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The Human Rights of Indigenous Peoples:
United Nations Developments†

S. James Anaya*  

I. INTRODUCTION

In the face of tremendous adversity, indigenous peoples have long sought to flourish as distinct communities, and to roll back the historical patterns and legacies of colonization. In conjunction with efforts at the domestic level, indigenous peoples have appealed to the international system, mostly through its human rights regime in recent years, to advance their cause. Indigenous Hawaiians are among the world’s indigenous peoples who have survived colonial onslaught and now assert their self-determination. Largely as a result of their own advocacy at the international level, indigenous peoples are now distinct subjects of concern within the international human rights program.† Several developments within the

† This article is adapted from parts of the author’s previous work, The Human Rights of Indigenous Peoples, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK 301 (Catarina Krause & Martin Scheinin eds., 2d ed. 2009). This adaptation is presented here in honor of the late Jon Van Dyke and with acknowledgement of his pioneering work in the areas of international law and indigenous rights, which contributed to the intellectual support for the developments discussed here.

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† For detailed discussions about the measures adopted by international and regional institutions concerning indigenous peoples, see S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (Oxford Univ. Press, 2d ed. 2004); S. JAMES ANAYA, INTERNATIONAL
United Nations system over the last few decades mark the progress toward placing indigenous peoples firmly on the international human rights agenda. These developments can be seen as progressing along two mutually reinforcing tracks. One is toward enhanced institutional commitment to the concerns of indigenous peoples, which has entailed a focus on indigenous issues by existing UN human rights bodies along with the creation of new institutions. This institutional commitment has allowed indigenous peoples themselves a measure of access to the international arena, while bringing increased depth of understanding about the their disadvantaged conditions and resulting in multiple programmatic initiatives to address those conditions. A second track, which is to a significant extent a product of the first, entails the generation of a new set of international standards for the treatment of the world’s indigenous peoples. These standards can be seen to be grounded in fundamental principles of universal human rights, while being aimed at remedying the historical and continuing deprivation of those rights. They represent a quickly developing body of international policy and law, with an emphasis on protecting indigenous bonds of community and culture.

The following pages provide a discussion of the major developments along these two tracks within the UN system, including its affiliate, the International Labour Organization. Important, complementary developments have taken place within regional institutions, in particular those of the inter-American and African human rights systems. This essay, however, is limited to UN developments.

II. THE INSTITUTIONAL COMMITMENT

A watershed in the international commitment to indigenous issues was the 1971 resolution of the UN Economic and Social Council authorizing the then UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, an expert advisory body of the intergovernmental Commission on Human Rights, to conduct a study on the “Problem of Discrimination against Indigenous Populations.” The resulting multivolume work by Special Rapporteur José Martínez Cobo compiled extensive data on indigenous peoples worldwide and made a series of findings and recommendations generally supportive of indigenous peoples’ demands. The Martínez Cobo study became a standard reference for

HUMAN RIGHTS AND INDIGENOUS PEOPLES (2009); PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS (2002).

discussion of the subject of indigenous peoples within the United Nations system. Moreover, it initiated a pattern of multiple activities concerning indigenous peoples among United Nations, regional, and affiliated institutions.

A. The Working Group on Indigenous Populations

Upon recommendation of the Martínez Cobo study and representatives of indigenous groups, the United Nations Commission on Human Rights, and its parent body the UN Economic and Social Council, approved in 1982 the establishment of the UN Working Group on Indigenous Populations. The Working Group was created as part of the Sub-Commission on Prevention of Discrimination and Protection of Minorities with a twofold mandate: “to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations . . . [and] give special attention to the evolution of standards concerning the rights of indigenous populations.”

Pursuant to its standard-setting mandate, the Working Group took the initiative of developing a draft Declaration on the Rights of Indigenous Peoples, which became the basis for subsequent discussions ultimately leading to the adoption of the Declaration in revised form by the UN General Assembly, as discussed below.

The Working Group ceased to exist after the restructuring of the UN human rights machinery in 2006. When the newly created Human Rights Council replaced the Commission on Human Rights that year, the latter’s Sub-Commission, along with its working groups, including the Working Group on Indigenous Populations, expired. However, as discussed below, in late 2007, the Council established its own five-member expert advisory body to conduct studies and make recommendations to the Council on matters concerning indigenous peoples.

following definition:

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.

Id. ¶ 379, at 4.


During its life, the Sub-Commission’s Working Group on Indigenous Populations provided an important international platform for indigenous peoples and played a major role in shaping international action in response to their concerns. The Working Group broke new ground within the UN system when it opened its sessions to and allowed oral and written submissions by all indigenous peoples and organizations, without the formal UN accreditation usually required for non-governmental organizations or other non-state actors to participate in official meetings of UN organs. Furthermore, the Working Group was a catalyst for generating heightened international concern for indigenous peoples. This concern was further elevated by the UN General Assembly’s designation of 1993 as the International Year for the World’s Indigenous Peoples followed by a first and second International Decade on the same theme.

B. The Permanent Forum on Indigenous Issues

The most significant achievement during the first International Decade of the World’s Indigenous People was the creation of the UN Permanent Forum on Indigenous Issues, today the major venue for indigenous peoples at the United Nations. The UN Working Group on Indigenous Populations was at the lowest level in the hierarchy of the UN organizational structure, despite its significant influence and role. By contrast, the Permanent Forum answers directly to the UN Economic and Social Council, one of the UN Charter organs. The idea for creating the Permanent Forum was first launched at the 1993 World Conference on Human Rights.\textsuperscript{5} The United Nations’ General Assembly responded by asking the Commission on Human Rights and its subsidiary organs to give “priority consideration” to the idea at the same time it declared the first International Decade of the World’s Indigenous People.\textsuperscript{6}

The Economic and Social Council finally established the Permanent Forum on Indigenous Issues in July 2000.\textsuperscript{7} Its mandate is to advise the UN agencies and programmes on matters concerning indigenous peoples and to promote awareness and coordination on indigenous issues within the UN system.\textsuperscript{8} Eight of the sixteen members who constitute the Permanent Forum are nominated by governments and elected by the Economic and Social Council; the other eight are named by the Council’s president in

\textsuperscript{7} E.S.C. Res. 2000/22 (July 29, 2000).
\textsuperscript{8} \textit{Id.} ¶ 2.
consultation with indigenous organizations. As expected, the individuals appointed by the president thus far have all been themselves leaders of indigenous organizations or people who were nominated by indigenous constituencies from the diverse regions of the world. Additionally, the elected chairperson of the Forum has been indigenous.

