions appear to move in the direction of bilingualism, they suggest overall a balance in favour of indigenous languages – regarded as valid, subsisting and entitled to respect and support for their development; the notion of indigenous control over education institutions is also powerful. Perhaps the key notion in the overall design of the Convention is participation, including participation in decision-making affecting the peoples. The participation notion respects certain realities: that indigenous peoples are in the world of States and with the world of States. Participation makes less sense for peoples who wish to draw back from engagement with the State, though even here some forms of 'participation' may remain essential as vital social defence. The Convention is less idealist than some indigenous texts,[47] and is perhaps less valued by them on that account. It omits self-determination, and for many that may be accounted a loss. But it is a pragmatic working instrument which can alleviate many indigenous concerns, and raise the profile and esteem in which the peoples are held by governments and the general population. The Convention is also capable of functioning as a legal baseline in drafting exercises: UN Declarations and standard-setting exercises will be regarded as the poorer if they regress from the model of Convention 169.

[46] Cited by Daes, *Indigenous Peoples and their Relationship to Land*, para. 14.

[47] Such as the UN draft Declaration. See also the texts appended to S. J. Anaya, *Indigenous Peoples in International Law* (New York and Oxford, Oxford University Press, 1996).

Modalities: self-determination and the draft Declaration

> 'What is self-determination?' asked the young Arakmbut man.
>
> 'Why do you ask?' I said.
>
> 'I have heard the word used by indigenous leaders in the town and have read it. My father and the old men do not know what it is and so I am asking you.'
>
> 'Self-determination is about the right of indigenous peoples to control their lives without unwanted outside interference.'
>
> 'Oh, so that's what it is.'[48]

The contemporary polemics around the draft Declaration on the Rights of Indigenous Peoples have been referred to at many points in the present text, and, *inter alia*, the draft has been quarried to secure a rough picture of an indigenous *Weltanschauung*.[49] The approach of indigenous groups has been to defend the current draft at almost any cost, though the drafting continues and it may be that some indigenous groups are prepared to accept 'technical' changes. A major difficulty for governments is the draft's employment of self-determination language: the use of self-determination characterises the text as a whole, just as 'participation' characterises ILO Convention 169. The reliance on self-determination has also furnished a basis for scholarly critique. Siren voices whisper that indigenous peoples should abandon self-determination, arguing that the universalising discourse[50] – that 'all peoples' have the right of self-determination – should not be taken literally.[51] They suggest in effect that self-determination is a cul-de-sac for indigenous aspirations. At the same time, indigenous groups continue to advocate self-determination with great intensity. When indigenous peoples invoke a general concept such as self-determination, they inevitably take on board its non-indigenous dimensions as well as the particular 'spin' or adaptation they impart to self-determination for their own uses. Self-determination is a *general* principle of international law. Indigenous peoples take from it what they can, but from the dominant viewpoint of UN-era international law it was not in their ownership. The fact that the principle is universally recognised is also the beginning of a problem, since inevitably the understandings of the wider world press upon the peoples' understanding of self-determination. This is the difficulty of using general concepts,

[48] A Gray, *Indigenous Rights and Development: Self-Determination in an Amazonian Community* (Providence and Oxford, Berghahn Books, 1997), p. 1.

[49] Defined in the *Concise Oxford Dictionary* as a 'philosophical survey of the world as a whole' (1960 edn, p. 1459).

[50] A. Linklater, *Men and Citizens in the Theory of International Relations* (London, Macmillan, 1990)

[51] J. J. Corntassel and T. H. Primeau, 'Indigenous "sovereignty" and international law: revised strategies for pursuing "self-determination"', *Human Rights Quarterly* 17 (1995), 343–65.

which were not generated in their dominant contemporary forms by those who claim under them. The problem is in essence the same as for human rights in general – and it should not be forgotten that self-determination is widely perceived as a meta-discourse holistically integrating human rights principles.[52] However, it is still probably true that for the wider world, the paradigm case – the image – of self-determination is accession to independence, formatting a new State in the mould of existing ones. The gods in this legal pantheon of self-determination have been accounted for in the present work: the UN Charter, Articles 1(2) and 55, and Chapters XI and XII; and General Assembly resolutions 1514 (XV) (the Colonial Declaration), 1541 (XV) and 2625 (XXV) (the Declaration on Principles of International Law). There is more ambiguity from the decolonisation or post-colonial State perspective about the common Article 1 of the two UN Covenants on Human Rights, especially since the HRC began to insist that it applied to all states internally, and was not simply a measure of external support for the peoples of Namibia, Palestine and South Africa. It is not surprising if States who perceive or claim that they would be affected by analogous decolonisation processes, resist the extension of any such principle, certainly to themselves, and to their neighbours – or even to their enemies, since 'the Lord makes his sun to rise on the just and the unjust' alike.[53]

On the other hand, the position has undergone some change since the drafting of the Declaration began. A number of governments have come round to accepting the force of indigenous arguments: that self-determination is an appropriate vehicle to carry indigenous claims. While there has been some zigzagging by governments in the drafting process,[54] in general, the 'trend' is towards acceptance of indigenous positions at least one key qualification: that self-determination is understood as essentially 'internal' in operation, and does not legitimate secession. To various citations above,[55] we may add recent Presidential instructions to US delegations that they should focus on internal self-determination.[56] France may be accounted a

[52] P. Thornberry, 'The democratic or internal aspect of self-determination with some remarks on federalism' in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, Martinus Nijhoff, 1993), pp. 101–38.

[53] B. Ayala, *On the Laws and Duties Connected with War and Military Discipline* (Classics of International Law Series), cited by G. Hasselbrink, 'Native rights to territorial sovereignty', paper for the International NGO Conference on Discrimination against Indigenous Peoples in the Americas, Geneva, 20–23 September 1977.

[54] Notably by the government of Australia which currently does not support self-determination language in the draft; see ch. 15 of this volume.

[55] See ch. 15 of this volume.

