

# INTERNATIONAL LAW AND THE DIVERSITY OF INDIGENOUS PEOPLES

Alessandro Fodella\*

## INTRODUCTION

The issue of the rights of indigenous peoples in international law provides an interesting viewpoint on the more general question of how the law can accommodate differences.

Although there is no universally accepted legal definition of “indigenous peoples” in international law, generally speaking they can be referred to as those peoples with their own identities and organized societies, distinct from other sectors of the societies in which they live (for social, economic, cultural, or political reasons), who are descendants of those who originally inhabited a land at the time when settlers came from elsewhere to occupy or conquer such land.<sup>1</sup> Indigenous peoples have unique cultural and spiritual values, a special relationship with their lands

---

\* Professor of International Law, University of Trento, Italy.

1. Some international organizations have adopted ad hoc definitions. *See, e.g.*, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention No. 169, art. 1, 1650 U.N.T.S. 383 (June 27, 1989) (entered into force Sept. 5, 1991), *available at* <http://digbig.com/4pgtd> [hereinafter ILO Convention No. 169] (applying the convention 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 “peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation . . . and . . . retain some or all of their own social, economic, cultural and political institutions”); WORLD BANK, WORLD BANK OPERATIONAL MANUAL: OPERATIONAL DIRECTIVE 4.20, at 1 (1991) (defining “indigenous peoples” as “social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process”); *see also* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, paras. 36–43, U.N. Doc. E/CN.4/Sub.2/L.566 (June 25, 1972) (*prepared by* José R. Martínez Cobo) [hereinafter Preliminary Report]. ECOSOC has also completed the study and released a report on it. ECOSOC, Sub-Comm’n on Prevention of Discrimination and Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, ch. V, U.N. Doc. E/CN.4/Sub.2/1982/2/Add.6 (1982) (*prepared by* José R. Martínez Cobo). However, the prevailing approach today is either to avoid any definition (as the Draft U.N. Declaration does, *see infra* Part V.B) or to leave the issue to the principle of self-identification by indigenous peoples themselves (as in the case of the ILO Convention No. 169, *see infra* Part V.A). On questions of definitions, *see, for example*, THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 172 (1997) (“One group which does not fall easily into any current legal category is that of indigenous populations.”); PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 33–60 (2002) (discussing the difficulty of defining the term “indigenous” throughout the various instruments and statements devoted to the subject).

and the environment, as well as clearly distinct societal and political organizations. Their very existence depends on the protection of their identity and diversity. These, however, are threatened by policies of marginalization, discrimination, and assimilation that were originally brought by foreign occupation and conquest and that continue to a large extent today.

Often regarded as an irrelevant or marginal, indigenous peoples in fact account for around three hundred million people and can be found almost everywhere in the world, from the Native Americans to the Saami in northern Europe, from the Inuit across the entire Arctic Circle to the Aborigines of Australia or the tribal peoples of Africa. They raise complex international law issues, especially in the field of international protection of human rights, that must be duly addressed by the international community as a whole.

The purpose of this Essay is to analyze whether, and how effectively, international law addresses these issues and to what extent it contributes to safeguarding the diversity of indigenous peoples and, thus, ultimately to their survival as such.<sup>2</sup>

#### I. THE EMERGENCE OF INDIGENOUS PEOPLES IN THE INTERNATIONAL COMMUNITY

Indigenous peoples have tried to raise the issue of their marginalization and discrimination since the 1920s. However, their first attempts to gain the consideration of the League of Nations, and thereafter the United Nations, were not very successful. The first international organization to deal seriously with indigenous peoples' issues was the International Labour Organization (ILO). Within its framework, the ILO Convention

---

2. On indigenous peoples in international law, see generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004); *INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS* (Sarah Pritchard ed., 1998); *INDIGENOUS AND TRIBAL PEOPLES' RIGHTS—1993 AND AFTER* (Eyassu Gayim & Kristian Mynnti eds., 1995); *INTERNATIONAL LAW AND INDIGENOUS PEOPLES* (Joshua Castellino & Niamh Walsh eds., 2005); DAVID MAYBURY-LEWIS, *INDIGENOUS PEOPLES, ETHNIC GROUPS, AND THE STATE* (2d ed. 2002); ANNA MEIJKNECHT, *TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2001); *THE HUMAN RIGHTS OF INDIGENOUS PEOPLES* (Cynthia Price Cohen ed., 1998); THORNBERRY, *supra* note 1; Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in *THE RIGHTS OF PEOPLES* 17 (James Crawford ed., 1988); Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, in *PEOPLES' RIGHTS* 69 (Philip Alston ed., 2001); Feisal Hussain Naqvi, *People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law*, 71 *IND. L.J.* 673 (1996); Garth Nettheim, *'Peoples' and 'Populations'—Indigenous Peoples and the Rights of Peoples*, in *THE RIGHTS OF PEOPLES* 107 (James Crawford ed., 1988); Rüdiger Wolfrum, *The Protection of Indigenous Peoples in International Law*, 59 *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND ÖFFENTLICHES RECHT UND VÖLKERRECHT* [HEIDELBERG J. INT'L L.] 369 (1999).

Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention No. 107) was adopted in 1957.<sup>3</sup> ILO Convention No. 107 was later revised by the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169).<sup>4</sup>

Ever since then, the prominence of indigenous peoples in international law has progressively increased. More and more indigenous peoples' organizations started to receive consultative status with the United Nations Economic and Social Council (ECOSOC). This allowed them to participate within the United Nations' system alongside other nongovernmental organizations. Beginning in the 1970s, nongovernmental organizations in Geneva launched ad hoc initiatives on specific human rights issues concerning indigenous peoples.<sup>5</sup> But slowly, the human rights bodies of the United Nations started to look more seriously at the problem as well.

In 1971, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission) appointed a Special Rapporteur (Mr. José R. Martínez Cobo of Ecuador) to undertake a study of the problem of discrimination against indigenous populations.<sup>6</sup> In 1982, ECOSOC created an ad hoc subsidiary organ of the Sub-Commission devoted to indigenous peoples: the Working Group on Indigenous Populations (the Working Group).<sup>7</sup> The Working Group, composed of representatives of governments as well as indigenous peoples and organizations, is one of the largest human rights fora in the U.N. system, amounting regularly to more than seven hundred participants.<sup>8</sup> Its tasks include the building of dialogue between governments and indigenous peoples, reviewing national situations, and developing international standards concerning the promotion and protection of indigenous peoples' rights. Among its major achievements, the Working Group has developed a

---

3. Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Convention No. 107, Int'l Labour Org. [ILO], 40th Sess., 328 U.N.T.S. 247 (June 26, 1957) (entered into force June 2, 1959) [hereinafter ILO Convention No. 107].

