

# Indigenous Peoples

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## A. Introduction

- 1 Indigenous peoples issues have increasingly been articulated in the language of law and legal rights, and addressed through legal institutions, in a process of juridification that has intensified rapidly since the 1980s (Anaya [2004] and [2009]; Lenzerini; Charters and Stavenhagen). Struggles over the broad approaches and concrete policies of State and international institutions on issues affecting indigenous peoples are framed in the language and concepts of law in an ever more diverse range of places and situations (McHugh; Lenzerini), at times representing not only a new politics of inclusion or recognition or decentralization, but a new self-understanding of State and nation. Claims by indigenous peoples are made with growing frequency to, and adjudicated by, courts and other juridical institutions, in processes which can shape indigenous organization and the self-understanding of indigenous groups (Gover; Charters, Malezer and Tauli-Corpuz). This juridification is highly uneven, and its multivalent consequences may frequently be assessed as equivocal. Grotesque incongruities are frequent, where for example an elegantly juridical process of prior consultation between a mining company and a forest people is conducted during a brief intermission before paramilitary death squads return (Rodríguez-Garavito). The juridical stratum may be isolated from material practice—not simply through conscious disregard, but more fundamentally in many situations where concepts and approaches embodied in legal texts are utterly unknown to the legislators and bureaucrats and local political and community leaders whose actions

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and powers shape daily life. Yet juridification has been important, in some contexts transformative, and international law and institutions have been and remain a significant venue and driver for this process.

- 2 This juridification has cemented the proposition that indigenous peoples are → *subjects of international law*, in a distinctive way. Earlier controversy about this issue was largely resolved by global inter-governmental bodies through adoption and partial implementation of key juridifying texts and institutions specifically recognizing legal rights of indigenous peoples. (These materials have not, however, resolved related questions such as how the practice of indigenous peoples may be relevant to the development of → *customary international law*.) The most important instrument, certainly in terms of its symbolic and ontological significance, is the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007 ('UN Declaration'). While the Declaration is of particular importance, in many situations involving indigenous peoples the applicable positive international law derives in substantial part from other legal materials. A full discussion of this topic would thus require extended discussion of materials on the customary international law, general principles, and treaties bearing on → *human rights*, discrimination, war, territory, fisheries, cultural property, development, and many other matters, as well as the institutions, governance dynamics, and major forces and interests affecting them. The present work, however, has a much narrower focus. It begins with a note on the international legal concept of indigenous peoples, then provides an inventory of some of the international legal instruments and institutions principally focused on indigenous peoples issues. It then outlines some of the key legal issues raised in claims by indigenous groups or their members, under five rubrics.

### **B. Definitions of 'Indigenous Peoples'**

- 3 The 2007 UN Declaration does not define 'indigenous peoples'. The broad approach in the UN is constructivist, leaving issues of definition to be resolved through gradual elaboration of requirements and indicative criteria through practice (Kingsbury [1998]). It does however formulate three principles which also figure in ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries of 1989 ('ILO Convention 169') and may well reflect customary international law. First, a group's self-identification is a fundamental consideration in determining its status and scope. Second, non-recognition or mis-recognition by the territorial State does not alter the applicable international law. Third, matters of membership are to be determined by the group itself, within some limits.
- 4 A general sense of the peoples involved is given by ILO Convention 169, which applies to: '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' and to 'peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country ... 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' (Art. 1 (1) ILO Convention 169).
- 5 The two prongs of this definition may be loosely associated with tribal identity and an identity based on pre-colonial (aboriginal) identity. The → *Inter-American Court of Human Rights (IACtHR)* has built its jurisprudence on collective land rights from cases of

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groups with strong continuity from pre-colonial groups, as in the → *Mayagna (Sumo) Awas Tingni Community v Nicaragua Case* (2001), to also cover non-pre-colonial tribal peoples in situations such as where they ‘possess an “all-encompassing relationship” to their traditional lands, and their concept of ownership regarding that territory is not centred on the individual, but rather on the community as a whole’ (*Moiwana Village v Suriname [Judgment]* para. 133).

- 6 The ILO Convention 169 definition, however, cannot be transposed into the UN Declaration or other instruments, into which it was deliberately not incorporated. An indicative approach is instead conveyed by the Working Group of the → *African Commission on Human and Peoples’ Rights (ACommHPR)*:

The focus should be on the more recent approaches focussing on *self-definition* as indigenous and distinctly different from other groups within a state; on a *special attachment to and use of their traditional land* whereby ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; on an experience of *subjugation, marginalization, dispossession, exclusion or discrimination* because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model (African Commission on Human and Peoples’ Rights 63).

(For a parallel approach drawn from work on Asia, see Kingsbury [1998].) The ACommHPR itself, in the 2010 *Centre for Minority Rights Development v Kenya* displacement case concluded that by virtue of their particular relationships with ancestral lands, and their particular self-identification and determination to pass this to future generations, the Endorois people should be regarded as an indigenous people. However the ACommHPR’s approach to definition is not entirely uniform. For example, in setting guidelines on economic, social and cultural rights reporting, the ACommHPR says:

Indigenous populations/communities are, for the purposes of these guidelines, any group of people whose culture and way of life and mode of production differ considerably from the dominant society, whose culture depends on access and rights to their traditional land and the natural resources thereon, and whose cultures are under threat. They suffer from discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society, which often prevents them from being able to genuinely participate in deciding on their own future and forms of development (ACommHPR ‘Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights’ [2010] 8).

This tracks more closely the World Bank’s approach in Operational Policy 4.10 (2005).

- 7 These open-ended approaches to definition help in bridging between two different sensibilities. Ethnicities and identities are dynamic and multiple: ethnic identity may be negotiated and re-fashioned by groups in different relational contexts, and individuals frequently in complete good faith present quite different ethnic identities in different settings (Levi and Maybury-Lewis; Scott). Yet many arguments based on indigenous peoples’ rights presume, with good reason, a fixity of the group and a continuity of its identity and sense of place over time, and this may be of great importance to the persons themselves and their understandings of their ancestors, divinities, territories, future generations, and responsibilities.

### **C. International Law and Institutions Principally Focused on Indigenous Peoples**

- 8 International legal texts principally focused on indigenous peoples include the UN Declaration on the Rights of Indigenous Peoples, with a related set of specific UN supervisory bodies, ILO Conventions 107 and 169, the Draft American Declaration on

the Rights of Indigenous Peoples, other inter-State treaties with particular clauses relating to indigenous peoples issues, operational policies of international financial institutions and other agencies, and treaties and agreements to which indigenous peoples are parties.