[56] Instructions to US human rights delegations (Executive Order of 19 January 2001) stated that the delegations should support the use of the term 'internal self-determination' in the following terms: 'Indigenous peoples have a right of internal self-determination, by virtue of that right they may negotiate their political status

recent convert to the notion of indigenous self-determination.[57] It seems unlikely that the draft articles on self-determination will remain untouched. Elsewhere, the author has commented on various possible drafting 'manoeuvres' of differing degrees of acceptability to indigenous groups, who may have to weigh the need for a pristine declaration of self-determination against the pragmatic requirement of achieving consensus at the GA.[58] Restriction of indigenous self-determination to the 'internal' variety' would open a gap between indigenous self-determination and peoples' rights in general. In other areas of international law – particularly under the Covenants and the African Charter – the line between 'peoples' and 'indigenous peoples' appears to be thinning, as expert bodies probe the details of State policy towards the groups. However, even here, secession is not the issue, and many indigenous statements also insist that this is not what their self-determination is about. The attitude of general international law to secession remains cloudy, though there are (contested) grounds for arguing that massive violations of human right trigger secession as a remedial measure.[59]

Of course, self-determination is not the only principle in the draft Declaration to be measured against contemporary human rights standards. Additional to many specific elements of contention, the domain of collective rights in the draft is particularly strong, and much authority would apparently be handed over to the communities. The drafting of human rights 'safeguards' in the text is problematic for some groups who object to their further elaboration. Several considerations suggest themselves. First, the draft may express a programme of parallel individual and collective rights:

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within the framework of the existent nation-State and are free to pursue their economic, social and cultural development. Indigenous peoples, in exercising their right of internal self-determination, have the internal right to autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language, religion, education, information, media, health, housing, employment, social welfare, maintenance of community safety, family relations, economic activities, lands and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions'. The US interpretation excludes independence or permanent sovereignty over natural resources for indigenous peoples. The position appears to have been sustained by the new US administration.

[57] 'The representative of France confirmed that his government is in favour of recognizing the right of self-determination of indigenous people. He stressed that this right has to be exercised through negotiation and dialogue and should involve all populations concerned. He offered as a positive example the case of New Caledonia' (E/CN.4/2001/85, para. 62).

[58] P. Thornberry, 'Self-determination and indigenous peoples: objections and responses', in P. Aikio and M. Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku/Åbo, Åbo Akademi University, 2000), pp. 39–57.

[59] A question specifically addressed by various essays, including that of the author, in Tomuschat, *Modern Law of Self-Determination*.

some rights can be appropriate for a dual formula; others should logically rest with either the community or the individual. Second, the human rights protecting principle in Article 33 is a possible focus for redrafting in broader terms. Third, the reference 'out' to international standards of human rights should not pretend that these are monolithic; on the contrary there is logical and dialogical space to accommodate various conceptions of rights, and an ongoing public process of development and reflection. In particular, indigenous understandings of rights could be incorporated in readings of the key principles. There is a likely 'overlapping consensus' between indigenous and non-indigenous on many key issues, even if not a concordance of views.

While ultimate resolutions of issues may not be possible, it is important to recall that not all disputes in human rights are between individual and collective rights: individual rights also collide and intersect in confusing ways. Brief recall of an aspect of Soviet theory may also be apt: Tunkin and other theorists argued that international law did not need a 'community of ideology', what it did need was agreement. A similar principle could be extended to indigenous–State relations, and the draft Declaration provides a platform for just that. The significance of the draft – and by extension of the Permanent Forum for Indigenous Issues – was grasped by the UN High Commissioner for Human Rights, for whom 'the working group represented an unusual standard-setting activity by which governmental delegations had an opportunity to talk directly with the beneficiaries of the draft Declaration; it represented the acknowledgement of a new generation of rights'.[60] The strong supporting framework for the Declaration – the GA, UN Summits, the High Commissioner – make it likely that a document will emerge, though it may not be in a form which meets the aspirations of all groups. On the other hand if we are speaking of a 'generation' of rights, this suggests further standard-setting exercises to come, perhaps in specific areas such as heritage, land and resources, sacred sites, etc. The overall 'separatism' of the text may continue to disconcert many, but any future 'generation' of indigenous rights may drive the international community farther along this path, or at least enlarge what Eide styles the private as opposed to the public domain.[61]

Culture and cultural practices

Following on from a consideration of the place of human rights in the draft Declaration, we may describe some aspects of human rights as 'cross-cutting' in relation to indigenous concerns. The chapter on the CRC, including

[60] E/CN.4/Sub.2/1998/106, para. 39.

[61] A. Eide, *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, E/CN.4/Sub.2/1993/34/Add. 1–4.

the points on reservations to protect indigenous customs and the concept of 'the best interests of the child', flagged up some of the issues, which can arise in other contexts also, such as 'traditional punishments'. Rights of women are another obvious issue: to the brief excursus above on the implications of *Lovelace*, the place of women's rights in ILO Convention 169 and the censuring of customary practices by sundry treaty bodies, we may add the specific instruments on women's rights, including the Convention on the Elimination of All Forms of Discrimination against Women,[62] with many attendant General Recommendations,[63] the UN's Beijing Summit,[64] Beijing + 5,[65] and the continuing UN enquiries into the ramifications of traditional practices affecting the health of women and the girl-child,[66] etc.

[62] Article 2(f) of the Convention engages States to take all appropriate measures, including legislation, 'to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; Article 5(a) mandates the taking of all appropriate measures 'To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'. Cf. The UN Declaration on the Elimination of Violence against Women 1994, Article 4 of which provides that 'States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination'. The use of the term 'appropriate' in addressing measures to be taken opens up the debate: the term must include 'culturally appropriate' in a manner analogous to the 'culturally appropriate education' in the Committee on Economic, Social and Cultural Right's General Comment on education; see ch. 7 of this volume.

[63] See in particular General Recommendation 21 on equality in marriage, paras. 8, 10–17, 27, 34, 39 and 46.