4. ILO Convention No. 169, *supra* note 1.

5. For example, an international conference on indigenous issues was held in 1977 and a conference on indigenous peoples and the land in 1981. U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, FACT SHEET NO. 9 (REV. 1), THE RIGHTS OF INDIGENOUS PEOPLES (1997), <http://digbig.com/4phha>.

6. Preliminary Report, *supra* note 1.

7. ECOSOC Res. 1982/34, U.N. Doc. E/Res/1982/34 (May 7, 1982), in ECOSOC, *Resolutions and Decisions of the Economic and Social Council*, supp. 1, at 26, U.N. Doc. E/1982/82 (Oct. 1982).

8. See International Work Group for Indigenous Affairs, The Working Group on Indigenous Populations, <http://www.iwgia.org/sw8632.asp> (discussing how the working group allows anyone to participate that is interested in these indigenous issues).

Draft United Nations Declaration on the Rights of Indigenous Peoples (the Draft U.N. Declaration), which is being submitted to the United Nations Commission on Human Rights (through another ad hoc Working Group of the latter).<sup>9</sup> The process should lead to the adoption of the Declaration by the United Nations General Assembly (UNGA).<sup>10</sup> Another declaration on the rights of indigenous peoples is also being developed at the regional level, within the Inter-American system.<sup>11</sup>

In 1985, the UNGA established the Voluntary Fund for Indigenous Populations to enable representatives of indigenous organizations to attend the sessions of the relevant U.N. bodies dealing with indigenous issues.<sup>12</sup> As a sign of the increasing importance of indigenous issues, the UNGA declared 1993 the International Year for the World's Indigenous People<sup>13</sup> and later, in 1995, it launched the International Decade of the World's Indigenous People (1995–2004).<sup>14</sup> More recently, in 2001, a “[S]pecial [R]apporteur on the situation of human rights and fundamental freedoms of indigenous people” was appointed to receive information and communications on violations of indigenous peoples’ rights.<sup>15</sup> A U.N. Permanent Forum on Indigenous Issues has also been established (as an advisory body to ECOSOC) in order to focus on global issues related to indigenous peoples, especially in the fields of human rights, economic and social development, culture, education, health, and the environment.<sup>16</sup>

---

9. ECOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/Res/1994/45, annex, in ECOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-Sixth Session*, 105, U.N. Doc. E/CN.4/1995/2 (Oct. 28, 1994) [hereinafter *Draft U.N. Declaration*].

10. The Draft U.N. Declaration should have been adopted before the end of the first International Decade of the World's Indigenous People (see *infra* note 14 and accompanying text), but the goal was not achieved.

11. ORGANIZATION OF AMERICAN STATES [OAS], INTER-AMERICAN COMM’N ON HUMAN RIGHTS, PROPOSED AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (1997), available at <http://digbig.com/4phhg>.

12. G.A. Res. 40/131, U.N. Doc. A/RES/40/131 (Dec. 13, 1985).

13. G.A. Res. 45/164, U.N. Doc. A/RES/45/164 (Dec. 18, 1990).

14. G.A. Res. 48/163, U.N. Doc. A/RES/48/163 (Dec. 21, 1993); G.A. Res. 50/157, U.N. Doc. A/RES/50/157 (Dec. 21, 1995). The Second International Decade of the World's Indigenous People was launched in 2004. G.A. Res. 59/174, U.N. Doc. A/RES/59/174 (Dec. 20, 2004).

15. U.N. Comm’n on Human Rights [UNCHR], Res. 2001/57, E/CN.4/RES/2001/57 (Apr. 24, 2001).

16. ECOSOC Res. 2000/22, U.N. Doc. E/RES/2000/22 (July 28, 2000), in ECOSOC, *Resolutions and Decisions of the Economic and Social Council*, 49, 50–51, U.N. Doc. E/2000/99 (2001); see also Permanent Forum on Indigenous Issues, <http://digbig.com/4qbkp>.

Moreover, apart from ad hoc initiatives and instruments, the diversity of indigenous peoples has been taken into account by other general instruments on human rights,<sup>17</sup> as well as within the realm of international environmental law<sup>18</sup> and cultural diversity.<sup>19</sup>

The issue of the rights of indigenous peoples has thus slowly but steadily gained importance for the international community. This has led to an international legal framework that, as will be illustrated, is comprised of individual and collective rights stemming from general and ad hoc instruments, deriving from different sources, and belonging to different areas of international law. The question is whether such a complex, fragmented, and multilayered international legal framework can be considered a satisfactory one for promoting the rights and protecting the diversity of indigenous peoples.

## II. INDIGENOUS PEOPLES AND THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS

In order to assess the international legal framework for the protection of indigenous peoples, one may start from applicable general instruments and rules on the international protection of human rights before considering ad hoc instruments specific to indigenous peoples.

### *A. Individual Human Rights, Equality, and Nondiscrimination*

The first “layer of protection” for indigenous peoples is that of individual human rights. Individuals belonging to indigenous populations enjoy the same human rights and fundamental freedoms as other individuals. Therefore, many international instruments on the protection of human rights apply to them.<sup>20</sup> Particularly relevant for indigenous individuals may be rights and freedoms such as the freedoms of thought, conscience, and religion; freedom of expression and of association; the right to private life; the right to education; the right to participation in public affairs; the right to property; and labor rights.

Among the most important rights in this regard are those of equality and nondiscrimination, inter alia, on the basis of race, religion, language, or ethnic origin, which aim to guarantee the same treatment to all individuals

---

17. See *infra* Part II.

18. See *infra* Part III.

19. See *infra* Part IV.

20. This is also explicitly reaffirmed in ad hoc instruments on indigenous peoples, such as the Draft U.N. Declaration (see *infra* Part V.B and, in particular, note 118). For a thorough examination of the application of international instruments on the protection of human rights to indigenous peoples, see generally THORNBERRY, *supra* note 1.

under the jurisdiction of a state.<sup>21</sup> These rights should ensure that an indigenous individual receive the same treatment as any other individual, not being discriminated against solely because of the individual's indigenous status. However, in order to safeguard the diversity of indigenous peoples, such a right must be interpreted in a flexible, extensive, and dynamic manner.