The Permanent Forum met for the first time in May 2002 at the UN Headquarters in New York and has since met each year at that venue around the same time. In addition to the sixteen members who constitute the Permanent Forum and a wide range of government and intergovernmental agency representatives, hundreds of representatives of indigenous peoples and organizations have attended the sessions, participating with oral and written submissions much as they did in the sessions of the Working Group on Indigenous Populations.

The Forum’s work has centred principally on the review and coordination of the programmes of various UN agencies and affiliates that concern indigenous peoples, and has been organized around the topical areas of the Economic and Social Council’s competency. These “mandate spheres” include social and economic development, the environment, culture, education, health, and human rights. In addition to devoting attention to each of these topics at its annual sessions, the Forum focuses each year on a particular theme. The themes have included: indigenous children and youth, indigenous women, UN Millennium Goals (focusing on eradication of poverty and hunger, and the achievement of universal primary education), lands and natural resources, climate change, the impact of development policies on indigenous peoples’ culture and identity, and the doctrine of discovery. The Forum has also convened workshops and commissioned studies in association with these themes.

C. The Special Rapporteur on Rights of Indigenous Peoples

As part of its increasing attention to indigenous concerns, the UN Human Rights Council’s predecessor, the Commission on Human Rights, authorized in 2001 the appointment of a Special Rapporteur on the rights of indigenous peoples for an initial term of three years. The mandate of the

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9 Id. ¶ 1.
10 E.S.C. Res. 2000/22, supra note 7, at ¶ 2.
12 Comm’n on Human Rights, Res. 2001/57, U.N. Doc. E/CN.4/2002/97 (Apr. 24, 2001). When initially established, this position was given the title of “Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.” Id. This position is one of the several thematic mandates held by independent experts now functioning under the
Special Rapporteur on indigenous peoples was established with the authority to “gather, request, receive and exchange information and communications from all relevant sources” concerning human rights violations against “indigenous people themselves and their communities and organizations,” as well as to “formulate recommendations and proposals ... to prevent and remedy” such violations. This mandate was extended by the Commission on Human Rights in 2004 and by the Human Rights Council in 2007 and in 2010. In doing so, the Human Rights Council broadened the mandate to promote collaboration between the Special Rapporteur and other UN agencies, states, indigenous peoples, and non-governmental organizations to eradicate barriers to the enjoyment of human rights by indigenous peoples and to identify best practices; and the Council also called upon the Special Rapporteur to promote application of the recently adopted Declaration on the Rights of Indigenous Peoples.

The position of the Special Rapporteur began to function with the appointment of the respected anthropologist Rodolfo Stavenhagen, and has continued with the selection of the author as the second Special Rapporteur as from May 2008. The work of the Special Rapporteur has developed within four interrelated spheres of activity. First, the Special Rapporteur has engaged in or promoted research, usually in connection with seminars or conferences, around a series of topics identified as being of interest to indigenous peoples worldwide. These topics have included the impacts of development projects on indigenous communities, the implementation of domestic laws and international standards to protect indigenous rights, the relationship between formal state law and customary indigenous law, indigenous cultural rights, indigenous children, indigenous participation in policy and decision-making processes, various forms of discrimination against indigenous individuals, implementation of the UN Declaration on the Rights of Indigenous Peoples, the duty of states to consult with indigenous peoples, corporate responsibility to respect indigenous rights,


Comm’n on Human Rights, Res. 2001/57, supra note 12, ¶¶ 1(a), 1(b).

violence against indigenous women and girls, and extractive industries on or near indigenous territories.

A second sphere of activity involves developing reports on particular countries with conclusions and recommendations aimed at identifying areas of concern and improving the human rights conditions of indigenous peoples in those countries. The reporting process typically involves a visit to the country under review, including the capital and selected places of interest, during which the Special Rapporteur interacts with government representatives, indigenous communities from different regions, and a cross-section of civil society working on issues of relevance to indigenous peoples. The country reports have often highlighted the topics being addressed by the Special Rapporteur through the thematic research. One of Dr. Stavenhagen’s first country visits was to the Philippines. That visit was linked to the Special Rapporteur’s initiative to examine the impacts of large scale development projects. He reported problems concerning indigenous land rights in that country, as well as serious human rights violations resulting from development projects such as the construction of dams, large scale logging concessions, commercial plantations, and mining; and he provided recommendations on action to address those problems.

Other country visits have taken the Special Rapporteur to Argentina, Australia, Brazil, Bolivia, Botswana, Canada, Colombia, Chile, Ecuador, Guatemala, Kenya, Mexico, Namibia, Nepal, New Caledonia, New Zealand, Republic of the Congo, Russia, the Sami region in the Nordic countries, South Africa, and the United States.

In a third area of activity, the Special Rapporteur has worked to promote good practices, advancing legal, administrative and programmatic reforms at the national and international levels to implement relevant international standards. For example, shortly after assuming the Special Rapporteur mandate in May 2008, the author, at the request of President of the Constituent Assembly of Ecuador and indigenous organizations, provided technical assistance in Ecuador’s constitutional revision process for ultimately successful efforts to include affirmation of indigenous peoples’ collective rights in the new constitution. Also within this sphere of

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16 See id., ¶¶ 29–56, 67.

17 The thematic, country, and other reports of the Special Rapporteur are available at the following web sites: http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx and http://www.unsr.jamesanaya.org.

18 See Special Rapporteur on the situation of human rights and fundamental freedoms of
promoting good practices, the Special Rapporteur has advised United Nations agencies and affiliated institutions in the development of their policies and practices as they relate to indigenous peoples, as was done for example, when in 2011 he provided extensive observations on the UN Development Programme draft guidelines on consultation with indigenous peoples for activities carried out in the context of the climate change mitigation initiative for reducing emissions from deforestation and forest degradation ("REDD").