[64] A/CONF.177/20, 17 October 1995. The Beijing Declaration – Platform for Action makes a number of references to customary practices: see for example paras. 71, 118, 124, 224, 225 and 232. On the other hand, there are many positive references on the Platform for Action to the role of indigenous women: see, for example, paras. 83 (role of indigenous women in regard to education, and support for their participation in culturally appropriate educational programmes), 109 (women and traditional knowledge and health case) and 256 (integrating indigenous women into decision-making on sustainable development).

[65] See the Final Outcome Document as adopted by the Plenary of the 23rd Special Session of the UN General Assembly, Women 2000. The Document makes a number of references to the disadvantaged condition of indigenous women in regard to equality, education and training, violence, barriers to decision-making, stereotyped attitudes, etc., along with references to harmful traditional practices. The document is on the Convention on Biological Diversity and the role of indigenous women therein. An element of 'methodology' to resolve differences appears in para. 48 bis: action to be taken at national and international level includes 'Continue to design efforts for the promotion of respect for cultural diversity and dialogue among and within civilizations'.

[66] See *Fourth Report on Traditional Practices Affecting the Health of Women and the Girl-Child*, E/CN.4/Sub.2/2000/17, Rapporteur Mrs H. E. Warzazi.

Some of the criticisms of States in Concluding Observations[67] or conference declarations have an accommodation element – a hint of methodology to overcome difficulties.[68] Concerns about customary law were also addressed in chapters on the African Charter and the American instruments on human rights. Many States have made reservations of a broadly cultural nature to the Women's Convention, as well as the CRC. As observed in the introduction, many issues circling around the debate on so-called cultural relativism are not expressly conducted in relation to indigenous groups, but there are clear implications for them in the commentaries and principles. At their most polarised, rival arguments insist on either social transformation in the light of the norms of human rights, or on absolute cultural integrity. Neither approach is completely vindicated by current practice. On the 'social transformation' plane, treaty bodies have not confined themselves to picking out what they regard as egregious practices such as female genital mutilation: comments on polygamy, a number of marriage practices; and practices relating to children, have been highly critical of customary law. On the other hand, outside such practices, all the bodies have expressed their solicitude for the plight of indigenous groups, indigenous women, indigenous children, and so on. The present work has sought to demonstrate that there is growing respect for social and cultural diversity in the practice of human rights, away from monolithic exercise in nation-building and assimilation, etc. There is discernible movement towards the cultural-integrity pole of the argument, while again excluding certain practices.

Issues are conveniently crystallised in Article 4.2 of the UN Declaration on Minorities, whereby States are to take measures to facilitate the expression of cultural characteristics 'except where specific practices are in violation of national law and contrary to international standards'.[69] The distinction between 'cultures', 'cultural values' and 'cultural practices' offers a way out of dilemmas to some commentators: selectively preserving the fundamentals of a culture while chipping away at targeted anti-human rights aspects. While the work of some treaty bodies reflects a degree of impatience with

[67] See recently, concluding observations in relation to India, CEDAW/C/2000/1/CRP.3/Add.4/Rev.1; Burkina Faso, CEDAW/C/2000/1/CRP.3/Add.3/Rev.1; Cameroon, CEDAW/C/2000/II/Add.2; Nepal, CEDAW/C/1999/L.2/Add.5; Tanzania, A/53/38/Rev.1, paras. 206–42, and Namibia, A/52/38/Rev.1, Part II, paras. 69–131.

[68] Including a comment to Indonesia that, while cultural and religious values cannot be allowed to undermine the universality of women's rights 'culture is not a static concept and . . . the core values of Indonesian society were not inconsistent with the advancement of women' (A/53/38/Rev.1, para. 282). The Concluding Observations on the initial report of India, referred to the need for reform of the personal laws of different religious and ethnic groups 'in consultation with them' (para. 31).

[69] Commentary by the present author in 'The UN Declaration on the Rights of Persons belonging to Minorities, etc.', in Phillips and Rosas (eds.), *Universal Minority Rights*, pp. 13–76.

a mass of traditional norms, this 'cultural selectivity' approach is broadly reflected in human rights practice. Thus, jointly with the Special Rapporteur on Violence against Women, the Sub-Commission Rapporteur on traditional practices affecting the health of women and the girl-child, made the observation in the case of a woman of Malian origin who had been sentenced to prison in France for Female Genital Mutilation that

> the importance attached to certain traditional practices in some communities must be taken into account. Both firmly and unequivocally condemned all practices that violate individuals' physical integrity [but] felt nevertheless that punishments and sentences based on value judgements could sometimes be counterproductive and encourage communities to close ranks and cling to practices which . . . are the only means they have of expressing their cultural identity. Such practices should not be condemned in the courts except as a last resort when education, information and the proposal of alternative rites . . . have not been successful.[70]

The Rapporteur also claimed that cultural values should not be confused with cultural practices, and that the practices can be changed without adversely affecting cultural values. In a general statement, Rapporteur Warzazi warned against 'the dangers of demonizing cultures under cover of condemning practices harmful to women and the girl child . . . reports . . . show how easy it is for the media . . . to resort to racist imagery and demonize cultures, religions, and entire communities'.[71] However, the problem with neat distinctions between *values* and *practices*, is that in many contexts they will not work. If a particular practice is bound up intimately with a language, view of the world, creation myth, religious observance and social practice, it cannot easily be 'detached' or 'severed' from 'the body politic'. The notion in this case of 'alternative rites' is valuable, though it will very much depend on acceptance and 'internalization' by groups concerned.[72] The broad problem with 'cultural substitution' is that it can imply a patronising, hierarchical attitude to the group intervened against – the dangers of which the Rapporteurs are evidently aware.[73]

[70] E/CN.4/Sub.2/1999/14, 9 July 1999, para. 75.

[71] *Ibid.*, para. 78.

[72] General Assembly resolution 54/133 on Traditional or Customary Practices Affecting the Health of Women and Girls, in incorporates the notion in a welter of condemnation of certain traditional practices, calling on States (para. 3l) 'To explore, through consultations with communities and religious and cultural groups, and their leaders, alternatives to harmful traditional or customary practices, in particular where those practices form part of a ritual ceremony or rite of passage'. Further reference to the role of communities, etc., is made in para. 3j.