Firstly, applying the same treatment and standards to both indigenous and nonindigenous individuals in a rigid manner may ensure a formal equality, but it may not be enough to achieve a substantial one. Indigenous peoples are often among the weakest groups of societies. Therefore, positive action by the state, in the form of preferential treatment in their favor, may be required to achieve a level playing field in this regard. The right to nondiscrimination has generally been interpreted according to this view, for example by the Human Rights Committee (HRC) with reference to the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR):<sup>22</sup>

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.<sup>23</sup>

Secondly, a rigid and absolutist interpretation of the objective of equality may lead to the adoption of assimilative policies. Such risk should be avoided through a more flexible, distinctive approach that aims to ensure

---

21. See, e.g., International Covenant on Civil and Political Rights (ICCPR), arts. 2, 26–27, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 2, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, arts. 2–3, *opened for signature* Dec. 21, 1965, S. Exec. Doc. C, 95-2, 660 U.N.T.S. 195; European Convention on Human Rights and Fundamental Freedoms, art. 14, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5; Universal Declaration of Human Rights, G.A. Res. 217A (III), arts. 1–2, 7, U.N. Doc. A/810 (Dec. 10, 1948).

22. ICCPR, *supra* note 21; HUMAN RIGHTS COMMITTEE (HRC), UNITED NATIONS, GENERAL COMMENT NO. 18: NON-DISCRIMINATION para. 10 (1989), *available at* <http://digbig.com/4qdcg>.

23. HRC, *supra* note 22, para. 10.

equality while also respecting diversity. A valuable example of such an approach is given by the Committee on the Elimination of Racial Discrimination (CERD). The CERD has explicitly stated that discrimination against indigenous peoples falls under the scope of the International Convention on the Elimination of All Forms of Racial Discrimination and has called upon state parties to:

- (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.<sup>24</sup>

#### *B. The Rights of Indigenous Peoples as Minorities*

The right to equality and nondiscrimination is supplemented by norms safeguarding the diversity of individuals belonging to particular groups. Particularly relevant in this regard are ad hoc instruments, and ad hoc provisions embodied in more general instruments, pertaining to minorities. The most important example of the latter "distinctive" provisions is article 27 of the ICCPR:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.<sup>25</sup>

---

24. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION [CERD], UNITED NATIONS, GENERAL RECOMMENDATION NO. 23: INDIGENOUS PEOPLES para. 4 (1997); International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 21.

25. ICCPR, *supra* note 21, art. 27.

Rules such as article 27 are specific provisions that supplement the nondiscrimination principle and other individual human rights.<sup>26</sup> Their precise objective is to safeguard diversity by ensuring that members of minority groups can live according to their own standards and identities.<sup>27</sup> For the state this entails the negative obligation of noninterference, as well as the positive obligation to adopt the preferential treatment that is necessary to achieve the objective thereof.<sup>28</sup>

Although article 27 refers to “minorities,” the provision also applies to indigenous peoples.<sup>29</sup> While the two concepts do not necessarily or automatically coincide, they may often overlap.<sup>30</sup> In fact, in most cases indigenous peoples will also be minorities within the state where they live. Therefore, international norms that apply to minorities, such as article 27, will apply to indigenous individuals as well. This is explicitly stated by the HRC in its General Comment<sup>31</sup> and is confirmed by the fact that the quasi-jurisprudence of the HRC has dealt with individuals belonging to indigenous communities frequently under article 27.<sup>32</sup>

---

26. “[T]his article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.” HRC, UNITED NATIONS, GENERAL COMMENT NO. 23: THE RIGHTS OF MINORITIES para. 1 (1994) [hereinafter GENERAL COMMENT NO. 23].

27. “[A]rticle 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.” *Id.* para. 9.

28. *Id.* paras. 6.1–6.2.

29. ICCPR, *supra* note 21, art. 27.

30. These concepts overlap if we consider minorities as numerically inferior groups in a nondominant position within a state with their own identity in terms of culture, ethnic origin, language, religion, etc. See ECOSOC, Sub-Comm’n on Prevention of Discrimination and Prot. of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, paras. 22–23, U.N. Sales No. E.91.XIV.2 (1991) (prepared by Francesco Capotorti) (discussing a definition of minorities that categorizes them as nondominant, numerically inferior groups with their own ethnic, religious, and linguistic traditions). On these conceptual issues, see also TIMO MAKKONEN, IDENTITY, DIFFERENCE AND OTHERNESS: THE CONCEPTS OF ‘PEOPLE’, ‘INDIGENOUS PEOPLE’ AND ‘MINORITY’ IN INTERNATIONAL LAW 59 (The Eric Castrén Inst. of Int’l Law & Human Rights, Research Report No. 7, 2000); THORNBERRY, *supra* note 1, at 151.

31. GENERAL COMMENT NO. 23, *supra* note 26, paras. 3.2, 7.

32. See, e.g., HRC, *Comm’n No. 167/1984: Chief Bernard Ominayak & Lubicon Lake Band v. Canada*, para. 7, U.N. Doc. CCPR/C/38/D/167/1984 (adopted on Mar. 26, 1990); HRC, *Comm’n No. 197/1985: Kitok v. Sweden*, para. 4.2, U.N. Doc. CCPR/C/33/D/197/1985 (adopted on July 27, 1988); HRC, *Comm’n No. 24/1977: Lovelace v. Canada*, para. 1, U.N. Doc. CCPR/C/OP/1 (adopted on July 30, 1981).



Indigenous peoples may thus benefit from the international legal framework on the protection of minorities.<sup>33</sup> While older, more traditional treaties on minorities were mainly driven by an assimilative approach, more recent instruments—such as the Council of Europe Framework Convention on the Protection of National Minorities<sup>34</sup> or the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities<sup>35</sup>—are inspired by the distinctive one, requiring states to take measures that are necessary to ensure that minorities' diversity is safeguarded. This is clearly emphasized, for example, in the Council of Europe Framework Convention:

[A] pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity.<sup>36</sup>

While all these international norms are clearly aimed at indirectly protecting the interests of minorities as groups—and often require action by the state that targets the group itself—it is not entirely clear whether they establish truly collective rights (i.e., rights that are attributed to the group as such).<sup>37</sup> It seems that though minorities would always be the material