Finally, the Special Rapporteur receives and often takes action on written communications alleging specific violations of the human rights of indigenous individuals and groups. The usual practice is for the Special Rapporteur to forward such a communication to the government concerned if it contains sufficient and credible information, along with a request that the government respond. Summaries of the communications together with summaries of the government responses, if any, and observations by the Special Rapporteur are included in the reports to the Council. The observations by the Special Rapporteur may include an evaluation of the situation and recommendations to the government concerned. The Special Rapporteur has sometimes conducted on-site visits to examine particular cases, as the author has done to investigate the situation of a mine in Guatemala and the construction of hydroelectric dams in Panama and Costa Rica. Also, the Special Rapporteur has used visits undertaken in the context of developing country reports to intervene in situations brought to his attention through communications from indigenous groups and non-


21 See La situación de los derechos humanos de las comunidades afectadas por la mina Marlin, en las municipalidades de San Miguel Ixtahuacán y Sipacapa, Departamento de San Marcos, App., UN doc. A/HRC/18/35/Add.3 (June 7, 2011).

22 See Observaciones sobre la situación de la Comunidad Charco La Pava y otras comunidades indígenas afectadas por el proyecto hidroeléctrico Chan 75, A/HRC/12/34/Add.5 (Sept. 7 2009).

23 See La situación de los pueblos indígenas afectados por el proyecto hidroeléctrico El Diquis en Costa Rica, A/HRC/18/35/Add.7 (July 11, 2011).
governmental organizations. For example, during his country visit to Chile, Dr. Stavenhagen engaged in discussions with authorities there about the fate of Mapuche leaders who were being prosecuted under a Pinochet-era anti-terrorism law for their activities defending Mapuche land rights.\(^\text{24}\)

\textbf{D. Expert Mechanism on the Rights of Indigenous Peoples}

As noted before, in 2007 the Human Rights Council established the Expert Mechanism on the Rights of Indigenous Peoples, which like the Special Rapporteur, reports directly to the Council, providing thematic expertise on indigenous issues. The Experts’ mandate is to advise the Council and prepare studies on topics proposed by the Council. The Expert Mechanism consists of five individual experts appointed by the Council, with “due regard” being given to experts of indigenous origin.\(^\text{25}\)

The Expert Mechanism met for the first time in Geneva in October 2008 with over 300 participants, many of whom were indigenous, in attendance.\(^\text{26}\) During the meeting, the Experts made recommendations on the Durban Review Conference on racism that took place in 2009 at the request of the Preparatory Committee of the Conference; developed proposals for the Human Rights Council, including the use of the Declaration on the Rights of Indigenous Peoples as one of the human rights standards in the Universal Periodic Review; and began preparation for the Mechanism’s first study, which focused on the theme of indigenous peoples’ right to education and was submitted to the Human Rights Council in 2009.\(^\text{27}\) Subsequent studies have address the right of indigenous peoples


in decisions affecting them, indigenous culture and languages, and access to justice. The Expert Mechanism will continue to meet annually for up to five days, including in sessions open to states, UN mechanisms and bodies, indigenous peoples' organizations, and other non-governmental organizations.

III. INTERNATIONAL STANDARD-SETTING

The commitment of institutional energies to indigenous issues that was represented by the UN Working Group on Indigenous Populations and that is now embodied by the Permanent Forum on Indigenous Issue, the mandate of the Special Rapporteur on the Rights of Indigenous Peoples of the Human Rights Council, and the Council's Expert Mechanism on Indigenous Peoples, has provided indigenous peoples important avenues of access to the international arena and has generated heightened focus on their concerns. And with this heightened focus has come a building consensus on the rights of indigenous peoples.

A. The UN Declaration on the Rights of Indigenous Peoples

1. Background

The most prominent manifestation of this building global normative consensus on a global scale is the UN Declaration on the Rights of Indigenous Peoples. The UN General Assembly adopted the Declaration on September 13, 2007, after over twenty years of negotiations between UN Member States, indigenous peoples, and human rights organizations. Drafting of the Declaration began in the United Nations Working Group on Indigenous Populations, pursuant to the Working Group's standard-setting mandate. Representatives of indigenous peoples from around the world actively participated in the years of deliberation by the Working Group that began in the early 1980s. A draft of the Declaration was produced and

29 Id.
31 Id.
adopted in 1993 by the UN’s five-member Working Group, and it was submitted to the UN Commission on Human Rights in 1994.\textsuperscript{33}

The Commission on Human Rights subsequently established its own working group consisting of the Commission’s member states to consider the Declaration and made arrangements for indigenous participation in the working group meetings.\textsuperscript{34} It was apparent from the outset that few states participating in the Commission working group would accept the prior draft Declaration without substantial amendments, and this resulted in a near stalemate in the deliberations for a number of years as many participating indigenous representatives insisted on nothing less than the Sub-Commission draft. Nonetheless, as the deliberations in the Commission working group proceeded over its eleven-year life, consensus on core principles and related prescriptions became increasingly apparent. In 2005, the chairperson of the Commission working group, Luis Enrique Chávez of Peru, began advancing proposals that eventually led to a complete revised text.\textsuperscript{35} Almost all indigenous groups and states participating in the deliberations came to align themselves with the chairperson’s text, and that text was adopted in 2006 by the Human Rights Council, which by that time had replaced the Commission on Human Rights. By the same resolution, the Council submitted the text to the UN General Assembly for final action.\textsuperscript{36}

Final approval by the General Assembly, however, would not come until a year later, as dissention among African states emerged. African states had remained mostly on the sidelines in the previous discussions on the Declaration, apparently on the assumption that it would have limited or no applicability to them. But it was now clear that many African groups were claiming indigenous status and that many if not all African states could find themselves subject to scrutiny under the Declaration’s standards. Led by Namibia, African states proposed a deferment in the vote on the Declaration


in order to revisit some of its provisions. The General Assembly’s Third Committee and then the General Assembly in plenary voted in favour of the deferment,³⁷ and a complex and at times opaque process of diplomatic exchanges ensued. In the end, the African states were satisfied by a package of amendments negotiated by Mexico that addressed key concerns while not altering the Declaration in its essential parts. The amendments added flexibility to some of the Declaration’s provisions and emphasis on the need to contextualize its implementation in light of the wide diversity of circumstances in which it might be relevant.