[73] Such sensitivity is not always in evidence. In UN Human Rights Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children, the harmful practices are described as taking on 'an aura of morality' (so are not

Another approach is offered by Hurrell, who differentiates between core values and others: [74]

> Although the precise line may be very hard to draw, there has to be a moral difference in a world of cultural, religious and social diversity between proscribing and preventing manifest violations of human rights and externally seeking to dictate the ways in which societies organise themselves and determine their priorities and values . . . The promotion of universally proclaimed values does not preclude sensitivity to context but it does involve distinguishing between particularly important core norms and attempting to export complete ways of life or conceptions of the good.[75]

The argument appears to be that, if core norms are at stake, outside intervention is legitimate; if they are not, it is not, and there should always be caution about exporting 'complete ways of life'. Alston constructs a similar 'core and periphery' distinction:[76]

> Once we move beyond the core . . . the nature of the society, its traditions and culture, and other such factors become highly pertinent to . . . efforts to promote and protect respect for the rights concerned. We must recognize that the reflexive, often dogmatic, admonitory and homogeneous approach that is appropriate to . . . core violations will . . . be less productive, and achieve far less enduring results than a more sensitive, open, and flexible approach which situates the goals sought within the society in question.[77]

The approaches depend on making the further distinction between core human rights and the rest. It is not immediately clear if this could be done on the basis of moral argument, general treaty law, customary law, *jus cogens*, non-derogability and other 'devices' to protect fundamental rights. From the perspective of some indigenous societies, this may look like a reflexive problem *within* human rights, outside the range of their immediate concerns, and many societies, indigenous or otherwise, would quake at the accusation of violating the fundamentals/core of human rights. On the other hand, while the Hurrell–Alston approach superficially focuses on the question from an 'exogamous' (to the indigenous) viewpoint, the point on

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'true' morality?); women follow such traditions 'passively'; food taboos 'are steeped in superstition'. This is hardly designed to promote respect for cultural preferences and those who follow tradition. *De minimis*, condemning practices while respecting persons requires more finesse than the Fact Sheet displays.

[74] 'Power, principles and prudence: protecting human rights in a deeply divided world', in T. Dunne and N. J. Wheeler (eds.), *Human Rights in Global Politics* (Cambridge University Press, 1999), 277–302.

[75] *Ibid.*, pp. 281–2.

[76] P. Alston, 'The UN's human rights record: from San Francisco to Vienna and beyond', *Human Rights Quarterly* 16 (1994), 375–90.

[77] *Ibid.*, p. 383.

situating goals within a particular society suggests bridge-building between the local and the global, between place and space.

Dialogue and participation

In their different ways, the approaches outlined above result in engaging communities in dialogue and decision. This is arguably the key to any accommodation, and does not justify the apparent impatience of some advocates of human rights. If decent hierarchical societies, or non-liberal societies are to be treated with respect,[78] *a fortiori* with indigenous societies, all of who have their own concepts of justice and the good life. The moral superiority of human rights in all aspects of life should not simply be assumed; human rights should not degenerate into intolerance. The whole point of the contemporary system is to empower and validate a range of human choice. Sometimes there will be group choices, at other times the individual voice will prevail. From the indigenous perspective, the key is to find a place in decision-making processes through norms backed up by appropriate mechanisms. This is the real importance of a platform of indigenous rights. Without the recognition that indigenous rights entail, the groups will tend to be overborne, and the current solicitude for their interests forgotten as a species of 'compassion fatigue'. It is true however, that, in the current alignment of international relations, the indigenous platform for meaningful dialogue is fragile. As set out in chapter 4, States still call most of the shots in human rights at international and national levels. There is much to be gained from current human rights arrangements, but the pace is slow, and societies are dying. Specific indigenous rights – or a particular indigenous 'stamp' on general rights like self-determination – also militate against 'lumping together' the indigenous demand for cultural protection with sundry fundamentalisms scathingly described by Eagleton:

> If identity politics have ranked among the most emancipatory of contemporary movements, some brands of them have also been closed, intolerant and supremacist. Deaf to the need for wider political solidarity, they represent a kind of group individualism which reflects the dominant social ethos as much as it dissents from it . . . At the worst, an open society becomes one which encourages a whole range of closed cultures.[79]

Societies in danger of disappearance are not Eagleton's target; many of these 'closed societies' would allow little space for indigenous flourishing; on the contrary, their intolerance would destroy them.

[78] J. Rawls, *The Law of Peoples* (London and Cambridge, MA, 1999); 'The law of peoples' in S. Shute and S. Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures 1993* (New York, Basic Books, 1993), pp. 41–82.

[79] T. Eagleton, *The Idea of Culture* (Oxford, Blackwell Publishers, 2000), p. 129.

The 'glass-ball country'

The review of human rights and the indigenous has taken the long view through the prehistory of international law to the present day, focusing on pathways through which the indigenous can access the principles of human rights and how the human rights world addresses indigenous societies. At the outset the Hughes image of a peaceful and reconciling glass-ball country was counterposed to a parable of ambiguity and struggle. In the long view, telescoped for purposes of exposition, indigenous groups played a role at various periods in the drama of international law; there was always recognition of sorts, even if not as completely equal to the colonising powers. Subtle and less subtle asymmetries of right and duty subordinated the peoples. Luminaries like Vitoria in essence legitimated the colonising enterprise, even if they blunted its edge. The imperfect equality did not completely rule out structured relationships between incomers and indigenous, sometimes in treaty form, and many contemporary groups have been persistent in exploring that legacy, piecing together their significance in a kind of archaeology of law. The draft Declaration on Indigenous Peoples would take the matter further, to the plane of international law. Even if we take the principle of inter-temporal law (legality decided in the light of the law of the time), there are still many questions of what that law was, whose version is to be believed, etc. The reception of oral history in *Delgamuukw* is one pointer to new ways of seeing, new concepts of evidence[80] and space for indigenous narratives in the realm of claim and counter-claim about the 'facts' of history. The indigenous never 'disappeared', though the imperial conceits of international law in the nineteenth and twentieth centuries almost consigned them to oblivion. The advent of human rights in international law was a new beginning, though the first chapters in the book were written over the heads of the peoples, and diminished them through projects of integration, development and assimilation. The summary by Linklater of Foucault's insight is apt: 'all claims to truth and enlightenment, and all emancipatory projects, contain the potential for dominating, marginalizing and excluding others'.[81] The significance to indigenous peoples of the growth of human rights is double-edged. Of the 'twin pillars' of the new order – self-determination, and individual human rights – the peoples have chosen to rest their claims rhetorically on the former. The obduracy of their advocacy of self-determination appears to be paying off, though the self-determination they attain will be a specific form, a control of lands, and the cultural