### ***1. United Nations Declaration on the Rights of Indigenous Peoples***

- 9 The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly on 13 September 2007, in Resolution 61/295. In total, 144 States voted in favour of the Resolution (Montenegro noted that its affirmative vote was omitted in the initial count of 143), four voted against it (Australia, Canada, New Zealand, and the United States—all States with large indigenous populations), 11 abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, Ukraine), and 34 States were absent from the vote (including 15 African States, 11 small island States in the Pacific or the Caribbean, four Central Asian States, Israel, Papua New Guinea, and Romania). Governments of each of the four States which had voted against the UN Declaration had all reversed their opposition by the end of 2010: the governments of Australia (April 2009), New Zealand (April 2010), and (in more guarded language) Canada (April 2010) and the United States (December 2010) each switched to supporting the UN Declaration. Some governments of States which had abstained in the 2007 vote later indicated their support for the UN Declaration (Colombia is one example).
- 10 A UN General Assembly Declaration is not constitutive of international legal obligation for States in the way a ratified treaty in force would be. The final preambular paragraph in the UN Declaration reinforces this general point, stating that the Declaration is proclaimed as ‘a standard of achievement to be pursued in a spirit of partnership and mutual respect’. Nonetheless, the UN Declaration as a whole, and particular provisions within it, are of considerable legal significance.
- 11 The adoption of the UN Declaration was the culmination of a process integrating elements of reflection, debate, negotiation and drafting that formally began in the UN Working Group on Indigenous Populations in 1985. That five-member body, a subordinate entity of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, met for an annual session every year (other than during a 1986 UN budget shortfall) from 1982 until 2007, when it (like its parent bodies, the Sub-Commission and the Commission on Human Rights) was dissolved following the creation in 2006 of the UN Human Rights Council (→ *United Nations Commission on Human Rights/United Nations Human Rights Council*). Its annual sessions were attended by many hundreds of members of indigenous groups, as well as representatives of numerous State governments, and other interested organizations. It finalized a draft in 1993, which then became the object of negotiations in an annual Working Group of the Commission on Human Rights from 1995 to 2006. The 2006 draft was approved by the Human Rights Council, then modified in further negotiations prior to approval by the UN General Assembly in 2007. This 22-year process involved extensive and careful consideration by State governments of the language to be used in the Declaration and of key concepts and formulations. In several countries, national political debates took place about drafts of the Declaration and what position the government and other State institutions should take. The number of States actively engaged with the process increased over time, growing from some 40–60 in the 1990s to almost the whole membership of the UN General Assembly in 2006–7. In particular, a large group of African States, having become active in the process at a late stage, were able to delay the adoption of the Declaration from 2006 to 2007 and to negotiate some amendments to the draft (Ndahinda; Charters and

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- Stavenhagen 170–82). The Declaration is thus the outcome of an extensive deliberative process in which participating States were conscious of the normative significance of what they were doing (Charters and Stavenhagen 280–303).
- 12 The process was unusual for the United Nations in that it was not fully dominated or controlled by States and inter-State dynamics (Charters and Stavenhagen; Charters, Malezer and Tauli-Corpuz). While State concerns played a large part especially in the final stages of negotiation, members of indigenous peoples' organizations participated strongly and effectively in establishment of the initial draft and in lobbying and negotiating to limit attenuation of provisions in which they had strong interests (Xanthaki). Substantial cohesion was achieved through an 'indigenous peoples caucus', and indigenous groups in the UN process engaged skilfully with different State delegations, with a wide variety of international forums and mechanisms, and with influential political actors within States. Indigenous participation on such terms was a minimum political necessity, and is at least loosely aligned with the requirements in Art. 41 UN Declaration for 'participation of indigenous peoples on issues affecting them' in the UN. It was aligned too with the potentially demanding proposition in Art. 18 UN Declaration that '[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights', a clause perhaps framed with intra-State processes as the unspoken reference, but on its face potentially applicable to all areas of national and global governance, and certainly applicable to relevant United Nations entities by virtue of the UN Declaration as a UN General Assembly pronouncement.
  - 13 While indigenous participation in the process was considerable, it was not realistically possible for any formal structure of 'representation' to be applied. Some persons participated with accreditation from strong indigenous organizations with large constituencies in their places of origin, others were leaders of transnational networks of indigenous experts in the workings of such international institutions, others were to some extent self-appointed from large or small constituencies, others started as interested individuals but became respected for their experience or leadership or expertise, others were simply there (considerable variability exists too among State representatives at some meetings, but States are closely defined, highly institutionalized, and operate credentialing processes, whereas indigenous groups vary considerably along these dimensions, and many indigenous communities strongly resist being transformed into bounded juridical entities isomorphic with States [Gover]). In this context, the UN Declaration is not an agreement between States and indigenous peoples *tout court*, although some indigenous peoples may choose through their own processes to endorse the UN Declaration. Nor is the UN Declaration a permanent political settlement on dynamic indigenous peoples' issues, although it is likely to remain a central UN text for many years. It is an instrument adopted by States; a landmark of a particular time and process.
  - 14 While government officials of various States have raised specific concerns, the UN Declaration overall takes the normative centrality of States as an ontological given. States are treated as principal responsible actors, monopolists of military power and dominating in their ability to mobilize resources. The → *territorial integrity and political independence* of States is expressly upheld, with Art. 46 (1) UN Declaration stipulating: 'Nothing in this Declaration may be... construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.' A general limitations clause in Art. 46 (2) UN Declaration seems to privilege State governments as the first-line decision-makers, albeit not explicitly:

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

Moreover, the term 'international' is used in the UN Declaration mainly with reference to human rights, inter-State borders, and general international law. The relations between indigenous peoples and States are framed in terms of rights of indigenous peoples (collectivities) and persons, and requirements to be met by States, with international legal concepts and language (such as that of self-determination and non-discrimination) used repeatedly, but not as a simple replication of the legal framing of inter-State relations. Indeed, some of the legal concepts are almost *sui generis* in international practice: on one view, this is true of the acceptance of collective rights in a human rights context, long a point of principled hesitation for governments such as Japan and the United Kingdom which nonetheless accepted the UN Declaration.