On September 13, 2007, amid expressions of celebration by indigenous peoples, 144 UN Member States voted to adopt the Declaration, including most African states.³⁸ Notably, Australia, Canada, New Zealand, and the United States voted against it, having become isolated in their opposition to the text even with the negotiated amendments.³⁹ Eleven states registered abstentions; these include Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine.⁴⁰

2. The Content of the Declaration

The Chair of the UN Permanent Forum on Indigenous Issues welcomed the adoption of the Declaration, noting that it “has the distinction of being the only Declaration in the UN which was drafted with the rights-holders, themselves, the Indigenous Peoples.”⁴¹ The Declaration is anchored in the complementary human rights of equality and self-determination, declaring that indigenous peoples are equal to all other peoples⁴² and that, like all other peoples, they “have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their

³⁹ Id.
⁴⁰ Id.
economic, social and cultural development. On this grounding, the Declaration affirms the collective rights of indigenous peoples in relation to culture, development, education, social services, and traditional territories; and it mandates respect for indigenous-state historical treaties and modern compacts.

The international attention to indigenous peoples highlighted by the Declaration is driven by concern over patterns of human rights abuses that are linked to histories of colonialism, or something like colonialism. The Declaration does not define “indigenous peoples,” but it makes clear who they are by emphasizing the common pattern of human rights violations they have suffered. The Preamble specifically grounds the Declaration in the concern “that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories[,] and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests[].”

By alluding to this history at the outset, the Declaration reveals its character as essentially a remedial instrument. It is not privileging indigenous peoples with a set of rights unique to them. Rather, indigenous peoples and individuals are entitled to the human rights enjoyed by other peoples and individuals, although these rights are to be understood in the context of the particular characteristics that are common to groups within the indigenous rubric. Thus, Article 3 claims for indigenous peoples the same right of self-determination that is affirmed in common Article 1 of the widely ratified international human rights covenants as a right of “all peoples.” The purpose of the Declaration is to remedy the historical denial of the right of self-determination and related human rights so that indigenous peoples may overcome systemic disadvantage and achieve a position of equality vis-à-vis heretofore dominant sectors.

With its remedial thrust, the Declaration contemplates change that begins with state recognition of rights of indigenous group survival that are deemed “inherent,” such recognition being characterized as a matter of

43 Id. art. 3.
44 Id.
45 Id. preamble, ¶ 6.
47 See generally S. James Anaya, Self-Determination as a Collective Human Right Under Contemporary International Law, in OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 3, 3-18 (Pekka Aikio & Martin Scheinin eds., 2000).
“urgent need.” Professor Erica-Irene Daes, the long-time chair of the UN Working Group on Indigenous Populations, has described this kind of change as entailing a form of “belated state-building” through negotiation or other appropriate peaceful procedures involving meaningful participation by indigenous groups. According to Professor Daes, self-determination entails a process:

[T]hrough which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.

Accordingly, the Declaration generally mandates that “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration[,]” and it further includes particularized requirements of special measures in connection with most of the rights affirmed. Such special measures are to be taken with the end of building healthy relationships between indigenous peoples and the larger societies as represented by the states. In this regard, “treaties, agreements and other constructive arrangements” between states and indigenous peoples are valued as useful tools, and the rights affirmed in such instruments are to be safeguarded.

Among the special measures required are those to secure “autonomy or self-government” for indigenous peoples over their “internal and local affairs,” in accordance with their own political institutions and cultural patterns; as well as measures to ensure indigenous peoples’ “right to participate fully, if they so choose, in the political, economic, social and cultural life of the State” and to have a say in all decisions affecting them. The affirmation of these dual aspects of self-determination—on the one hand autonomous governance and on the other participatory engagement—reflects the widely shared understanding that indigenous

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51 Id. preamble, art. 37.
52 Id. art. 4.
53 See id. art. 5.
54 Id. art. 5.
55 Id. arts. 18, 19.
peoples are not to be considered unconnected from larger social and political structures. Rather, they are appropriately viewed as simultaneously distinct from, yet joined to, larger units of social and political interaction, units that may include indigenous federations, the states within which they live, and the global community itself.

Also significantly, special measures are required to safeguard the right of indigenous peoples "to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." And because indigenous peoples have been deprived of great parts of their traditional lands and territories, the Declaration requires states to provide "redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation," for the taking of the lands. Special measures are also required to restore and secure indigenous peoples' rights in relation to culture, religion, traditional knowledge, the environment, physical security, health, education, the welfare of women and children, the media, and maintaining traditional relations across international borders.

While the Declaration articulates rights and the need for special measures in terms particular to indigenous peoples, the rights affirmed are simply derived from human rights principles that are deemed of universal application. These include, especially, principles of equality and self-determination as already stressed. Other generally applicable human rights also are foundational, including the right to enjoy culture, the right to health, right to life, and the right to property, all of which have been affirmed in various human rights instruments as applicable to all segments of humanity. Indigenous peoples’ collective rights over traditional lands and resources, for example, can be seen as derivative of the universal human right to property, as concluded by the inter-American human rights institutions, or as extending from the right to enjoy culture, as affirmed by the UN Human Rights Committee in light of the cultural significance of lands and resources to indigenous peoples. By particularizing the rights of indigenous peoples, the Declaration seeks to accomplish what should have been accomplished without it: the application of universal human rights principles in a way that appreciates not just the humanity of indigenous individuals but that also values the bonds of community they form. The Declaration, in essence, contextualizes human rights with

56 Id. art. 26(1).
57 Id. art. 28(1).
58 See id. arts. 31(1), 36(1).
60 See id. at 288-89.
61 See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295,
attention to the patterns of indigenous group identity and association that constitute them as peoples, and demands measures to make those human rights a reality.62

3. The Status of the Declaration

Having been proclaimed by a resolution of the UN General Assembly, the Declaration on the Rights of Indigenous Peoples has in formal terms a status like that of the Universal Declaration of Human Rights and other numerous human rights declarations adopted by the General Assembly pursuant to its authority under the UN Charter to “make recommendations” on matters of concern to the organization, including human rights.63 Such declarations, although arising from affirmative votes of state members of the UN acting jointly in the General Assembly, are not like treaties to which states individually commit to be bound through formal means of acceptance. Thus, in and of themselves, UN General Assembly declarations are not legally binding.64 Nonetheless, they have some measure of authority and impact when they are invoked, given that they emanate from the most representative political organ of the world body and are typically grounded in well-established principles of world order or human rights.65 Because of these characteristics, UN declarations and other such non-treaty documents proclaiming human rights or related standards are sometimes referred to as “soft law”.66