[80] See the account of 'singing the song' in the *Delgamuukw* proceedings, in H. Brody, *The Other Side of Eden: Hunter-Gatherers, Farmers and the Shaping of the World* (London, Faber & Faber, 2000), pp. 206–15.

[81] A. Linklater, *The Transformation of Political Community* (Cambridge, Polity Press, 1988), p. 68.

elements of their world, all the time contested by governments and the social masses they sustain. The present work has sought to demonstrate the potential uses of the 'smaller' rights, the single grievance, the claim that integrates their humanity with that of others, the non-separating legal intervention, and also the losses and limitations that these uses may imply. The human rights network is there to explore, and many groups explore it skilfully, benefiting themselves and the wider world with precedents set. The multiplicity of avenues of protection in the realm of human rights has parallels in decentred postmodernism and the complexities of culture and identity.

But human rights are double-edged. The 'rules of the game', even accounting for their indeterminacies, will not suit all indigenous societies. There are losses and gains in trading in the currency of human rights, as there are with politically 'big' self-determination. As indigenous groups structure their claims in the language of human rights, so human rights structure the modes of social representation and the potential responses. The individual rights 'grid' or syntax of human rights makes difficult the case for the collective, even where that is the gravamen of the claim. Human rights set apparent limits to the kind of social practices embraced. Rights practice is still infused by notions of progress and civilisation. But rights principles are not concluded, their philosophy of intervention into the practices of traditional societies is undeveloped, and commentary increasingly questions the foundations. There is space for reciprocity, for broadening the cultural reach of human rights in the light of 'feedback' from indigenous societies. This has been a function of the international indigenous movement: more than consciousness-raising about another class of 'victims', but an intercalation of an alternative view in the face of overweening State power and other survival challenges from burgeoning globalisation and precipitate social change. Indigenous rights can flourish if they offer something to the world at large as well as to the indigenous. Substituting 'indigenous peoples' for the term 'hunter-gatherers' in Brody's conclusions, we can say with him that

> If the world can acknowledge who indigenous peoples are, how they know and own their lands, what the encounter with . . . colonists has meant, then some restitution can be made. An inquiry into the fate as well as the achievement of indigenous peoples is, in this regard, part of a story that indigenous peoples need to tell and have told. Without the indigenous peoples, humanity is diminished and cursed; with them, we can achieve a more complete vision of ourselves.[82]

The significance of *locus standi* in the human rights canon for indigenous groups goes beyond the particular case. The ability of human rights and international law to accommodate the indigenous is a forerunner of bigger

[82] Brody, *The Other Side of Eden*, p. 314.

battles about what kind of human rights are appropriate for a world integrating and diversifying at the same time, and how nations address and respect the 'others' of their imagination. Only in the imaginary glass-ball country could these issues be resolved; in the substantial world, the conversation continues, and the struggle.

Annexes

1

ILO Convention No. 107 on Indigenous and Tribal Populations

C107 Indigenous and Tribal Populations Convention, 1957

Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Fortieth Session on 5 June 1957, and

Having decided upon the adoption of certain proposals with regard to the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, which is the sixth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, and

Considering that the Declaration of Philadelphia affirms that all human beings have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, and

Considering that there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population, and

Considering it desirable both for humanitarian reasons and in the interest of the countries concerned to promote continued action to improve the living and working conditions of these populations by simultaneous action in respect of all the factors which have hitherto prevented them from sharing fully in the progress of the national community of which they form part, and

Considering that the adoption of general international standards on the subject will facilitate action to assure the protection of the populations concerned, their progressive integration into their respective national communities, and the improvement of their living and working conditions, and

Noting that these standards have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, at appropriate levels and in their respective fields, and that it is proposed to seek their continuing co-operation in promoting and securing the application of these standards,

adopts the twenty-sixth day of June of the year one thousand nine hundred and fifty-seven, the following Convention, which may be cited as the Indigenous and Tribal Populations Convention, 1957:

Part I General Policy

Article 1

1 This Convention applies to –
   (a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
   (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

2 For the purposes of this Convention, the term *semi-tribal* includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.

3 The indigenous and other tribal or semi-tribal populations mentioned in paragraphs 1 and 2 of this Article are referred to hereinafter as 'the populations concerned'.

Article 2

1 Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.

2 Such action shall include measures for –
   (a) enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population;
   (b) promoting the social, economic and cultural development of these populations and raising their standard of living;
   (c) creating possibilities of national integration to the exclusion of measures tending towards the artificial assimilation of these populations.

3 The primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative.

4 Recourse to force or coercion as a means of promoting the integration of these populations into the national community shall be excluded.

Article 3

1 So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.

2 Care shall be taken to ensure that such special measures of protection –
   (a) are not used as a means of creating or prolonging a state of segregation; and
   (b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.

3 Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures of protection.

Article 4

In applying the provisions of this Convention relating to the integration of the populations concerned –

(a) due account shall be taken of the cultural and religious values and of the forms of social control existing among these populations, and of the nature of the problems which face them both as groups and as individuals when they undergo social and economic change;
(b) the danger involved in disrupting the values and institutions of the said populations unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept shall be recognised;
(c) policies aimed at mitigating the difficulties experienced by these populations in adjusting themselves to new conditions of life and work shall be adopted.