- 15 The UN Declaration has been invoked with increasing frequency as informing the interpretation of pre-existing multilateral treaties. The Committee on the Rights of the Child has referred regularly to the UN Declaration in interpreting the Convention on the Rights of the Child ([1989] 1577 UNTS 3), including in its General Comment No 11 on indigenous children ([12 February 2009] UN Doc CRC/C/GC/11). The → *Committee on Economic, Social and Cultural Rights (CESCR)* likewise has used the UN Declaration in interpreting the → *International Covenant on Economic, Social and Cultural Rights (1966)* ('ICESCR'), for example in its General Comment No 21 on Art. 15 ICESCR dealing with the right to take part in cultural life ([21 December 2009] UN Doc E/C.12/GC/21; → *Cultural Life, Right to Participate in, International Protection*). A similar approach has been taken by the Committee on the Elimination of Racial Discrimination. These bodies have also referred to the UN Declaration in discussing reports of specific States parties, as has the UN → *Human Rights Committee* ('UN HRC'). The IACtHR, in the *Saramaka People v Suriname* case (2007), referred to Art. 32 UN Declaration, dealing with consultation and prior informed consent, in reaching the conclusion that Suriname had violated the → *American Convention on Human Rights (1969)* ('ACHR'). In *Cal v Attorney-General* (2007), the Supreme Court of Belize took a very similar approach to that in *Saramaka* in emphasizing both that the UN General Assembly had adopted the UN Declaration and that the relevant State (*in casu*, Belize) had voted for the UN Declaration. The UN Declaration is also likely to have influence on practice under other general human rights treaties, and in interpretation of specialized treaties such as ILO Convention 169 (see below). This process of influence reflects a general pattern of international legal interpretation that nonetheless varies with the subject area of the applicable treaty and with the hermeneutic style of the relevant interpreting body. In some cases (but only some) the UN Declaration may be treated as evidence of a relevant applicable rule of general international law under the principle of interpretation embodied in Art. 31 (3) (c) → *Vienna Convention on the Law of Treaties (1969)*. In other situations, an explicit textual basis for use of the UN Declaration may be provided in the treaty, as with Art. 60 → *African Charter on Human and Peoples' Rights (1981)*, which provides: 'The Commission shall draw inspiration from... other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights ...'.

## ***2. United Nations Permanent Forum on Indigenous Issues and Other UN Bodies***

- 16 The UN Permanent Forum on Indigenous Issues ('Permanent Forum'), which meets annually in New York in sessions often attended by over 1500 persons, was established by the UN Economic and Social Council ('ECOSOC') through Resolution 2000/22 ([28 July 2000] ESCOR [2000] Supp 1, 49). It comprises eight members nominated by States and eight members appointed by the President of the ECOSOC after consultations with indigenous organizations, so that in practice many are members of indigenous groups, often persons who have been involved in the UN-oriented international indigenous peoples movement for decades. It produces thematic reports, and has been active in promoting production of quantitative data on health, education, development and cultural issues among indigenous peoples. The Permanent Forum is specifically mentioned in Art 42 UN Declaration as being expected to 'promote respect for and full application of' the UN Declaration and to 'follow up the effectiveness' of the UN Declaration. The Permanent Forum faces constraints of limited resources and limited formal legal powers—for example, States have no textual obligation to make reports to the Permanent Forum or to respond to complaints. Nonetheless, procedural innovations in the practice of the Permanent Forum have enhanced somewhat its supervisory capacities. In its General Comment No 1 (2009) on Art. 42 UN Declaration (UN Doc E/C.19/2009/L.3, Annex), the Permanent Forum asserted that its position is analogous to that of bodies established by human rights treaties, and that it has an implied authority to arrange dialogues with States regarding application of the UN Declaration and to criticize implementation gaps and demand reforms. It claimed that 'States have a duty to respond to a demand by the Forum for dialogue on the Declaration', but proposed initially, 'for practical and political reasons' to 'advance along a voluntary road in relation to the States' (at para. 21). The Permanent Forum has dispatched investigative teams to States whose governments have requested these, such as the multi-national missions to Bolivia and Paraguay in 2009 'to verify complaints regarding the practice of forced labour and servitude among communities of the Guaraní people and to draw up proposals and recommendations' (UN Doc E/C.19/2010/6 para 1). The Permanent Forum has also instituted itself as a site for public discussions between members of indigenous groups voicing specific complaints about conduct of States, and the Special Rapporteur.
- 17 The UN Commission on Human Rights appointed Rodolfo Stavenhagen as its first Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in 2001. This mandate was extended by the UN Human Rights Council; S. James Anaya was appointed Special Rapporteur on the rights of indigenous peoples in 2008. He has used the UN Declaration, along with applicable treaties and other legal instruments, as a basis for assessment in addressing specific allegations of violations of rights of indigenous people (his 2010 report, for instance, addressed 34 such cases, many involving substantial numbers of people), and in evaluations of policies, laws and practices based on his visits to specific countries. These roles have been extended to following up on implementation of rulings by other bodies, such as his 2011 visit to Suriname to assess and assist implementation of the IACtHR's 2007 judgment in *Saramaka People v Suriname*.
- 18 The Working Group on Indigenous Populations (1982–2007) was replaced by the Expert Mechanism on the Rights of Indigenous Peoples. The Expert Mechanism comprises five persons, serving for three-year terms as experts rather than representatives, appointed through the Byzantine processes of the UN Human Rights Council for selection and

appointment of mandate-holders framed in its Resolution 5/1 of 18 June 2007 (UN Doc A/HRC/5/L.11). The Expert Mechanism produces studies, but it is under-resourced, and its impact has generally been modest.

### 3. ILO Conventions 107 and 169

- 19 The 1957 ILO Convention No 107 concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries ('ILO Convention 107'), which entered into force in 1959, was a substantial extension of earlier ILO work on indigenous labour issues, and of the Andean Indian Programme in which the ILO had worked with national indigenous institutes. The leadership of these ventures had very little participation of indigenous peoples' organizations or indeed of members of indigenous groups. The ILO Committee of Experts on the Application of Conventions and Recommendations began by the 1980s to address some cases of egregious non-compliance with Convention 107, including controversies about the Narmada dams in India, the Chittagong Hill Tracts in Bangladesh, and the situation of Yanomami people in Brazil (Rodríguez-Piñero). This Convention was important in establishing and normalizing the idea that a distinct body of international law specifically addressed to situations of indigenous and tribal peoples could be articulated separately from dominant framings of individual human rights, European → *decolonization*, and the then very limited law of minority rights. It included in Art. 11 ILO Convention 107 a strong provision that: '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'. It accorded some respect to indigenous custom including in relation to ownership and use of land (Art. 13 ILO Convention 107), and it set (in Art. 12 ILO Convention 107) controls on removal from habitual territories and requirements of → *compensation* including land-for-land compensation. The Supreme Court of India invoked these provisions in seeking to control some abuses of tribal peoples in the mid-1980s. However, the assimilationist tones of some of the Convention's provisions, its focus on nudging State policy rather than on proclaiming rights of indigenous peoples, and the very modest scale and reach of ILO measures for its effective supervision led to considerable dissatisfaction and criticism in the 1980s especially by the growing international indigenous peoples' movement. ILO Convention 107 remains in force for 17 States (including Bangladesh, India, and Pakistan), but was closed to new ratifications with the adoption of ILO Convention 169, having been strongly criticized by indigenous peoples for favouring assimilation (see → *Assimilation, Forced*).
- 20 The 1989 ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, which entered into force in 1991, rejects assimilation as an aim, and seeks to emphasize indigenous peoples' control over their own institutions and ways of life. ILO Convention 169 has been ratified by 22 States, including 14 Latin American States (among which are all the large-population States), four European States, plus Dominica, Fiji, Nepal, and the Central African Republic. ILO Convention 169 has become a significant part of the rapid juridification of indigenous issues in Latin America. It is repeatedly invoked in petitions to national courts, and court judgments, in government policy statements, in negotiations involving indigenous groups, and in the practice of the Inter-American human rights bodies. This is due particularly to its provisions on consultation with regard to natural resource projects (Rodríguez-Garavito), land and resource rights (Anaya [2009]), and removal (even though some of these provisions are not very strong), and to its emphasis on self-identification as a basis for identity as an

indigenous or tribal people. ILO Convention 169 replaces ILO Convention 107 for those States that have ratified both.