But beyond seeing the Declaration on the Rights of Indigenous Peoples as soft law, it is also possible to understand the Declaration as related to legal obligation within standard categories of international law. First, as a statement of human rights the Declaration informs understanding of the general obligations that states have to promote and respect human rights under the UN Charter. Second, as already noted, the Declaration builds upon well established principles of human rights—including self-determination, equality, property, and cultural integrity—that are incorporated into widely ratified human rights treaties, such as the International Covenant on Civil and Political Rights, and the International

supra note 42.
62 Id.
63 See U.N. Charter art. 13, para. 1.
65 Id.
66 See SHELTON, supra note 59, at 449-63.
Convention on the Elimination of All Forms of Racial Discrimination.67 The work of the monitory bodies attached these treaties, discussed below, makes evident that the Declaration is in significant part interpretive of the principles found in these treaties that legally bind the states that have ratified them.

Finally, the Declaration on the Rights of Indigenous Peoples can be understood to reflect or embody, to some degree, customary or general principles of international law.68 The Declaration undoubtedly represents widespread consensus on the rights of indigenous peoples and a certain level of global expectation that those rights will be upheld, at least in regard to its core provisions. Even those few states that voted against the Declaration did so while affirming adherence to the basic human rights standards embodied in the Declaration. They registered objections only to particular provisions of the Declaration, especially those concerning self-determination and lands and resources, interpreting certain aspects of those provisions—but not necessarily their normative foundations—as too far-reaching.69 And now, in the aftermath of a change of governments, Australia reversed its position and endorsed the Declaration in 2009.70 The other states (Canada, New Zealand, and USA) followed suit in 2010.71

The basic normative precepts embodied in the Declaration appear in several other written instruments and in decisions by several international

68 The International Law Association, a global consortium of international lawyers, judges, and academics, conducted a major study on the rights of indigenous peoples over several years and concluded in 2012 that key aspects of the Declaration constitute customary international law. Int’l Law Ass’n, Rights of Indigenous Peoples: Res. 5/2012 (2012).
bodies, including regional and specialized institutions.\textsuperscript{72} Several instruments developed within United Nations processes addressed indigenous issues prior to the Declaration’s proclamation by the General Assembly.\textsuperscript{73} Resolutions adopted at the 1992 United Nations Conference on Environment and Development include provisions on indigenous people and their communities. The Rio Declaration,\textsuperscript{74} and the more detailed environmental programme and policy statement known as Agenda 21,\textsuperscript{75} reiterate precepts of indigenous peoples’ rights and seek to incorporate them within the larger agenda of global environmentalism and sustainable development.\textsuperscript{76} In the same vein, Article 8(j) of the Convention on Biodiversity affirms the value of traditional indigenous knowledge in connection with conservation, sustainable development, and intellectual property regimes.\textsuperscript{77} Resolutions adopted at subsequent major UN conferences—the 1993 World Conference on Human Rights, the 1994 UN Conference on Population and Development, the World Summit on Social Development of 1995, the Fourth World Conference on Women of 1995, and the World Conference Against Racism of 2001—similarly include provisions that affirm or are consistent with prevailing normative assumptions in this regard.\textsuperscript{78} Further still, the Convention on the Rights of

\textsuperscript{72} See infra, at 1005-08 for a discussion on the development of International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples.

\textsuperscript{73} See, e.g., Rio Declaration, infra note 74.


\textsuperscript{75} Id. (vols. 1, 2, 3), Annex 2.

\textsuperscript{76} Especially pertinent is Chapter 26 of Agenda 21. See id. ch. 26. Chapter 26 is phrased in nonmandatory terms; nonetheless, it carries forward normative precepts concerning indigenous peoples and hence contributes to the crystallization of consensus on indigenous peoples’ rights. Chapter 26 emphasizes indigenous peoples’ “historical relationship with their lands” and advocates international and national efforts to “recognize, accommodate, promote and strengthen” the role of indigenous peoples in development activities. Id.

\textsuperscript{77} Convention on Biological Diversity, art. 8(j), U.N. Doc. UNEP/BIO.Div/N7–INC.5/4, 31 ILM 818 (June 5, 1992). Implementation of the Convention includes periodic meetings of State Parties (Conferences of the Parties), and a number of technical committees and working groups on specific issues covered by the convention. The issue of indigenous traditional knowledge has been the object of a specific focus by the Conference of the Parties. See, e.g., Decision III/14, Implementation of Article 8(j), Report of the Third Meeting of Conference of the Parties to the Convention on Biological Diversity, U.N. Doc. UNEP/CBD/COP/3/38 (1997), Annex 2.

the Child, a UN-sponsored treaty that has been ratified by almost all of the world’s states, affirms in Article 30 the right of indigenous children to culture, religion and language.\textsuperscript{79}

With these antecedents, the Declaration manifests a strongly rooted level of consensus about the human rights of indigenous peoples, and it also represents expectations of compliance with these rights.\textsuperscript{80} The discussion about indigenous peoples and their rights promoted through multiple international venues has proceeded in response to demands made by indigenous groups over several years and upon an extensive record of justification.\textsuperscript{81} The pervasive assumption has been that the articulation of norms concerning indigenous peoples has been an exercise in identifying standards of conduct that are \textit{required} to uphold widely-shared values of human dignity.\textsuperscript{82} Accordingly, indigenous peoples’ rights can be seen to derive from previously accepted, generally applicable human rights principles, as discussed earlier.\textsuperscript{83} The multilateral processes that build a common understanding of the content of indigenous peoples’ rights—as now reflected in the Declaration—therefore also build expectations that the rights will be upheld.\textsuperscript{84}

The customary international law character of at least the core precepts of the Declaration is reinforced by a developing pattern of domestic laws, judicial decisions, and administrative practices in various countries that are generally in line with those precepts.\textsuperscript{85} For example, the Supreme Court of