---

33. On the international framework on the protection of minorities, see generally Yadh Ben Achour, *Souveraineté étatique et Protection Internationale des Minorités*, in RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, 1994-I, at 321 (Hague Acad. of Int'l Law, No. 245, 1995); FELIX ERMACORA, *The Protection of Minorities Before the United Nations*, in 4 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, 1983, at 251 (1984); KRISTIN HENRARD, *DEVising AN ADEQUATE SYSTEM OF MINORITY PROTECTION: INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS AND THE RIGHT TO SELF-DETERMINATION* (2000); JAVAID REHMAN, *THE WEAKNESSES IN THE INTERNATIONAL PROTECTION OF MINORITY RIGHTS* (2000); PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (1991); Francesco Capotorti, *Il regime delle minoranze nel sistema delle Nazioni Unite e secondo l'art. 27 del Patto sui diritti civili e politici*, in RIVISTA INTERNAZIONALE DEI DIRITTI DELL'UOMO 102 (1992); Francesco Capotorti, *The Protection of Minorities Under Multilateral Agreements on Human Rights*, in 2 THE ITALIAN YEARBOOK OF INTERNATIONAL LAW, 1976, at 3, 19 (1977).

34. Framework Convention on the Protection of National Minorities, Feb. 1, 1995, Europ. T.S. No. 157, available at <http://digbig.com/4qbkx> [hereinafter Framework Convention].

35. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992).

36. Framework Convention, *supra* note 34, pmbl. This is also restated in the operational part of the Convention: "Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation." *Id.* art. 5, para. 2.

37. On collective rights, see generally PEOPLES' RIGHTS, *supra* note 2; THE RIGHTS OF PEOPLES, *supra* note 2; Robert N. Clinton, *The Rights of Indigenous Peoples As Collective Group*

beneficiaries of protection, the latter would be given indirectly through rights that are technically held by the individual members of the group. This may be inferred from the wording of the aforementioned ad hoc instruments, which generally refer to rights of “persons belonging to” minority groups, rather than to minorities as such.<sup>38</sup> This is also the case in article 27 of the ICCPR. The text of the provision refers to “persons belonging to . . . minorities,” although the right is enjoyed by the individual “in community with the other members.”<sup>39</sup> The HRC has confirmed this conclusion *a contrario* by comparison with the right to self-determination in article 1 of the ICCPR, which belongs to peoples as such.<sup>40</sup>

From the point of view of the positive action by the states to ensure the diversity of minorities, the debate over the individual or collective nature of the right will probably not be decisive: positive measures to achieve the objective of article 27 will most likely be in favor of minorities and would target the group as such, not the individual.<sup>41</sup> The difference may be seen, however, in the operation of the quasi-judicial mechanism. Norms such as article 27 can provide a powerful tool to protect cultural, linguistic, and religious diversity of indigenous peoples since these norms embody justiciable rights, thus enabling states to be scrutinized over their compliance with their obligations before judicial or quasi-judicial bodies. However, these instruments provide procedural rights to individuals belonging to indigenous peoples (or to a number of individuals if they are all equally claiming to be victims) and not to the latter as such: they may be useful to resolve a specific individual claim, but they may be unable to improve the conditions of an indigenous population as a whole. In fact, a

---

*Rights*, 32 ARIZ. L. REV. 739 (1990); Yoram Dinstei, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102 (1976); Peter Jones, *Human Rights, Group Rights, and Peoples' Rights*, 21 HUM. RTS. Q. 80 (1999); Jean-Bernard Marie, *Relations Between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions*, 7 HUM. RTS. L.J. 195 (1986); B.G. Ramcharan, *Peoples' Rights and Minorities' Rights*, 56 NORDIC J. INT'L L. 9 (1987); Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368 (1991).

38. See, e.g., Framework Convention, *supra* note 34, arts. 1, 3.

39. ICCPR, *supra* note 21, art. 27.

40. See GENERAL COMMENT NO. 23, *supra* note 26, para. 3.1 (“The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples . . . [It] is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such . . . and is cognizable under the Optional Protocol.”).

41. This is confirmed by a reasoning of the HRC, which states that:

Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.

*Id.* para. 6.2.

successful individual case may not necessarily benefit the entire community as such. The submission of a case that is of common interest for the group will depend upon the decision, ability, admissibility, and specific contingent situation of the individuals and their specific applications. Finally, one should not exclude a priori the possibility that the interests of the individual and the group as a whole may collide. Collective rights may provide an alternative approach to these points of view.

### *C. Collective Rights of Indigenous Peoples*

Collective rights may be the expression of the collective dimension of a corresponding individual right (e.g., the right to collective property) or they may be inherently collective—new and different as compared to the rights of the individual (e.g., the right of peoples to self-determination). Although the safeguarding of the rights of the individual members of an indigenous group indirectly and cumulatively enhances the protection of the indigenous group as a whole, collective rights may provide for a direct and supplemental protection to the collectivity as such. In fact, the individual-rights approach may be insufficient to defend some crucial collective interests of indigenous peoples, not only from a procedural point of view (as seen above with article 27 of the ICCPR) but also from a substantive one. A clear example is the right to land. Land is essential for indigenous peoples as land and its natural resources are the principal (if not, at times, the only) sources for their very existence. Such a right, in its collective dimension, is clearly supplemental to the individual one: a collective right to land may imply, for example, an obligation by the state to demarcate indigenous territory and respect it as a whole, something that would be difficult to conceive from the perspective of an individual right to private property. In other instances a collective right would suit the needs of indigenous peoples better than individual rights, such as in the case of a right to participation or a right to control over natural resources. Lastly, some rights are only collective, like the right to self-determination.

Collective rights are thus another essential layer of protection for indigenous peoples, and international law recognizes the existence of some of these rights, both in customary law and in treaty law.

#### 1. Existence and Self-Determination

A collective right to existence appears to be given, albeit indirectly, to groups or minorities through the Convention on the Prevention and Punishment of the Crime of Genocide, which prohibits and condemns such

crime with regards to “ethnic, racial or religious group[s].”<sup>42</sup> The prohibition against genocide goes well beyond the Convention, as it is firmly rooted in customary international law. Though the Convention refers to minorities, this can be extended in principle to indigenous peoples as well.<sup>43</sup>

The most important right of peoples, and also a well-established customary principle of international law, is the right to self-determination.<sup>44</sup> This right lies at the very heart of the U.N. Charter,<sup>45</sup> and is embodied in common article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>46</sup> It has also been recalled in many resolutions of the U.N. General Assembly,<sup>47</sup> and has been endorsed by international courts and tribunals, in particular, the International Court of Justice (ICJ).<sup>48</sup> Originally designed to enable peoples that were subject to colonial dominion to obtain more autonomy, the right to self-determination has evolved, in its most extreme form, into the right of populations of former overseas colonies to obtain independence. Thereafter, it was further extended to peoples subject to foreign military occupation or a regime of apartheid.