#### ***4. Draft American Declaration on the Rights of Indigenous Peoples (OAS)***

- 21 A process to develop an American Declaration on the Rights of Indigenous Peoples began within the → *Organization of American States (OAS)* in 1989. The → *Inter-American Commission on Human Rights (IACommHR)* developed a draft declaration, which was passed to the OAS Permanent Council for closed-door consideration from June 1997 to June 1999. In 1999, the OAS Permanent Council established a Working Group to consider the declaration. In 2006, the Working Group began negotiations in an effort to establish a draft American Declaration. This languorous process had a different political dynamic than the UN process, but also faced less pressure to produce a result, partly because of the focus of energies on the adoption of the UN Declaration, but also due to the considerable influence of ILO Convention 169 in the Americas, and the active engagement with indigenous issues in Inter-American human rights bodies under existing legal instruments.

#### ***5. Inter-State Treaties with Special Provisions addressing Indigenous Peoples' Issues***

- 22 An increasing number of inter-State treaties on other issues have provisions directly addressing indigenous peoples' issues. Among the important examples are the following.
- 23 The UN Convention on the Rights of the Child provides in Art. 30: '[A] child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.' The Committee on the Rights of the Child has used this provision as a springboard for more far-reaching interpretations of the Convention, including in its General Comment No 11 on indigenous children.
- 24 The 1992 Convention on Biological Diversity (1760 UNTS 79; → *Biological Diversity, International Protection*) which recognizes the dependence of many indigenous peoples on biological diversity and requires, in its Art. 8 (j), that States respect, preserve, and maintain indigenous knowledge and encourage the equitable sharing of the benefits arising from the use of such knowledge. Elaborating and implementing this general principle has been a labyrinthine endeavour. It remains incompletely specified how the Convention's protections interact with existing intellectual property system, including the TRIPS Agreement ([1994] 1869 UNTS 299; → *Intellectual Property, International Protection*). Member States have discussed amending the TRIPS Agreement to include a requirement to disclose the origin of biological resources, to obtain the community's prior informed consent, and to equitably share the benefits with the indigenous community. The 2010 Nagoya Protocol to the Convention on Biological Diversity (UN Doc UNEP/CBD/COP/10/L.43/Rev.1) takes some steps toward benefit-sharing, but it is primarily oriented to → *developing countries* rather than indigenous peoples.
- 25 The → *World Intellectual Property Organization (WIPO)*, a specialized agency of the UN, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('IGC') in 2000. By 2011 a draft convention had been established that would potentially prohibit the misappropriation of traditional cultural expressions and traditional knowledge from indigenous communities

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in a manner broadly consistent with but complementary to existing intellectual property systems. Indigenous groups were critical, however, of the approach taken to indigenous peoples' property rights in this text.

- 26 Safeguard provisions, enabling a State to take special measures in relation to indigenous peoples without having to accord the same opportunities or protections to foreign investors, are included in the → *North American Free Trade Agreement (1992)*, the Canada-Chile Free Trade Agreement, the New Zealand-Singapore Closer Economic Partnership Agreement, the Australia-US Free Trade Agreement, and several other such treaties. Exactly which categories of groups are referred to in these instruments varies. US and Mexican declarations refer generally to socially and economically disadvantaged minorities, Canada and Chile echo this but also refer to aboriginal or indigenous peoples, New Zealand refers specifically to Maori and to obligations under the Treaty of Waitangi ([1840] (1839–1840) 89 CTS 473), Australia refers to Aboriginal and → *Torres Strait Islanders* in its declaration under the → *General Agreement on Trade in Services (1994)*, but to indigenous peoples in the Singapore-Australia Free Trade Agreement. Very little jurisprudence or legal analysis exists on these provisions: the language variations are potentially significant in their bearing on how the domestic safeguards will work, and on whose interests are driving adoption of them.

### ***6. Operational Policies of International and Private Institutions Relating to Indigenous Peoples***

- 27 The World Bank (→ *World Bank Group*) was the first major international organization engaging in or financing major on-the-ground projects to formulate a policy setting standards for these operations as they affect indigenous peoples (Sarfaty [2005]). Its Operational Policy 4.10 on indigenous peoples (in effect from July 2005), and the more technical Bank Procedures 4.10 (2005), work in tandem with Operational Policy 4.12 on involuntary settlement (revised February 2011), and other policies on matters such as environmental assessment, natural habitats, and forests. Other inter-governmental financial institutions have formulated comparable sets of policies and comparable implementation and supervisory mechanisms. These are important normative texts in the articulation of a governance-based approach to indigenous peoples issues. Although not couched in the language of rights (Sarfaty [2009]), they become transitive and capable of rights-type vindication to the extent that a breach of these policies can be invoked by affected communities in proceedings before the World Bank Inspection Panel or its counterparts in other institutions, potentially leading to remedial measures.
- 28 Operational policies have also been established by the → *United Nations Development Programme (UNDP)*: the UNDP Policy of Engagement with Indigenous Peoples (2001), a section on Indigenous Peoples added to the internal Policies and Programmes Operations and Procedures (2010), and the UN Development Group Guidelines on Indigenous Peoples' Issues (2008). Other significant operational policies include those of the United Nations High Commissioner for Refugees (→ *Refugees, United Nations High Commissioner for [UNHCR]*), and of private aid organizations such as Oxfam. Complex issues arise as to the impact and legal status of guidelines established by, or with the adherence, of non-indigenous commercial corporations, such as the International Council on Mining and Metals, the Forest Stewardship Council, and the Global Reporting Initiative (Anaya [2010]).