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\item \textsuperscript{(h), 35(e), 38(g), 54(c), 61, 67, 74(h), 75(g); Beijing Declaration, in Report of the Fourth World Conference on Women (Beijing, 4–15 Sept. 1995), U.N. Doc. A/CONF.177/2 (Oct. 17, 1995), ch. 1, res. 1, Annex I, ¶ 32; id., Annex II, ¶¶ 8, 32, 34, 58(q), 60(a), 61(c), 83(m), (n) and (o), 89, 106(c) and (y), 109(b) and (j), 116, 167(c), 175(f). However, it should be noted that, from the point of view of the indigenous representatives participating in these conferences, the provisions of these resolutions have not provided sufficient affirmation of rights of the indigenous people.}\textsuperscript{79}
\item \textsuperscript{Convention on the Rights of the Child, art. 30, November 20, 1989, 1577 U.N.T.S. 3.}\textsuperscript{80}
\item \textsuperscript{See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, \textit{supra} note 42.}\textsuperscript{81}
\item \textsuperscript{ANAYA, \textit{INDIGENOUS PEOPLE IN INTERNATIONAL LAW}, \textit{supra} note 1, at 61.}\textsuperscript{82}
\item \textsuperscript{Id. at 69.}\textsuperscript{83}
\item \textsuperscript{Id. at 97.}\textsuperscript{84}
\item \textsuperscript{Id. at 72.}\textsuperscript{85}
\item \textsuperscript{This includes a pattern of new or amended constitutions and laws favouring indigenous rights in a number of countries. \textit{See}, e.g., \textit{CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION]} art. 231 (Braz.); \textit{CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.]} arts. 171, 176, 330; \textit{CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR} art. 56-60; Constitution Act, 1982, art. 35.1 (U.K.), \textit{reprinted in} R.S.C. 1985, app. II, no. 44 (Can.). For a survey of domestic state practice in several countries across the globe, see Siegfried Wiessner, \textit{Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis}, 12 \textit{HAV. HUM. RTS. J.} 57 (1999). \textit{See also} S. James Anaya & Robert A. Williams, Jr., \textit{The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights
Belize affirmed that the Maya people of that country have rights to land on the basis of their customary land tenure, and it further found that these rights are protected by the general rights to property and equal protection of the Constitution of Belize. In its decision the court not only applied domestic law in a manner that coincided with the land rights provisions of the Declaration, it specifically invoked the Declaration to reinforce its constitutional ruling. The court held that "this Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it."

As indicated by the Supreme Court of Belize, the Declaration may be characterized as reflecting general principles of international law, in addition to customary international law. The distinction between customary international law and general principles of international law is ambiguous in modern doctrine. The rubric of general principles, however, is now often understood to include not just such shared principles of domestic law, but also principles reflected on a widespread basis in state practice in the international arena, discernible from numerous international treaties or other standard-setting documents, or which are necessary as logical propositions of legal reasoning. Even before the Declaration was finally adopted, the Inter-American Commission on Human Rights identified "general international legal principles developing out of and applicable inside and outside of the inter-American system" regarding

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87 The court, in Maya Villages Case, id. ¶ 131, referred especially to Article 26 of the Declaration, which provides: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, supra note 42, art. 26.
88 Maya Villages Case, ¶ 132.
89 Id.; see also Statute of the International Court of Justice, art. 38(1)(c), June 26, 1945, T.S. No. 993, 59 Stat. 1055 (including among the sources of law to be applied by the World Court "general principles of law recognized by civilized nations").
90 The classic distinction is that, while customary international law evolves from the actual day-to-day practice of states, "general principles" embrace the principles of private and public law administered in domestic courts where such principles are applicable to international relations. See J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 57-63 (H. Waldock ed., 6th ed. 1963).
indigenous peoples. It did so by reference to several international documents, including the Commission's own draft of an American Declaration on the Rights of Indigenous Peoples, which included provisions similar to those of the UN Declaration.

Whatever the precise legal status of the UN Declaration on the Rights of Indigenous Peoples, given its character as a pronouncement of the major political organ of the United Nations it will continue to be applied in some measure by the Permanent Forum on Indigenous Issues, the Human Rights Council, and other UN institutions in executing their own programmes and in evaluating state conduct on the subject. In its resolution of September 2007 extending the mandate of the Special Rapporteur on indigenous peoples, the Human Rights Council directed the Special Rapporteur to "promote the United Nations Declaration on the Rights of Indigenous Peoples... where appropriate." As a global benchmark of indigenous rights, the Declaration also bears, as it should, on the activities of regional and specialized international institutions concerning indigenous peoples, as well as on domestic state practice as exemplified by the Maya Villages Case in Belize.

B. ILO Convention No. 169

A second major international instrument, which undoubtedly is legally binding within its ambit of application, and which reinforces the global consensus around standards of indigenous rights, is the International Labour Organization ("ILO") Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries of 1989. Parallel to the developments leading to the Declaration on the Rights of Indigenous Peoples, the International Labour Organization, a specialized agency of the UN, embarked on its own indigenous rights exercise which resulted in the

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95 See generally Maya Villages Case.
adoption of its Convention No. 169. This international treaty, opened for ratification by the ILO in 1989, is the successor to the earlier ILO Convention concerning Indigenous and Tribal Populations in Independent Countries of 1957, which the ILO had developed following a series of studies and expert meetings signalling the particular vulnerability of indigenous workers. ILO Convention No. 169 represents a marked departure in world community policy from the philosophy reflected in the earlier convention of promoting the assimilation of indigenous peoples into majority societies. This paradigm shift, promoted by the indigenous rights movement and reflected in the contemporaneous UN developments, is indicated by the Convention’s Preamble, which recognizes “the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.” Upon this premise, the Convention includes provisions advancing indigenous cultural integrity, land and resource rights, and non-discrimination in social welfare spheres; and it generally enjoins states to respect indigenous peoples’ aspirations in all decisions affecting them.