It is hard to say whether indigenous peoples can fall under any of these categories or whether the principle in general even applies to them since there exist, *inter alia*, complex, unresolved conceptual issues.<sup>49</sup> “Peoples”

42. Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

43. See *supra* Part II.B.

44. On self-determination, see generally ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995); GIANCARLO GUARINO, AUTODETERMINAZIONE DEI POPOLI E DIRITTO INTERNAZIONALE (1984); MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed., 1993); MUSGRAVE, *supra* note 1; SELF-DETERMINATION IN INTERNATIONAL LAW (Robert McCorquodale ed., 2000); James Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, in PEOPLES' RIGHTS, *supra* note 2, at 7; Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMP. L.Q. 241 (1994). It is important to highlight that although often framed as a “right to” self-determination in the relevant instruments, it is unclear whether peoples are really the holders of such right. Self-determination is probably better conceived as a principle entailing obligations for the state of which peoples are simply beneficiaries.

45. U.N. Charter arts. 1.2, 55, 73.

46. ICCPR, *supra* note 21, art. 1; ICESCR, *supra* note 21, art. 1.

47. See, e.g., Definition of Aggression, G.A. Res. 3314 (XXIX), art. 7, U.N. Doc A/9631 (Dec. 14, 1974); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 123, U.N. Doc A/8028 (Oct. 24, 1970); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at 67, U.N. Doc A/4684 (Dec. 14, 1960).

48. For example, see the latest ICJ advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 137 (July 9), available at <http://digbig.com/4qdcr>.

49. On self-determination and indigenous peoples in particular, see generally S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 97–115 (2d ed. 2004); MAIVÂN CLECH LÂM, AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION (2000); Gudmundur

to which self-determination refers are not defined in legal terms in the relevant instruments and, as already stated, the same can be said for the concept of “indigenous peoples.”<sup>50</sup> There is even debate over whether to use the term indigenous “peoples,” “people” (singular), or “populations”; the latter two terms being proposed precisely to avoid any possible implications for the applicability of the self-determination principle.<sup>51</sup>

Moreover, there are other important legal considerations regarding the right to self-determination. In its extreme form, implying the right to secession (“external” self-determination), self-determination conflicts with another fundamental principle of international law: the sovereignty and territorial integrity of a state. Any exceptions to such a principle should not be easily presumed and the scope of the principle of self-determination must be interpreted narrowly. As of now, nothing in international practice suggests that the customary right to self-determination as a right to independence, attributed to peoples in the three situations described above, can be extended to indigenous peoples.<sup>52</sup>

The legitimate aspirations of indigenous peoples, as distinct peoples with their own identities, towards self-determination may thus mean, at present, a more general right to determine their own political status and economic and cultural development, even going so far as obtaining a certain degree of autonomy within the state—“internal self-determination.” Ad hoc instruments such as the ILO Convention 169 or the Draft U.N. Declaration appear to follow this approach.<sup>53</sup> However, the exact content of such internal self-determination is not entirely clear and is not established under customary international law. Specific instruments on indigenous peoples can be used to illuminate it, albeit on a case-by-case basis.

---

Alfredsson, *The Right of Self-Determination and Indigenous Peoples*, in MODERN LAW OF SELF-DETERMINATION 41 (Christian Tomuschat ed., 1993); Caroline E. Foster, *Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples*, 12 EUR. J. INT’L L. 141 (2001); Hurst Hannum, *Minorities, Indigenous Peoples, and Self-Determination*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 1 (Louis Henkin & John Lawrence Hargrove eds., 1994); Glenn T. Morris, *In Support of the Right of Self-Determination for Indigenous Peoples Under International Law*, 29 GERMAN Y.B. OF INT’L L. 277 (1986); Douglas Sanders, *Self-Determination and Indigenous Peoples*, in MODERN LAW OF SELF-DETERMINATION 55 (Christian Tomuschat ed., 1993).

50. See *supra* Introduction.

51. Even when the term “peoples” is adopted, there may be safeguarding clauses excluding the application of the self-determination principle. E.g., ILO Convention No. 169, *supra* note 1, art. 1, para. 3.

52. The HRC has indirectly commented on that, explicitly stating that: “The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party.” GENERAL COMMENT NO. 23, *supra* note 26, para. 3.2.

53. See *infra* Part V. The Proposed American Declaration on the Rights of Indigenous Peoples also talks about a right to self-government rather than self-determination. See OAS, *supra* note 11, art. 15.

## 2. The Rights of Indigenous Peoples in the African Charter on Human and Peoples' Rights

Turning to the subject of collective rights embodied in treaty law, a fundamental instrument on the rights of peoples, though only regional in scope, is the African Charter on Human and Peoples' Rights (the African Charter).<sup>54</sup> The African Charter is the first international binding instrument on the protection of human rights that explicitly provides for justiciable collective rights alongside individual rights. According to the African Charter, peoples have, in addition to the right of self-determination (article 20), the right to equality (article 19); the right to freely dispose of their wealth and natural resources (article 21); the right to development (article 22); the right to peace and security (article 23); and the right to a satisfactory environment (article 24).<sup>55</sup>

All of these rights may be relevant in order to improve the protection of indigenous peoples. Although the African Charter does not contain a definition of "people," the quasi-jurisprudence of the African Commission on Human and Peoples' Rights (the African Commission) shows that the African Charter may also protect indigenous peoples. Reference can be made, in this regard, to the crucial case of the Ogoni people.<sup>56</sup>

In 1996, the Ogoni, an indigenous people living in eastern Nigeria, filed a complaint before the African Commission claiming Nigeria violated, *inter alia*, their individual rights to nondiscrimination (article 2); life (article 4); property (article 14); health (article 16); housing,<sup>57</sup> the collective rights to freely dispose of their wealth and natural resources (article 21); a satisfactory environment (article 24); and the individual and collective right to food.<sup>58</sup> The applicants claimed that Nigeria was responsible for the violation of such rights as a result of its involvement in the careless exploitation of the Ogoni territory for oil production purposes, something

---

54. African (Banjul) Charter on Human and Peoples' Rights, *adopted on June 27, 1981*, 21 I.L.M. 58 [hereinafter African Charter]. On peoples' rights in the African Charter, see generally Theo van Boven, *The Relations Between Peoples' Rights and Human Rights in the African Charter*, 7 HUM. RTS. L.J. 183 (1986).