### ***7. Treaties and Agreements to which Indigenous Peoples are Parties***

- 29 Indigenous peoples have long entered into agreements, sometimes in the form of treaties, with incoming imperial States and corporations and groups, neighbouring States and groups, and overarching States in which they live. Many of these related to processes of State formation and consolidation. Under current conditions indigenous peoples make diverse agreements with external corporations on natural resource extraction, external scientists about research in the community, international financial institutions about community projects, environmental → *non-governmental organizations* about co-management or forest product certification, external manufacturers about intellectual property rights, religious entities about schools. The status, nature and applicable law for such historical or contemporary treaties and agreements may be highly diverse. Considerable contention has long existed over the legal significance of treaties of colonizing States and successor States made with indigenous peoples, a theme of much litigation especially in the US, Canada, and New Zealand.

### **D. Five Legal Frames for Claims by Indigenous Peoples**

- 30 The following five sections are organized on the basis of distinctions between five different patterns of legal argumentation in which indigenous peoples' claims have been made as this field has become increasingly juridified (Kingsbury [2001]). These are: (1) claims made distinctively as indigenous peoples; (2) historic sovereignty claims; (3) self-determination claims; (4) claims as a minority or a member of a minority; and (5) human rights and non-discrimination claims.
- 31 Each of these patterns has its own style of argument, historical account and canon, forms of legitimation and delegitimation, institutional adherents, discursive community, and boundary markers. Debates as to the essence of each pattern, and especially as to the boundaries between them, are often proxies for clashes of political interest. The construction of conceptual structures and of lines between them is a form of political expression, but one that utilizes and is conditioned by, while itself affecting, law. The multiplicity of patterns opens many strategic possibilities in the law of the claims of indigenous peoples, but not just for indigenous peoples. Claimants may choose structures based on the competence and likely receptivity of the forum, looking in some cases for a structure that does not overreach, in others for one that may open paths for future lines of argument in the same or other fora. Respondents must decide whether to counter a claim within the same structure of argument as it has been made, to recharacterize it, or to raise a competing claim based on another conceptual structure. Bodies with powers of recommendation or decision may calibrate their approaches in one of several different systems of measure, jump between two or more structures to avoid unpalatable implications, or integrate two or more conceptual structures in seeking to craft far-sighted and workable approaches.
- 32 The patterns of legal argumentation do not necessarily correspond with the institutional configurations. Thus, to give illustrations from the work of general human rights bodies, the UN HRC has developed a legal doctrine of indigenous self-determination (Anaya [2004]; Kingsbury [2001]), and the Inter-American Commission and Court of Human Rights have built an extensive jurisprudence of indigenous collective land rights and of → *reparations* and remedies (Pasqualucci; Anaya [2009]). The ACommHPR is increasingly introducing legal ideas concerning indigenous peoples into its special rubrics of human and peoples' rights (Ndahinda presents a reflective critical assessment). The →

*European Court of Human Rights (ECtHR)* (and, before its abolition, the European Commission on Human Rights), while tremendously influential other areas of human rights jurisprudence, has done rather less with the specific claims presented to it by indigenous peoples (Koivurova), but faces new questions in *Chagos Islanders v United Kingdom*, an indigenous peoples rights issue which is at the same time implicated in the *Mauritius v United Kingdom* arbitration (on the UK's designation of a marine protected area) under the 1982 Law of the Sea Convention.

### ***1. Distinctive Claims of 'Indigenous Peoples'***

- 33 Apart from claims to self-determination, → *sovereignty*, and protection against massive discriminatory human rights abuses (each dealt with in subsequent sections), some of the most fundamental claims made distinctively by indigenous peoples relate to land and territories, participation, development, and cultural issues.

#### **(a) Rights to Lands and Territories**

- 34 International legal formulations are inevitably abstractions from the vast range of formal and informal legal and human relations to land among indigenous groups across different States (Gilbert). These abstractions can be very important, however, when they are invoked in helping to concretize a new local legal regime or practical arrangement. Intense negotiating effort was thus invested in what became Arts 25–32 UN Declaration (Wiessner 20–24, analytical commentary by Charters). A distinction is drawn in Art. 26 UN Declaration between an unspecified 'right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired', and 'the right to own, use, develop, and control the lands, territories and resources that they possess ...'. Possession is thus a major advantage. Art. 28 UN Declaration establishes a right to redress 'for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent'. A process for adjudication of rights of indigenous peoples to land, territories and resources is required by Art. 27 UN Declaration, which sets certain minimum conditions for such a process. Whether state institutions should deal not only with claims against the state or disputes involving non-indigenous persons and entities (including mining, energy and forestry corporations), but should also be a principal recourse in inter-indigenous or intra-indigenous disputes, has been a difficult issue in many such situations.

#### ***(i) Collective Rights in Relation to Land***

- 35 The UN Declaration requires recognition of indigenous peoples' collective rights to lands and territories, as does ILO Convention 169. The IACtHR adopted, in *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001), an 'evolutionary interpretation' of Art. 21 ACHR (which protects the right to property), holding that 'the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property' (at para. 148). The court recognized that '[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community' (ibid para. 149). The Inter-American Commission on Human Rights extended this

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interpretation to the right to property under the → *American Declaration of the Rights and Duties of Man* (1948), in the case of *Dann v United States* (2002).

### **(ii) Spiritual Relationship with the Land**

- 36 As the IACtHR recognized in the *Mayagna (Sumo) Awas Tingni Community* case, indigenous peoples' relationships with their land are often spiritual. In *Comunidad Indígena Yakye Axa v Paraguay (Judgment)* (2005), it held that '[t]o guarantee the right of indigenous peoples to communal property, it is necessary to take into account that the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values' (at para. 154). Art. 25 UN Declaration embodies and extends this approach.

### **(iii) Rights to Natural Resources**

- 37 Indigenous peoples' rights to their lands also include certain rights (very extensive in some cases) to control the natural resources located in those lands. Art. 15 (1) ILO Convention 169 goes beyond ILO Convention 107 in addressing issues concerning natural resources. Although heavily qualified by references to national law, it does require States to safeguard indigenous peoples' rights 'to participate in the use, management and conservation of the natural resources pertaining to their lands'. Resources are treated together with lands and territories in the UN Declaration, although the principal provisions (Arts 25–28 UN Declaration) depend on the resources having been 'traditionally owned, occupied, or otherwise used or acquired' by the indigenous group. Other resources such as seed, medicines and traditional knowledge are dealt with separately in Art. 31 UN Declaration. Art. 32 UN Declaration gives indigenous peoples 'the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'. In *Saramaka People v Suriname*, the IACtHR held that 'members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land' (at para. 121).