Convention No. 169 preceded the UN Declaration on the Rights of Indigenous Peoples in recognizing the collective rights of indigenous “peoples” as such, and not just rights of individuals who are indigenous. Although in terms not as far reaching as the UN Declaration, the collective rights affirmed in Convention No. 169 include rights of ownership over

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99 Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO No. 107), June 2, 1959, 328 U.N.T.S. 247 [hereinafter ILO Convention No. 107].
100 For a description of the ILO activity leading to the adoption of Convention No. 107, see Hannum, supra note 98, at 652-53. For the history of the ILO’s involvement in indigenous issues, see generally Luis Rodriguez-Piñero, Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919–1989) (2005); ILO Convention No. 169, supra note 96.
101 Compare ILO Convention No. 169, supra note 96, with ILO Convention No. 107, supra note 99.
102 Id. Convention No. 169, supra note 97, preamble.
103 Id. art. 2.
104 Id. art. 15.
105 Id. art. 24.
106 See generally id.
traditional lands, the right to be consulted as groups through their own representative institutions, and the right as groups to retain their own customs and institutions. With its affirmations of collective rights, the Convention represented a substantial innovation in international human rights law, which until then had almost exclusively been articulated in terms of individual rights.

In the Convention, a savings clause is attached to the usage of the term "peoples" to avoid implications of a right of self-determination, even though in other international instruments "all peoples" are deemed to have such a right. At the time the Convention was adopted in 1989, the issue of whether or not indigenous peoples have a right of self-determination remained an especially contentious one. Since then, the secretariat of the ILO has taken the position that the qualifying language of the Convention regarding use of the term "peoples . . . did not limit the meaning of the term, in any way whatsoever" but rather simply was a means of leaving a decision on the implications of the term to United Nations processes. In any case, the qualifying language in no way undermines the collective nature of the rights that are affirmed in the Convention.

Yet in part because of the qualified use of the term peoples, and because several advocates of indigenous groups saw the Convention as not going far enough in the affirmation of indigenous rights, several representatives of indigenous peoples joined in expressing to the ILO dissatisfaction with the new Convention upon its adoption. But since the ILO adopted Convention No. 169, indigenous peoples’ organizations and their representatives increasingly have taken a pragmatic view and expressed support for its ratification so that

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109 Id. art. 6(1)(a).
110 Id. art. 8(2).
111 E.g., as discussed supra note 46 and accompanying text, common Article 1 of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.
115 See ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, supra note 1, at 61.
116 Id. at 61.
most of the countries in that region are now parties to the Convention, in addition to a number of other countries in other regions of the world. In the countries that have ratified Convention No. 169, indigenous groups are invoking the Convention in domestic or ILO proceedings with some success in their efforts to gain redress for problem situations. In Colombia, for example, the efforts of the U’wa people to resist oil development on their traditional lands led to a decision of the Colombian Constitutional Court, which, relying substantially on ILO Convention No. 169, found invalid a government-issued license for Occidental Petroleum to explore for oil within the U’wa reserve (resguardo) because of inadequate consultation with the U’wa people. Subsequently, the government issued to Occidental a different license to explore for oil outside the U’wa reserve but within ancestral land still used by the U’wa. After Occidental proceeded with the oil exploration under the second license, a Colombian labour organization, acting on behalf of the U’wa people, submitted the matter to the ILO under the procedure authorized by Article 24 of the ILO Constitution for examining “representations” alleging violations of ILO conventions. The ILO Committee of Experts convened to examine the complaint and found an absence of compliance with the Convention’s requirements of consultation as to both exploration licenses and recommended remedial measures.

118 As of January 2013, the parties to the Convention include Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela. Id.
119 See generally JAMES S. ANAYA, APPLICATION OF CONVENTION No. 169 BY DOMESTIC AND INTERNATIONAL COURTS IN LATIN AMERICA—A CASEBOOK (2009).
120 Corte Constitucional [C.C.] [Constitutional Court], Febrero 3, 1997, M.P.: Barrera, Sentencia SU-039/97 (Colom.).
121 Id. § 3. Demanda de nulidad presentada por el Defensor del Pueblo ante el Consejo de Estado.
122 Id. § 1. Hechos. For a description of the Article 24 procedure and other ILO procedures to advance adherence to ILO conventions, see Lee Swepston, The International Labour Organization and Human Rights, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK (Catarina Krause & Martin Scheinin eds., 2d ed. 2009).
123 Rep. of the Comm. set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers’ Union (CUT), ILO Docs. GB.276/17/1, GB.282/14/3 (Nov. 14, 2001).
C. The Jurisprudence of UN Treaty Monitoring Bodies

Apart from the UN Declaration and ILO Convention No. 19, the rights of indigenous peoples are rooted in relevant provisions of widely ratified human rights treaties of general applicability. Even though these treaties do not explicitly address indigenous peoples, relevant international institutions endowed with competent authority have interpreted them in accordance with the now prevailing assumptions about indigenous peoples and their rights. The work of United Nations treaty-monitoring bodies, especially the Human Rights Committee and the Committee on the Elimination of Racial Discrimination ("CERD"), is noteworthy in this regard. Although interpreting treaties that are independent of the Declaration, these treaty-monitoring bodies have reinforced the general human rights foundations of the Declaration while evidently being influenced by the broader discussion about indigenous peoples within the UN system.

As already noted, the right of self-determination is affirmed as a right of "all peoples" in the common Article 1 of the widely ratified International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The UN Human Rights Committee, which is charged with monitoring compliance with the Covenant on Civil and Political Rights, weighed in favour of applying Article 1 for the benefit of indigenous peoples well before the Declaration explicitly affirmed for them the right of self-determination in the same terms as Article 1. It did this initially in commenting upon Canada's 1999 report under the Covenant, stating that the right of self-determination affirmed in Article 1 protects indigenous peoples, inter alia, in their enjoyment of rights over traditional lands, and it recommended that, in relation to the aboriginal people of Canada, "the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant." The Committee has since often examined the situations

124 See e.g., International Covenant on Civil and Political Rights, supra note 46; International Covenant on Economic, Social and Cultural Rights, supra note 46.
127 International Covenant on Civil and Political Rights, supra note 46.
130 Id. ¶ 8.
of indigenous peoples in reviewing the periodic reports by State Parties to the Covenant, applying its apparent understanding about the implications of the general right of self-determination, but often without specifically referring to Article 1.\textsuperscript{131}