Article 5

In applying the provisions of this Convention relating to the protection and integration of the populations concerned, governments shall –

(a) seek the collaboration of these populations and of their representatives;
(b) provide these populations with opportunities for the full development of their initiative;
(c) stimulate by all possible means the development among these populations of civil liberties and the establishment of or participation in elective institutions.

Article 6

The improvement of the conditions of life and work and level of education of the populations concerned shall be given high priority in plans for the over-all economic development of areas inhabited by these populations. Special projects for economic development of the areas in question shall also be so designed as to promote such improvement.

Article 7

1 In defining the rights and duties of the populations concerned regard shall be had to their customary laws.

2 These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes.

3 The application of the preceding paragraphs of this Article shall not prevent members of these populations from exercising, according to their individual capacity, the rights granted to all citizens and from assuming the corresponding duties.

Article 8

To the extent consistent with the interests of the national community and with the national legal system –

(a) the methods of social control practised by the populations concerned shall be used as far as possible for dealing with crimes or offences committed by members of these populations;

(b) where use of such methods of social control is not feasible, the customs of these populations in regard to penal matters shall be borne in mind by the authorities and courts dealing with such cases.

Article 9

Except in cases prescribed by law for all citizens the exaction from the members of the populations concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law.

Article 10

1 Persons belonging to the populations concerned shall be specially safeguarded against the improper application of preventive detention and shall be able to take legal proceedings for the effective protection of their fundamental rights.

2 In imposing penalties laid down by general law on members of these populations account shall be taken of the degree of cultural development of the populations concerned.

3 Preference shall be given to methods of rehabilitation rather than confinement in prison.

Part II Land

Article 11

The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

Article 12

1 The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

2 When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

3 Persons thus removed shall be fully compensated for any resulting loss or injury.

Article 13

1 Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.

2 Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

Article 14

National agrarian programmes shall secure to the populations concerned treatment equivalent to that accorded to other sections of the national community with regard to –

(a) the provision of more land for these populations when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

(b) the provision of the means required to promote the development of the lands which these populations already possess.

Part III Recruitment and Conditions of Employment

Article 15

1 Each Member shall, within the framework of national laws and regulations, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to the populations concerned so long as they are not in a position to enjoy the protection granted by law to workers in general.

2 Each Member shall do everything possible to prevent all discrimination between workers belonging to the populations concerned and other workers, in particular as regards –

(a) admission to employment, including skilled employment;

(b) equal remuneration for work of equal value;

(c) medical and social assistance, the prevention of employment injuries, workmen's compensation, industrial hygiene and housing;

(d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

Part IV Vocational Training, Handicrafts and Rural Industries

Article 16

Persons belonging to the populations concerned shall enjoy the same opportunities as other citizens in respect of vocational training facilities.

Article 17

1 Whenever programmes of vocational training of general application do not meet the special needs of persons belonging to the populations concerned governments shall provide special training facilities for such persons.

2 These special training facilities shall be based on a careful study of the economic environment, stage of cultural development and practical needs of the various occupational groups among the said populations; they shall, in particular enable the persons concerned to receive the training necessary for occupations for which these populations have traditionally shown aptitude.

3 These special training facilities shall be provided only so long as the stage of cultural development of the populations concerned requires them; with the advance of the process of integration they shall be replaced by the facilities provided for other citizens.

Article 18

1 Handicrafts and rural industries shall be encouraged as factors in the economic development of the populations concerned in a manner which will enable these populations to raise their standard of living and adjust themselves to modern methods of production and marketing.

2 Handicrafts and rural industries shall be developed in a manner which preserves the cultural heritage of these populations and improves their artistic values and particular modes of cultural expression.

Part V Social Security and Health

Article 19

Existing social security schemes shall be extended progressively, where practicable, to cover –

(a) wage earners belonging to the populations concerned;
(b) other persons belonging to these populations.

Article 20

1 Governments shall assume the responsibility for providing adequate health services for the populations concerned.

2 The organisation of such services shall be based on systematic studies of the social, economic and cultural conditions of the populations concerned.

3 The development of such services shall be co-ordinated with general measures of social, economic and cultural development.

Part VI Education and Means of Communication

Article 21

Measures shall be taken to ensure that members of the populations concerned have the opportunity to acquire education at all levels on an equal footing with the rest of the national community.

Article 22

1 Education programmes for the populations concerned shall be adapted, as regards methods and techniques, to the stage these populations have reached in the process of social, economic and cultural integration into the national community.

2 The formulation of such programmes shall normally be preceded by ethnological surveys.

Article 23

1 Children belonging to the populations concerned shall be taught to read and write in their mother tongue or, where this is not practicable, in the language most commonly used by the group to which they belong.

2 Provision shall be made for a progressive transition from the mother tongue or the vernacular language to the national language or to one of the official languages of the country.

3 Appropriate measures shall, as far as possible, be taken to preserve the mother tongue or the vernacular language.

Article 24

The imparting of general knowledge and skills that will help children to become integrated into the national community shall be an aim of primary education for the populations concerned.

Article 25

Educational measures shall be taken among other sections of the national community and particularly among those that are in most direct contact with the populations concerned with the object of eliminating prejudices that they may harbour in respect of these populations.

Article 26

1 Governments shall adopt measures, appropriate to the social and cultural characteristics of the populations concerned, to make known to them their rights and duties, especially in regard to labour and social welfare.

2 If necessary this shall be done by means of written translations and through the use of media of mass communication in the languages of these populations.

Part VII Administration

Article 27

1 The governmental authority responsible for the matters covered in this Convention shall create or develop agencies to administer the programmes involved.

2 These programmes shall include –
   (a) planning, co-ordination and execution of appropriate measures for the social, economic and cultural development of the populations concerned;
   (b) proposing of legislative and other measures to the competent authorities; (c) supervision of the application of these measures.