### **(iv) Consultation and Consent**

- 38 Immense energy has been invested in promulgation of a principle that activities affecting the lands, resources and environments of indigenous peoples must be subject to full → *prior informed consent* or → *consultation*. Indigenous groups have insisted that consent is required; many States have insisted that consultations are all that is needed. The differences on the ground may often be less marked, given asymmetries of power and violations of → *rule of law* that often in fact occur. Nonetheless, this has been an important dimension of juridification of indigenous issues, and has provided significant leverage for them in national court proceedings, particularly in Latin America (Rodríguez-Garavito). World Bank Operational Policy 4.10 finesses this in relation to indigenous peoples by repeatedly requiring 'free prior and informed consultation [and that this] results in broad community support to the project by the affected Indigenous Peoples'. Art. 32 UN Declaration takes a similar or more stringent approach (depending how it is interpreted) in prescribing: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project ...'

**(v) Rights against Forced Removal**

- 39 Art. 16 ILO Convention 169 would allow removal as an ‘exceptional measure ... following appropriate procedures established by national laws’ even without the consent of the indigenous people themselves. The refusal of the World Bank, in adopting Operational Policy 4.12 in 2001, to require that removals of persons to make way for development projects be contingent on the consent of those persons, was intensely criticized. The President of the World Bank stated that this was justifiable as no national legislation circumscribed the power of eminent domain to such an extent, nor did international legal texts unequivocally require consent. Operational Policy 4.10 attenuates this in relation to indigenous peoples. Art. 10 UN Declaration would resolve the issue by prohibiting the forcible removal of indigenous peoples from the lands they occupy without their ‘free, prior and informed consent’.

**(vi) Restitution and Compensation**

- 40 Practice in different countries with regard to reparations for indigenous peoples is substantial but highly variable (Lenzerini), with distinctions sometimes drawn between historic claims and recent or imminent dispossession or other wrongs. The results of cash payments for loss of lands or resources have often been dismal for the groups involved, including dependency, dissipation, and corruption. The UN Declaration prioritizes → *restitution* or land-for-land → *compensation*, as does ILO Convention 169 and (in the limited domain to which it applies) World Bank Operational Policy 4.10. This is replicated in the jurisprudence of the IACtHR. In *Comunidad Indígena Yakye Axa v Paraguay (Judgment)*, the court found that Paraguay had violated Art. 21 ACHR and ordered it to return the land at issue to a small group of indigenous people who no longer occupied the land (at para. 242). In *Sawhoyamaxa Indigenous Community v Paraguay (2006)*, the IACtHR held that the restitutionary claim would depend on the unique relationship between the indigenous people and their land continuing, or else the claim to restitution would lapse. The court found, however, that this relationship could persist in many forms, including ‘through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture’ (at para. 131). The court further held that the right would not lapse where indigenous people were prevented from continuing their special relationship with the land (*ibid* para. 132). In practice, therefore, this temporal restriction may do very little to limit the preference for restitution. The court required in both *Comunidad Indígena Yakye Axa* and *Sawhoyamaxa Indigenous Community* that the State perform a case-by-case analysis of each indigenous land claim, balancing the indigenous people’s right to their traditional lands and the private property rights of the current owners of that land. The court held that private occupation of the lands and productive use of the lands by current owners did not constitute *prima facie* reasons to deny indigenous peoples’ claims. Where restitution is not possible, the court required that indigenous peoples receive alternative lands of equal value, chosen by them.

**(b) Rights of Participation**

- 41 Under Art 5 UN Declaration, indigenous peoples have the right to participate fully in the political life of the State and under Art. 18 UN Declaration ‘the right to participate in decision-making in matters which would affect their rights, through representatives

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chosen by themselves in accordance with their own procedures'. The reality of such representation, and the real effects and value of such participation, are often much more difficult problems in practice than are addressed in this abstract formulation. Art. 6 (b) ILO Convention 169 requires that indigenous peoples be able to 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'. In *Yatama v Nicaragua* (2005), the IACtHR decided that Nicaragua had violated Arts 23 and 24 ACHR by denying the participation of Yatama, an indigenous political association, in the elections. Although Yatama was excluded under an election law that applied to all groups that sought to field candidates in the elections, the court found that indigenous peoples had the right to participate in accordance with their own customary organizations and practices. It held that States had to ensure that members of indigenous communities could participate in decision-making on matters that could affect them, that they be able to participate in State bodies proportionately to their population, and that they be able to do this 'from within their own institutions and according to their values, practices, customs and forms of organization, provided these are compatible with the human rights embodied in the Convention' (at para. 225).

### **(c) Rights relating to Development**

- 42 Indigenous groups take different positions on questions of large-scale economic development, and these issues also provoke splits within communities. Many indigenous groups have experienced 'development' as dispossession, immiseration, repression, and destruction of the environment or even of the group itself. For this and other reasons, some are implacably opposed to all proposed large-scale 'development', and to the neo-liberal capitalist orthodoxies with which it is frequently associated (Rodríguez-Garavito). Others, by contrast, are anxious to reduce poverty and to create jobs, opportunities and infrastructure that attract community members who might otherwise leave for cities. Others again are based in urban areas and may have lifestyles much closer to the ambient populations but with their own views on development, conservation and sustainability. Not surprisingly, the clearest agreement among indigenous groups is on Art. 23 UN Declaration: 'Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development'. Art. 7 ILO Convention 169 is phrased similarly, but with the weakening clause 'to the extent possible'. The IACtHR held in the *Yatama* case that Nicaragua was obligated to 'adopt all necessary measures to ensure that the members of the indigenous and ethnic communities of the Atlantic Coast of Nicaragua can participate, in equal conditions, in decision-making on matters and policies that affect or could affect their rights and the development of these communities' (at para. 225).
- 43 The World Bank has placed increasing emphasis on indigenous peoples in its anti-poverty programmes, and it is one of many international agencies now focusing on specific development assistance for indigenous peoples rather than the often miserable history of ancillary measures or outright neglect in other development projects. Whether this more affirmative approach is producing valuable results, and at what costs, is much debated.

### **(d) Rights relating to Culture**

- 44 The IACtHR has emphasized the protection of indigenous peoples' culture. In *Masacre Plan de Sánchez v Guatemala (Reparaciones)*, the court found that the massacre of women and elders of the Mayan-Achí people 'produced a cultural vacuum' (at para. 49

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(12)), because women and elders were the primary cultural transmitters of the community. This finding influenced the court's decision to award reparations to the community as a whole, not just to individual victims.

- 45 Exemplary of a growing creativity in finding legal bases to address distinctive indigenous cultural issues is *Hopu v France* (1997), where the UN HRC considered a claim brought by native Tahitians against a French government decision to allow construction of a hotel on top of an ancient Polynesian grave site. Although the complainants did not claim that the graves were those of their direct family members, the UN HRC found that their rights to family and to privacy had been violated (→ *Family, Right to, International Protection*; → *Privacy, Right to, International Protection*). The UN HRC ruled that the concept of 'family' had to be interpreted in reference to the social practices and cultural traditions of native Tahitian society and concluded that the burial grounds 'play an important role in the authors' history, culture and life' (at para. 10 (3)).