In pronouncing on the rights of indigenous peoples, the Human Rights Committee has most frequently relied on Article 27 of the Covenant, which affirms the rights of members of minorities, in community with the other members of their group, to their own culture, religion and language.\textsuperscript{132} In its General Comment on Article 27, the Committee held this provision of the Covenant to establish affirmative obligations on the part of states with regard to indigenous peoples in particular, and it interpreted Article 27 as covering all aspects of an indigenous group’s survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices.\textsuperscript{133} This interpretation of Article 27 is confirmed in the Committee’s adjudication of complaints\textsuperscript{134} submitted to it by representatives of indigenous groups pursuant to the Optional Protocol to the Covenant.\textsuperscript{135}

In \emph{Ominayak, Chief of the Lubicon Lake Band v. Canada}, the Human Rights Committee determined that Canada had violated Article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the ancestral territory of the Lubicon Lake Band.\textsuperscript{136} The Committee found that the natural resource

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\item \textsuperscript{132} International Covenant on Civil and Political Rights, \textit{supra} note 46, art. 27.

\item \textsuperscript{133} Human Rights Comm., CCPR General Comment No. 23: Article 27 (Rights of Minorities), 207-10 ¶ 7, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008).

\item \textsuperscript{134} \textit{Id.}


\item \textsuperscript{136} Human Rights Comm., Chief Bernard Ominayak and Lubicon Lake Band v. Canada,
development activities compounded historical inequities to "threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue."\textsuperscript{137} Several other decisions by the Committee have built upon this understanding of Article 27, even while not finding a violation.\textsuperscript{138}

The Committee has also found that indigenous religious and cultural traditions are protected by Articles 17 and 23 of the Covenant, which affirm the rights to privacy and to the integrity of the family. In a case involving people indigenous to Tahiti, the Committee determined that these articles had been violated by France when its territorial authority allowed the construction of a hotel complex on indigenous ancestral burial grounds.\textsuperscript{139}


CERD, the treaty-monitoring body that promotes compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, has also regularly considered issues of indigenous peoples.\textsuperscript{140} It has done so within the general framework of the non-discrimination norm running throughout that Convention, and not usually in connection with any particular article of the Convention, which like other relevant human rights treaties nowhere specifically mentions indigenous groups or individuals.\textsuperscript{141} In its General Recommendation on indigenous peoples, CERD identifies indigenous peoples as vulnerable to patterns of discrimination that have deprived them, as groups, of the enjoyment of their property and distinct ways of life; and it hence calls upon state parties to take special measures to protect indigenous cultural patterns and traditional land tenure.\textsuperscript{142}

CERD applied its understanding of the non-discrimination norm in examining amendments to legislation in Australia that regulates the recognition of indigenous traditional land rights.\textsuperscript{143} Invoking its “early warning/urgent action” procedure,\textsuperscript{144} the Committee found that the amendments discriminated against indigenous title holders in favor of non-indigenous interests and would result in Aboriginal and Torres Strait Islanders losing their “native title” rights.\textsuperscript{145} It thus called upon Australia to suspend implementation of the amendments and engage in consultation with the indigenous people of the country in order to arrive at an acceptable alternative.\textsuperscript{146} CERD similarly examined legislation challenged by the Maori of New Zealand that declared areas of New Zealand’s foreshore and seabed as Crown, or government, land.\textsuperscript{147} The legislation was drafted following the New Zealand Court of Appeal’s decision in the Ngati Apa

\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} ATSUKO TANAKA & YOSHINOBU NAGAMINE, THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A GUIDE FOR NGOs (Minority Rights Group International/International Movement Against All Forms of Discrimination and Racism ("IMADR") 2001).
\textsuperscript{144} For an explanation of the function and procedures of the early-warning measures of CERD, see id.\textsuperscript{145} Comm. on the Elimination of Racial Discrimination, Decision 2 (54) on Australia, U.N. Doc. A/54/18, 54th Sess., Supp. No. 18 6-8, (Mar. 18, 1999).
\textsuperscript{146} Id. ¶¶ 11-12.
case, in which that court held that the Maori had the right to seek customary title over the land in question.\textsuperscript{148} CERD found that the legislation contained "discriminatory aspects"\textsuperscript{149} and urged the state to "resume dialogue with the Maori community . . . in order to seek ways of mitigating [the legislation's] discriminatory effects, including through legislative amendment, where necessary."\textsuperscript{150} The Committee also encouraged New Zealand to minimize any negative effects by "broadening the scope of redress available to the Maori."\textsuperscript{151} In numerous other cases CERD has addressed concerns of indigenous peoples within the framework of the standard of non-discrimination, through its early warning/urgent action procedure.\textsuperscript{152}

IV. CONCLUSION

Indigenous peoples have inserted themselves prominently into the international human rights agenda. In doing so they have created a movement that has challenged state-centered structures of power and practices that previously failed to value indigenous cultures, institutions, and group identities.\textsuperscript{153} This movement has resulted in a heightened international concern over indigenous peoples and constellation of internationally accepted norms that flow from generally applicable human rights principles.\textsuperscript{154} These norms find expression in the UN Declaration on the Rights of Indigenous Peoples and other international instruments, and are otherwise discernible in the ongoing multilateral and authoritative discussions about indigenous peoples and their rights.\textsuperscript{155}

The full extent of international affirmation of indigenous peoples' rights is still developing as indigenous peoples continue to press their cause.\textsuperscript{156} Nonetheless, commensurate with the degree of their acceptance by relevant international actors, new and emergent norms concerning indigenous

\textsuperscript{150} Id. ¶ 7.
\textsuperscript{151} Id. ¶ 8.
\textsuperscript{153} \textsuperscript{154} ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW, \textit{supra} note 1, at 56.
\textsuperscript{155} Id. at 72.
\textsuperscript{156} Id. at 233.
\textsuperscript{157} Id. at 289.
peoples are grounds upon which nonconforming conduct may be subject to scrutiny within the international system’s human rights programme. For many indigenous peoples, such scrutiny may be a critical, if not determinative, factor in the quest for survival. The movement toward a new normative order concerning indigenous peoples is a dramatic manifestation of the capacities for social progress and change for the better in the human rights frame of the contemporary international system.