Part VIII General Provisions

Article 28
The nature and the scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 29
The application of the provisions of this Convention shall not affect benefits conferred on the populations concerned in pursuance of other Conventions and Recommendations.

Article 30
The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 31
1 This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2 It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3 Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratifications has been registered.

Article 32
1 A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an Act communicated to the Director-General of the International Labour Office for registration. Such denunciation should not take effect until one year after the date on which it is registered.

2 Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 33
1 The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all

ratifications and denunciations communicated to him by the Members of the Organisation.

2 When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 34

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 35

At such times as may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 36

1 Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
   (a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 32 above, if and when the new revising Convention shall have come into force;
   (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2 This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 37

The English and French versions of the text of this Convention are equally authoritative.

2

ILO Convention No. 169 on Indigenous and Tribal Peoples

C169 Indigenous and Tribal Peoples Convention, 1989

Convention concerning Indigenous and Tribal Peoples in Independent Countries

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

Noting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957;

adopts the twenty-seventh day of June of the year one thousand nine hundred and eighty-nine, the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989;

Part I General Policy

Article 1

1 This Convention applies to:
   (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
   (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2 Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3 The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Article 2

1 Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

2 Such action shall include measures for:
   (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;

(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

(c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 3

1 Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

2 No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

Article 4

1 Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2 Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

3 Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 5

In applying the provisions of this Convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

(b) the integrity of the values, practices and institutions of these peoples shall be respected;

(c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 6

1 In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2 The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

1 The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2 The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3 Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4 Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 8

1 In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2 These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3 The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9

1 To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

2 The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10

1 In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

2 Preference shall be given to methods of punishment other than confinement in prison.

Article 11

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

Article 12

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

Part II Land

Article 13

1 In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2 The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

1 The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2 Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3 Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

1 The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2 In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1 Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2 Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3 Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4 When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5 Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

1 Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2 The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3 Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18
Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19
National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:
(a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
(b) the provision of the means required to promote the development of the lands which these peoples already possess.

Part III Recruitment and Conditions of Employment

Article 20
1 Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

2 Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:
   (a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
   (b) equal remuneration for work of equal value;
   (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
   (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

3 The measures taken shall include measures to ensure:
   (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;
   (b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;
   (c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;

(d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

4 Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

Part IV Vocational Training, Handicrafts and Rural Industries

Article 21
Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

Article 22
1 Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.

2 Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.

3 Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

Article 23
1 Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

2 Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

Part V Social Security and Health

Article 24
Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

Article 25

1 Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.

2 Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.

3 The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.

4 The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

Part VI Education and Means of Communication

Article 26

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

Article 27

1 Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.

2 The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.

3 In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

Article 28

1 Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.

2 Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3 Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29
The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 30
1 Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

2 If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

Article 31
Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

Part VII Contacts and Co-operation across Borders

Article 32
Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

Part VIII Administration

Article 33
1 The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them.

2 These programmes shall include:
   (a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;
   (b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

Part IX General Provisions

Article 34
The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 35
The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

Part X Provisions

Article 36
This Convention revises the Indigenous and Tribal Populations Convention, 1957.

Article 37
The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 38
1 This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2 It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3 Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 39
1 A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2 Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 40

1 The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2 When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 41

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 42

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 43

1 Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides –
   (a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;
   (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2 This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 44

The English and French versions of the text of this Convention are equally authoritative.

3

UN draft Declaration on the Rights of Indigenous Peoples

Draft declaration as agreed upon by the members of the working group at its eleventh session

AFFIRMING that indigenous peoples are equal in dignity and rights to all other peoples, while recognising the right of all peoples to be different, to consider themselves different, and to be respected as such,

AFFIRMING ALSO that all peoples contribute to the diversity and richness of civilisations and cultures, which constitute the common heritage of humankind,

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

REAFFIRMING also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

CONCERNED that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

RECOGNISING the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

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

CONVINCED that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen

their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

RECOGNISING ALSO that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

EMPHASISING the need for demilitarisation of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

RECOGNISING in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

RECOGNISING ALSO that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

CONSIDERING that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

ACKNOWLEDGING that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

BEARING IN MIND that nothing in this Declaration may be used to deny any peoples their right of self-determination,

ENCOURAGING States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,

EMPHASISING that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

BELIEVING that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

SOLEMNLY PROCLAIMS the following United Nations Declaration on the Rights of Indigenous Peoples:

Part I

Article 1

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2
Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3
Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4
Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 5
Every indigenous individual has the right to a nationality.

Part II

Article 6
Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

Article 7
Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
(e) Any form of propaganda directed against them.

Article 8
Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognised as such.

Article 9
Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Article 10
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11
Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:
(a) Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;
(b) Recruit indigenous children into the armed forces under any circumstances;
(c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;
(d) Force indigenous individuals to work for military purposes under any discriminatory conditions.

Part III

Article 12
Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13
Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 14
Indigenous peoples have the right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Part IV

Article 15
Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

Article 16
Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 17
Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

Article 18
Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

Article 19
Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20
Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21
Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 22
Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 23
Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24
Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

Part VI

Article 25
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26
Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27
Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28
Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29
Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30
Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Part VII

Article 31
Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 32
Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards.

Article 34
Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

Article 35
Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right.

Article 36
Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

Part VIII

Article 37
States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognised herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38
Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognised in this Declaration.

Article 39
Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 40
The organs and specialised agencies of the United Nations system and other intergovernmental organisations shall contribute to the full realisation of the provisions of this Declaration through the mobilisation, *inter alia*, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 41
The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

Part IX

Article 42
The rights recognised herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43
All the rights and freedoms recognised herein are equally guaranteed to male and female indigenous individuals.

Article 44
Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

Article 45
Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

E/CN.4/Sub.2/1993/29/Annex I
23 August 1993

4

CERD General Recommendation VIII: identification with a particular racial or ethnic group

Identification with a particular racial or ethnic group (Art. 1, par. 1 & 4)

(Thirty-eighth session, 1990)

The Committee on the Elimination of Racial Discrimination,

Having considered reports from States parties concerning information about the ways in which individuals are identified as being members of a particular racial or ethnic groups or groups,

Is of the opinion that such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.