### **2. Historic Sovereignty Claims**

- 46 Indigenous peoples in some cases frame claims in terms of wrongful interference in their historic sovereignty. Historic sovereignty is sometimes evidenced by treaties that indigenous peoples signed in the past with States. Claims are sometimes made to a revival or re-recognition of sovereignty, whether or not the people ever signed such a treaty.
- 47 This theory reasons that indigenous peoples' sovereignty was not properly or lawfully extinguished by conquering or occupying States and therefore continues to subsist. The IACtHR has hinted at an enduring dominium if not necessarily imperium arising from something akin to historic sovereignty, noting that the Yakye Axa community's legal status and rights existed prior to Paraguay's formal recognition of the community's status, as the community existed before the State. This kind of analysis invites arguments for restoration of the *status quo ante*. It suggests also that there might be legal responsibility for wrongful interference with indigenous sovereign rights, a claim which is similar to the claim that could have been raised by Nauru for pre-independence despoliation in the → *Certain Phosphate Lands in Nauru Case (Nauru v Australia)* but was not, perhaps because of anxiety about provoking intense opposition from all the former or current colonial powers.
- 48 Arguments for a vindication or a revival of historic sovereignty, when made in their stronger forms, are generally resisted vigorously by the relevant territorial States. Moreover, serious problems also may arise in relation to title to territory (Castellino)—little analysis has been undertaken, for example, of the relationship between historic sovereignty claims and the → *uti possidetis doctrine*. Internal administrative boundaries utilized by the metropolitan imperial rulers or the contemporary State may differ greatly from the boundaries ascribed to the historic entity, yet such internal boundaries generally have been upheld in the legal practice relating to decolonization and to disintegrating federations. The traditional group associated with the historic entity may face rival historically-based claims from other groups, and with settlement and migration may now be only a minority in the aspiring entity.

### **3. Self-Determination Claims**

- 49 A longstanding controversy over indigenous peoples' right to → *self-determination* is rooted in a deeper controversy surrounding the very meaning of self-determination. The practice of decolonization did much to transform what had been in effect a political principle of self-determination into a legal right. Thus, under Art. 1 → *International*

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*Covenant on Civil and Political Rights* (1966) ('ICCPR') and ICESCR, '[a]ll peoples have the right of self-determination'. If 'all peoples' have the legal right to self-determination, it is argued strongly that it is unjustifiable discrimination to treat indigenous peoples differently from other 'peoples' and that independence should be one of the options for indigenous peoples.

- 50 The UN Declaration took a substantial step in proclaiming in Art. 3: 'Indigenous peoples have the right to self-determination'. This is a marked transformation from ILO Convention 169, which does not mention self-determination at all. Although the concept of self-determination is linked to the concept of 'peoples' in international law, Art. 1 (3) ILO Convention 169 was careful to make clear that '[t]he 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'. In their joint statement of opposition at the time of the adoption of the UN Declaration (opposition that was later transformed into support for the declaration), the US, Australia, and New Zealand expressed concern that Art. 3 UN Declaration could be used to justify unilateral → *secession* and thus threaten the sovereignty of existing States. Later, however, they seem to have been content with the protection conferred by Art. 46 (1) UN Declaration in providing that '[n]othing in this Declaration may be interpreted 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'.
- 51 Indeed, the overall tenor of the UN Declaration (a tenor which leads some indigenous groups to have considerable misgivings) is that the UN Declaration does not endorse an end-State understanding of self-determination similar to that associated with decolonization. Instead, the UN Declaration appears to endorse a relational understanding of self-determination, where the right to self-determination is understood to be realized within the boundaries of the existing State, to define the relationship between the indigenous peoples and the State (Kingsbury [2001]). Thus, the UN Declaration favours greater degrees of → *autonomy* and self-government for indigenous peoples, within the bounds of the existing State. Art. 4 UN Declaration points in this direction: 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs'.
- 52 The legal interpretations of Art. 1 ICCPR by the UN HRC reinforce this approach. Beginning in the 1990s, in dialogues with States parties under the reporting procedure, the UN HRC expressed views under the self-determination rubric on the substantive terms of relationships between States and indigenous peoples. It has emphasized in particular the provisions of Art. 1 (2) ICCPR, which stipulates that all peoples may dispose freely of their natural wealth and resources and must not be deprived of their own means of subsistence. In an early statement it also criticized the Canadian government's practice of insisting on the inclusion in contemporary claims settlement agreements of a provision extinguishing inherent aboriginal rights, confining aboriginal rights instead to those specified in the agreement.
- 53 The UN HRC has also used Art. 1 ICCPR as the basis for interpreting other provisions of the ICCPR. In *Ominayak v Canada* (1990), for example, the Committee reinterpreted a claim initially brought as a violation of Art. 1 ICCPR, into a violation of Art. 27 ICCPR. *Gillot v France* (2000), a case on the eligibility of recent migrants to vote, raised the issue of whether self-determination could justify restrictions on the eligibility of residents of New Caledonia to vote in a → *referendum* on the future of their community. France argued that the restrictions were justified by the principle of self-determination and the

Committee agreed, finding that the right to vote under the ICCPR ‘must be considered in conjunction with article 1’ (at para. 13 (16)).

#### ***4. Minority Claims***

- 54 The remarkable evolution of international norm-making to the point where numerous State governments accept some concept of self-determination as a principle broadly applicable to indigenous peoples has not been paralleled by a general acceptance of rights of minorities to self-determination. For many States this is because the category of ‘indigenous peoples’ is close-ended, politically accepted, and historically justified, whereas ‘minorities’ is much wider and free-ranging (→ *Minorities, International Protection*). Nonetheless, minority rights have also been subject to increasing international juridification and legal amplification (Kymlicka).
- 55 Many representatives of indigenous peoples reject the minority rights paradigm, arguing that it ignores what is distinctive about being indigenous and being a people. Other advocates, however, have used the minority rights regime to advance their claims, particularly by invoking Art. 27 ICCPR before the UN HRC. In dealing with indigenous issues, the UN HRC began quite early to interpret Art. 27 ICCPR in a creative and expansive manner.
- 56 Perhaps the most important juridical application of Art. 27 ICCPR for indigenous peoples has been a series of holdings that failure of the State to protect indigenous land and resource bases, including the continuing effects of past wrongs, in certain circumstances may amount to a violation of the right to culture protected in Art. 27 ICCPR. The leading case outlining the views of the UN HRC is *Ominayak v Canada*, where the Committee concluded that the historical inequity of the failure to assure to the Lubicon Lake Band a reservation to which it had a strong claim and the effect on the Band of certain recent developments including oil and timber concessions ‘threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue’ (at para. 33).