55. African Charter, *supra* note 54, arts. 19–24.

56. The Soc. and Econ. Rts. Action Ctr. (SERAC) & the Ctr. for Econ. and Soc. Rts. (CESR) v. Nigeria, Comm'n 155/96, Doc. ACHPR/COMM/A044/1 (African Comm'n on Hum. and Peoples' Rts., May 27, 2002), *available at* <http://cesr.org/nigeria> (follow "judgment of the African Commission" hyperlink); see also Fons Coomans, *The Ogoni Case Before the African Commission on Human and Peoples' Rights*, 52 INT'L & COMP. L.Q. 749 (2003) (commenting on the *Ogoni* case).

57. The right to housing is not explicitly included in the African Charter, but the African Commission derives it from articles 14, 16, and 18 (family rights). *SERAC*, Doc. ACHPR/COMM/A044/1, paras. 59–61.

58. *Id.* para. 10. The right to food is not explicitly included in the African Charter, but the African Commission derives it from individual rights contained in articles 4 and 16, and the collective right included in article 22 (the right of all peoples to their economic, social, and cultural development). *Id.* paras. 64–66.

that had caused, among other things, severe environmental damage and health problems to the Ogoni land and people.<sup>59</sup> In its 2001 decision, the African Commission found that Nigeria violated all of the aforementioned rights.<sup>60</sup>

The decision in the Ogoni case is highly relevant for a variety of reasons. Firstly, it clarifies that indigenous peoples are protected as peoples under the African Charter, thus extending to them important collective rights, such as those relevant to the control of natural resources or the protection of their environment. Secondly, it exemplifies the great potential of the African Charter in terms of justiciability of peoples' rights. It demonstrates that these rights (even economic or social rights), though sometimes framed in very general terms, may be translated into justiciable obligations for states. The collective rights embodied in the African Charter can be directly invoked before the African Commission by the peoples concerned, making them truly collective rights in all respects. This is a major difference from other international instruments on human rights protection whereby only individual rights are cognizable.<sup>61</sup> Lastly, the African Commission has taken a progressive approach that goes beyond the scope of the African Charter itself (as far as collective rights are concerned) by initiating a process of "collectivization" of individual rights. In fact, in the Ogoni case, the African Commission declared that Nigeria violated the rights to life, property, and health of the Ogoni people, even though these rights are designed as individual rights in the African Charter.<sup>62</sup> This decision shows that, at least as far as the African Charter is concerned, it is possible to protect indigenous peoples through a progressive interpretation that takes into account not only collective rights but also the collective dimension of individual rights.

### 3. The Rights of Indigenous Peoples in the American Convention on Human Rights

The African Charter is not the only instrument where the profile of collective rights of peoples has been improved through creative judicial interpretation beyond the text of the treaty. A similar approach has been taken by the Inter-American Court of Human Rights (the Inter-American Court).

---

59. *Id.* paras. 1–9.

60. *Id.* para. 70

61. *See, e.g.,* ICCPR, *supra* note 21, art. 27 (extending certain rights only to "persons belonging to . . . minorities" and not the group as a whole).

62. African Charter, *supra* note 54, arts. 4, 14, 16; *SERAC*, Doc. ACHPR/COMM/A044/1, concl.

A very important case in this regard is that of the Awas Tingni community under the American Convention on Human Rights (the American Convention).<sup>63</sup> The indigenous community Mayagna (Sumo) Awas Tingni filed a complaint against Nicaragua before the Inter-American Court, claiming that a decision by Nicaraguan authorities permitting foreign multinational companies the right to exploit the forests in the Awas Tingni territory violated the land rights of the latter under the American Convention.<sup>64</sup> In a very progressive decision, the Inter-American Court upheld the applicants' argument by extending the scope of the individual right to property contained in article 21 of the American Convention.<sup>65</sup> The Inter-American Court even went so far as to derive from article 21 a truly collective right to land for the indigenous community, implying, *inter alia*, a right to demarcation and protection of traditional land and a right to the management of its natural resources.<sup>66</sup> As a result, it ordered Nicaragua to demarcate the lands of the Awas Tingni people, to recognize their property rights, and to refrain from activities that may impair the interests of indigenous peoples connected with their land.<sup>67</sup> The Inter-American Court's decision is the first binding decision of an international tribunal recognizing indigenous peoples' right to land. The fact that such a decision relates to a treaty that does not contain any explicitly collective right is even more remarkable.

The examples of the African and American systems show how collective rights, accompanied by access to international justice, can effectively protect indigenous peoples. This is all the more true if the international court or quasi-judicial body is ready to adopt a creative and progressive approach that can go as far as "collectivizing" individual rights whether or not the relevant instruments provide for any collective right at all.

---

63. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

64. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, paras. 1–6 (Aug. 31, 2001), *available at* <http://digbig.com/4qdc>. See generally S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1 (2002) (commenting on the *Awas Tingni* case).

65. Mayagna (Sumo) Awas Tingni Cmty., 2001 Inter-Am. Ct. H.R. para. 148.

66. *Id.* para. 153.

67. *Id.* paras. 153, 173.



### III. INDIGENOUS PEOPLES AND INTERNATIONAL ENVIRONMENTAL LAW: BIODIVERSITY PROTECTION AND PARTICIPATION

Another layer of protection is provided outside of human rights law by international environmental law instruments. Insofar as international environmental law aims to protect the environment, it will also indirectly benefit indigenous peoples by safeguarding their (often particularly sensitive) environment and their strong linkage with their lands and territories.<sup>68</sup> Moreover, international environmental law does, in a few instances, address the specific roles and interests of indigenous peoples, mainly in the areas of biodiversity protection and participation in environmental matters.

As principle 22 of the Rio Declaration clarifies: “Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”<sup>69</sup>

As far as biodiversity is concerned, apart from the protection of biological diversity (which indirectly safeguards indigenous territories and lands), indigenous peoples may have a supplemental interest in the field of management and exploitation of natural resources. In particular, international environmental law addresses the issue of their traditional knowledge and techniques relating to biodiversity, which must be protected and promoted. In this regard, the most important instrument is the Convention on Biological Diversity (CBD), which in article 8(j) requires each contracting party to:

[R]espect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.<sup>70</sup>

---

68. See generally Dinah Shelton, *Environmental Rights*, in PEOPLES' RIGHTS, *supra* note 2, at 235 (discussing the environmental protection of indigenous peoples' local communities).

69. Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874, princ. 22.

70. Convention on Biological Diversity art. 8(j), *opened for signature* June 5, 1992, 1760 U.N.T.S. 142, 31 I.L.M. 822.

Very often traditional indigenous knowledge and techniques are exploited by the state or by foreign entities without the consent of, or for the benefit of, indigenous peoples. Article 8(j) of the CBD aims to tackle this problem by ensuring that indigenous knowledge relating to biodiversity is protected and promoted, and that benefits arising out of the exploitation of the same is redistributed in favor of indigenous peoples.<sup>71</sup> Though very important in principle, the norm appears to be somewhat soft in nature. The overall obligation is not absolute (being “[s]ubject to . . . national legislation”) and, in addition, equitable sharing is simply “encourage[d].”<sup>72</sup> Such weak wording suggests that this may not be considered a very strict obligation.

The diversity of indigenous peoples was also recognized by the World Summit on Sustainable Development (Johannesburg, South Africa, August 26–September 4, 2002). The Plan of Implementation adopted in Johannesburg provides for, among other things: the improvement of access to economic activities and employment in order to fight poverty of indigenous communities, access to agricultural resources, and the promotion of indigenous property systems.<sup>73</sup> The Plan of Implementation follows the CBD in encouraging the use of indigenous knowledge and techniques in general, the management of natural resources in particular (as well as the sharing of benefits arising thereof), and the participation of indigenous peoples in decisions affecting the management of such knowledge.<sup>74</sup> It requires the enhancement of assistance to indigenous peoples in their efforts to conserve biodiversity, and it encourages partnership with indigenous peoples as far as forest management and mining are concerned.<sup>75</sup>

Public participation is a key tool for the improvement of indigenous peoples’ status in international law and a principle that has gained great importance in the environmental field. One particularly innovative instrument in this regard was recently adopted: the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).<sup>76</sup> The Aarhus

---

71. *Id.*

72. *Id.*

73. WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, PLAN OF IMPLEMENTATION, in World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, annex, at 7, paras. 7(e), 7(h), U.N. Doc. A/CONF.199/20 (Sept. 4, 2002) [hereinafter *Report of the World Summit*].

74. *Id.* paras. 37(f), 40(d), (h), (r), 42(e), 44(j), (l), 45(h), 54(h), 63, 64(d), 70(c), 109(a).

75. *Id.* paras. 44(h), 45, 46.

76. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *opened for signature* June 25, 1998, 2161 U.N.T.S. 447, 38 I.L.M.

Convention provides for specific obligations for state parties to ensure that civil society has a right to receive information, participate in decision making, and receive judicial review in environmental matters.<sup>77</sup> The scope of application of the treaty may not ensure worldwide protection to indigenous peoples as such, but the Aarhus Convention represents a precedent and an example of how to translate into binding form the relevant aforementioned general principles.

Although participation is normally intended with reference to the domestic level, some attention has also recently been drawn to participation at the international level. In this regard, the idea of “partnerships for sustainable development” (launched in Johannesburg) may be useful in increasing indigenous peoples’ participation in the environmental protection and sustainable development of their natural resources at the global level.<sup>78</sup> These partnerships are flexible agreements among different entities (states, international organizations, nongovernmental organizations, and other stakeholders, including indigenous peoples) aimed at establishing a cooperative structure around specific sustainable development topics and programs in order to catalyze ideas and resources and enhance global cooperation at all levels among all actors concerned with a specific issue.<sup>79</sup>

#### IV. INDIGENOUS PEOPLES AND CULTURAL DIVERSITY

Particular attention has recently been devoted to the protection of cultural diversity, which is increasingly affected by the conforming force of the so-called globalization, especially as far as indigenous peoples are concerned. The United Nations Educational Scientific and Cultural Organization (UNESCO) has done relevant work in this field, in particular by adopting the Universal Declaration on Cultural Diversity (the UNESCO Declaration)<sup>80</sup> and the Convention for the Safeguarding of the Intangible Cultural Heritage (the UNESCO Convention).<sup>81</sup>

According to the UNESCO instruments, “cultural diversity is as necessary for humankind as biodiversity is for nature,” thus being the “common heritage of humanity,” and it must constitute the base for an

---

517.

77. *Id.* art. 1.

78. *Report of the World Summit*, *supra* note 73, annex III, at 166, para. 2.

79. Alessandro Fodella, *Il vertice di Johannesburg sullo sviluppo sostenibile*, in 2003 RIVISTA GIURIDICA DELL’ AMBIENTE 385, 385–86.

80. Universal Declaration on Cultural Diversity, UNESCO, 31st Sess., 20th plen. mtg. (Nov. 2, 2001), available at <http://digbig.com/4qbwf> (follow “English” link) [hereinafter UNESCO Declaration].

81. Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO, 32d Sess. (Oct. 17, 2003), available at <http://digbig.com/4qbwg> [hereinafter UNESCO Convention].

evolution towards a culturally pluralist society.<sup>82</sup> The specific role of indigenous peoples in this regard is recognized,<sup>83</sup> and the protection of their human rights is required as a guarantee of cultural diversity.<sup>84</sup>

The UNESCO Convention envisages the creation of an international list of intangible cultural heritages resembling the system of the UNESCO World Heritage Convention,<sup>85</sup> although in the present case the aim is simply “to ensure better visibility of the intangible cultural heritage and awareness of its significance.”<sup>86</sup> Other obligations for states-parties, though quite general in nature (such as the drawing up of inventories of intangible cultural heritages<sup>87</sup> or the adoption of general policies aimed at promoting it),<sup>88</sup> could improve the protection of the intangible cultural heritages of indigenous peoples should the Convention enter into force.<sup>89</sup>

## V. AD HOC INSTRUMENTS ON INDIGENOUS PEOPLES

The final layer of protection for the rights of indigenous peoples is that of ad hoc instruments: the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries<sup>90</sup> and the Draft U.N. Declaration on the Rights of Indigenous Peoples.<sup>91</sup>

---

82. UNESCO Declaration, *supra* note 80, arts. 1–2.

83. UNESCO Convention, *supra* note 81, pmb. (“Recognizing that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and recreation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity . . .”).

84. UNESCO Declaration, *supra* note 80, art. 4 (“The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.”).

85. Convention Concerning the Protection of the World Cultural and Natural Heritage, *opened for signature* Nov. 23, 1972, 1037 U.N.T.S. 151.