5

CERD General Recommendation XXIII: indigenous peoples

Indigenous Peoples

(Fifty-first session, 1997)

1 In the practice of the Committee on the Elimination of Racial Discrimination, in particular in the examination of reports of States' parties under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, the situation of indigenous peoples has always been a matter of close attention and concern. In this respect, the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.

2 The Committee, noting that the General Assembly proclaimed the International Decade of the World's Indigenous Peoples commencing on 10 December 1994, reaffirms that the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination apply to indigenous peoples.

3 The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardised.

4 The Committee calls in particular upon States parties to:

(a) Recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;

(b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;

(c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;

(e) Ensure that indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs and to preserve and to practise their languages.

5 The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

6 The Committee further calls upon States' parties with indigenous peoples in their territories to include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention.

6

CERD General Recommendation XXIV: reporting of persons belonging to different races, etc.

Reporting of persons belonging to different races, national/ethnic groups, or indigenous peoples (Art. 1)

(Fifty-fifth session, 1999)

1 The Committee stresses that, according to the definition given in article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention relates to all persons who belong to different races, national or ethnic groups or to indigenous peoples. If the Committee is to secure the proper consideration of the periodic reports of States' parties, it is essential that States' parties provide as far as possible the Committee with information on the presence within their territory of such groups.

2 It appears from the periodic reports submitted to the Committee under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, and from other information received by the Committee, that a number of States' parties recognise the presence on their territory of some national or ethnic groups or indigenous peoples, while disregarding others. Certain criteria should be uniformly applied to all groups, in particular the number of persons concerned, and their being of a race, colour, descent or national or ethnic origin different from the majority or from other groups within the population.

3 Some States' parties fail to collect data on the ethnic or national origin of their citizens or of other persons living on their territory, but decide at their own discretion which groups constitute ethnic groups or indigenous peoples that are to be recognised and treated as such. The Committee believes that there is an international standard concerning the specific rights of people belonging to such groups, together with generally recognised norms concerning equal rights for all and non-discrimination, including those incorporated in the International Convention on the Elimination of All Forms of Racial Discrimination. At the same time, the Committee draws to the attention of States parties that the application of different criteria in order to determine ethnic groups or indigenous peoples, leading to the recognition of some and refusal to recognise others, may give rise to differing treatment for various groups within a country's population.

4 The Committee recalls General Recommendation IV, which it adopted at its eighth session in 1973, and paragraph 8 of the general guidelines regarding the form and contents of reports to be submitted by States' parties under article 9, paragraph 1, of the Convention (CERD/C/70/Rev.3), inviting States' parties to endeavour to include in their periodic reports relevant information on the demographic composition of their population, in the light of the provisions of article 1 of the Convention, that is, as appropriate, information on race, colour, descent and national or ethnic origin.

7

General Comment of the HRC on the rights of minorities

ICCPR General Comment 23

The rights of minorities

(Article 27)

(Fiftieth session, 1994)

1 Article 27 of the Covenant provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. The Committee observes that this article establishes and recognises a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.

2 In some communications submitted to the Committee under the Optional Protocol, the right protected under article 27 has been confused with the right of peoples to self-determination proclaimed in article 1 of the Covenant. Further, in reports submitted by States' parties under article 40 of the Covenant, the obligations placed upon States' parties under article 27 have sometimes been confused with their duty under article 2.1 to ensure the enjoyment of the rights guaranteed under the Covenant without discrimination and also with equality before the law and equal protection of the law under article 26.

3.1 The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognisable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights

conferred on individuals, in Part III of the Covenant and is cognisable under the Optional Protocol.[1]

3.2 The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources.[2] This may particularly be true of members of indigenous communities constituting a minority.

4 The Covenant also distinguishes the rights protected under article 27 from the guarantees under articles 2.1 and 26. The entitlement, under article 2.1, to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority. In addition, there is a distinct right provided under article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in article 27 or not.[3] Some States' parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.

5.1 The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.

5.2 Article 27 confers rights on persons belonging to minorities which 'exist' in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term

[1] See *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40* (A/39/40), annex VI, General Comment No. 12 (21) (article 1), also issued in document CCPR/C/21/Rev.1; *ibid.*, *Forty-fifth Session, Supplement No. 40* (A/45/40), vol. II, annex IX, sect. A, Communication No. 167/1984 (*Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*), views adopted on 26 March 1990.

[2] See *ibid.*, *Forty-third Session, Supplement No. 40* (A/43/40), annex VII, sect. G, Communication No. 197/1985 (*Kitok v Sweden*), views adopted on 27 July 1988.

[3] See *ibid.*, *Forty-second Session, Supplement No. 40* (A/42/40), annex VIII, sect. D, Communication No. 182/1984 (*F. H. Zwaan-de Vries v The Netherlands*), views adopted on 9 April 1987; *ibid.*, sect. C, Communication No. 180/1984 (*L. G. Danning v The Netherlands*), views adopted on 9 April 1987.

'exist' connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.

5.3 The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant. In particular, it should be distinguished from the general right to freedom of expression protected under article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not. Further, the right protected under article 27 should be distinguished from the particular right which article 14.3 (f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14.3 (f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.[4]

6.1 Although article 27 is expressed in negative terms, that article, nevertheless, does recognise the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

6.2 Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the

[4] See *ibid.*, *Forty-fifth Session, Supplement No. 40,* (A/45/40), vol. II, annex X, sect. A, Communication No. 220/1987 (*T. K. v France*), decision of 8 November 1989; *ibid.*, sect. B, Communication No. 222/1987 (*M. K. v France*), decision of 8 November 1989.

rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

7 With regard to the exercise of the cultural rights protected under article 27, the Committee observes 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.[5] 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.

8 The Committee observes that none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.

9 The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States' parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States' parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.

[5] See notes 1 and 2 above, Communication No. 167/1984 (*Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*), views adopted on 26 March 1990, and Communication No. 197/1985 (*Kitok v Sweden*), views adopted on 27 July 1988.

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