#### ***5. Human Rights and Non-Discrimination Claims***

- 57 Some claims by indigenous people clearly relate to violations by state agencies of general human rights standards, such as norms against abusive conduct by prison officials or soldiers, or general rights of access to food and basic health care. A more far-reaching argument, made by several State representatives during the negotiations of both the UN Declaration and the Draft American Declaration, is that the conscientious application of human rights standards is sufficient fully to address problems suffered by members of indigenous groups. Many indigenous groups, antagonized by the assimilationism of the ‘human rights only’ position and aware that such equal rights rhetoric historically has been accompanied by gross injustices, point out that the human rights program has not worked adequately in institutional practice and argue that it is normatively insufficient (Thornberry). A more radical position taken by some indigenous representatives, that the human rights program has been of little relevance in practice and is a conceptual obstacle to the realization of indigenous sovereigntist aspirations, is animated also by bitter experiences even in supposedly rights-protecting countries. For those engaged in processes of juridification, however, the liberal human rights program has provided an important source of concepts and legal leverage when creatively applied to special situations relating to indigenous peoples (Kymlicka; Anaya [2009]); but the other patterns of argument mentioned above are also important.

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- 58 Art 1 UN Declaration specifies “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in... international human rights law.” This assertion of the right to have rights is evocative of Hannah Arendt’s combatting of totalitarianism and its treatment of numerous human beings as morally and physically superfluous. Read in this light, it is buttressed by Art. 45 UN Declaration: “Nothing in the Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.” Article 1 is also a lexical formula that avoids directly asserting that international human rights in general are or can be collective rights, thereby meeting concerns long voiced by the governments of the United Kingdom and Japan, among others.
- 59 One significant dimension of human rights law for indigenous peoples issues concerns non-discrimination. The UN Committee on the Elimination of Racial Discrimination (‘CERD’), which monitors → *compliance* with the International Convention on the Elimination of all Forms of Racial Discrimination ([1966] 660 UNTS 195), opined in 2005 that New Zealand’s Foreshore and Seabed Act 2004 discriminated against Maori people because of the way it extinguished Maori customary title and its failure to provide means of redress, and it subsequently used similar arguments in relation to legislation and policy measures in Australia and other countries. The strong international policy against racial discrimination has also influenced some national courts dealing with indigenous claims. In the landmark decision of the High Court of Australia on → *aboriginal title* in *Mabo v Queensland (No 2)* ([3 June 1992] 175 Commonwealth Law Reports 1), for example, Justice Brennan indicated that the unacceptability of racial discrimination or other violations of fundamental internationally-recognized human rights was a strong reason for that court to be willing to reverse the long-established principle of Australian property law that aboriginal people hold no rights to land at common law except those derived from the Crown. Conversely, however, the rights of others to be protected from invidious discrimination have often been invoked as a counterweight to indigenous claims.
- 60 Despite areas of convergence, the human rights regime and the indigenous peoples regime can be in tension. Some such tensions arise between human rights of non-indigenous individuals, or of indigenous non-members, and rights or claims of an indigenous group. Other tensions can occur between a group’s rights or interests and the human rights of individual members. This has frequently been manifested in situations confronting indigenous women, whose individual rights as women may clash with the → *group rights* held by indigenous peoples. The centrality of women in the cultural, socio-economic and political life of indigenous communities, highlighted for example by the IACtHR in the *Masacre Plan de Sánchez* case with regard to roles of women and elders in cultural transmission among the Mayan-Achí people, means women are directly and sometimes disproportionately affected by almost all violations of the rights of their communities, and are often leaders in developing legal claims of the community. Indigenous women frequently suffer from compounded discrimination, however, as women and as indigenous individuals and as persons enduring extreme poverty or deprivation. For instance, the UN HRC and the CERD have both noted that indigenous women in many locations are much more likely to be victims of violent crime than non-indigenous women. The UN Permanent Forum in 2004 launched a Task Force on Indigenous Women, aimed at ‘mainstreaming’ the concerns and rights of indigenous women throughout the UN system.

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- 61 Indigenous women have at times challenged gender discrimination in the governance of their own communities, posing challenging legal issues for internal and external juridical institutions. In *Lovelace v Canada*, Sandra Lovelace relied on Art. 27 ICCPR to challenge her band's decision to exclude her from the reservation when she married a non-Indian. The UN HRC held that restrictions on rights conveyed by Art. 27 ICCPR must have a reasonable and objective justification and must be consistent with other provisions of the ICCPR. In Lovelace's case, the Committee concluded that 'it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe' (at para. 17). The UN HRC's views reflect sensitivity to the problems for community decision-making and capacity that would be entailed by external bodies abruptly requiring the disentrenching of such a longstanding identity-shaping system. In a somewhat comparable case in the US Supreme Court, *Santa Clara Pueblo v Martinez* ([15 May 1978] 436 US 49), however, the court let stand the Santa Clara tribal authorities' decision to exclude Ms Martinez's children because she had married a man who was not a member of the tribe. The court based its decision on the fact 'that the tribes remain quasi-sovereign nations' and that federal judicial intervention 'may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity' (at part V para. 3), since membership issues are closely related to tribal custom and tradition. Thus, the choice of forum and the legal regime invoked can impact the balance that is struck between indigenous women's rights as women and indigenous peoples' rights as peoples.
- 62 Indigenous children or persons speaking for them can raise claims under general international human rights treaties. For example, in the *Sawhoyamaya* case, the IACtHR noted that most of the people who had died were under the age of three years old and that the community's living conditions, alongside a road without adequate sanitation, food, water, or health care, had caused the deaths of the eighteen children. The IACtHR invoked Art. 19 ACHR, which provides that 'every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state'. The court held that the State had failed in its duty to act as guarantor of that right and that it had an obligation to adopt 'special measures based on the best interest of the child' (at para. 177).
- 63 As with indigenous women, indigenous children's rights as individual children can conflict with indigenous peoples' rights. In particular, the 'best interests of the child' standard, invoked by the IACtHR and also enshrined in Art. 3 Convention on the Rights of the Child, may conflict with the UN Declaration's protection for indigenous peoples' culture and customary laws. It is contentious who should determine the best interests of the child—the tribe or the State. Indigenous peoples are understandably wary of the State making that decision, given the history of mass removals of indigenous children from their families and communities in countries such as Canada and Australia as part of a strategy of assimilation. Art. 7 UN Declaration seeks to prevent a repeat of this practice by prohibiting 'forcibly removing children of the group'. There is a strong argument that the best interests of the child standard should be informed by the child's culture and should consider the benefits to the child of being raised within his or her community. Nevertheless, the potential for a clash between individual and group rights remains.

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July 2011