86. UNESCO Convention, *supra* note 81, art. 16.

87. *Id.* art. 12.

88. *Id.* art. 13.

89. *Id.* art. 34.

“[I]ntangible cultural heritage” means the practices, representations, expressions, knowledge, skills - as well as the instruments, objects, art[i]facts and cultural spaces associated therewith - that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity . . . .”

*Id.* art. 2, para. 1. It “is manifested inter alia in the following domains: (a) oral traditions and expressions, including language . . . ; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.” *Id.* art. 2, para. 2.

90. ILO Convention No. 169, *supra* note 1.

91. Draft U.N. Declaration, *supra* note 9.

Both documents mark the eventual abandonment of the assimilative approach that characterized previous instruments by requiring states to recognize, respect, and protect the diversity of indigenous peoples. The documents also provide for specific rights and obligations, building upon the principles that indigenous individuals enjoy all human rights and fundamental freedoms, and that states should ensure to them substantial equality and nondiscrimination, as well as the widest possible rights of participation.

#### A. The ILO Conventions

The first legally binding instrument on indigenous peoples to be adopted was the ILO Convention No. 107 in 1957.<sup>92</sup> The Convention was explicitly built on an assimilation assumption, which was progressively criticized as indigenous peoples gained importance in international fora. Since ILO Convention No. 107 ceased to reflect the approach of the international community with regards to indigenous peoples, it was revised. At the end of the process, a new ILO Convention, No. 169, Concerning Indigenous and Tribal Peoples in Independent Countries, was adopted.<sup>93</sup> Ratifications of ILO Convention No. 107 have been closed, but this convention is still binding for those states that ratified it without ratifying the subsequent ILO Convention No. 169. For the states that ratified both conventions, ILO Convention No. 169 applies since it explicitly revises the former.<sup>94</sup> Therefore, although ILO Convention No. 107 is still in force, it seems appropriate to analyze only the provisions of the ILO Convention No. 169, since they reflect the new standards of international law in the field.

ILO Convention No. 169 provides for a definition of indigenous or tribal peoples in article 1:

1. This Convention applies to:

- (a) [T]ribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated

---

92. ILO Convention No. 107, *supra* note 3.

93. ILO Convention No. 169, *supra* note 1. For more on the Convention, see Hans-Joachim Heintze, *The Protection of Indigenous Peoples Under the ILO Convention*, in *AMAZONIA AND SIBERIA: LEGAL ASPECTS OF THE PRESERVATION OF THE ENVIRONMENT AND DEVELOPMENT IN THE LAST OPEN SPACES* 310, 318–27 (Michael Bothe et al. eds., 1993); Lee Swebston, *The Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption*, in *THE HUMAN RIGHTS OF INDIGENOUS PEOPLES* 17 (Cynthia Price Cohen ed., 1998); THORNBERRY, *supra* note 1, at 339.

94. ILO Convention No. 169, *supra* note 1, pmb., art. 36. Even without such an explicit clause, according to the principle of *lex posterior*, the ILO Convention No. 169 would prevail over the ILO Convention No. 107 for states that are parties to both treaties.

wholly or partially by their own customs or traditions or by special laws or regulations;

(b) [P]eoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>95</sup>

It adds, however, that “[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”<sup>96</sup>

The definitive rejection of the assimilative approach is evident throughout the Convention. For example, it requires states *inter alia* to recognize, respect, and protect institutions and social, cultural, religious, and spiritual values and practices of indigenous peoples.<sup>97</sup> Indigenous peoples also have the right “to retain their own customs and institutions,”<sup>98</sup> such as (to a certain extent) methods for dealing with offenses committed by members or customs in regard to penal matters.<sup>99</sup>

However, on the issue of self-determination, the Convention is quite unsatisfactory, since no such right is explicitly provided for; moreover, the Convention seems to exclude its application to indigenous peoples with a sentence that states: “The use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”<sup>100</sup>

Although the provision was probably introduced to avoid extending to indigenous peoples the “external” aspect of self-determination, this seems to be an element against the recognition of such right for indigenous peoples in general. It must be emphasized, however, that the Convention nonetheless recognizes some rights which could be linked to self-determination (at least to its “internal” dimension), such as “the right to decide their own priorities for the process of development . . . and to exercise control, to the extent possible, over their own economic, social and cultural development.”<sup>101</sup>

---

95. *Id.* art. 1.

96. *Id.*

97. *Id.* arts. 4–5.

98. *Id.* art. 8, para. 2.

99. *Id.* arts. 9–10.

100. *Id.* art. 1, para. 3.

101. *Id.* art. 7, para. 1.

The Convention reaffirms the principle that indigenous peoples enjoy all human rights, in particular the right to nondiscrimination,<sup>102</sup> and it emphasizes the need for their participation in decision making affecting them.<sup>103</sup>

Quite specific obligations are established in the field of land rights. Parties must respect the special importance of the relationship between indigenous peoples and their land and they must recognize “[t]he right[] of ownership and possession of the peoples concerned over the lands which they traditionally occupy,” including respect for their procedures for the transmission of land rights.<sup>104</sup> “The rights of the peoples concerned to the natural resources pertaining to their lands” must “be specially safeguarded,” but this only goes so far as providing a right “to participate in the use, management and conservation of these resources.”<sup>105</sup> The Convention establishes special rules in case of exploitation of mineral or subsurface resources in indigenous territories: these include prior consultation and participation procedures, as well as benefit-sharing or compensation in favor of indigenous peoples.<sup>106</sup> Removal of indigenous peoples from their land is possible only when “necessary as an exceptional measure” and with their consent.<sup>107</sup> Indigenous peoples have a right to return to their land, where possible, or a right to be compensated, either with a restitution in kind (i.e., “with lands of quality and legal status at least equal”) or with economic compensation.<sup>108</sup>

Finally, the Convention requires the adoption of special measures ensuring nondiscrimination and substantial equality regarding recruitment and conditions of employment,<sup>109</sup> vocational training, handicrafts and rural industries,<sup>110</sup> social security and health,<sup>111</sup> education, and means of communication.<sup>112</sup>

---

102. *Id.* arts. 2–4, 8, para. 3.

103. *Id.* art. 2, para. 1, arts. 6, 7, para. 3.

104. *Id.* arts. 13–14, 17.

105. *Id.* art. 15.

106. *Id.*

107. *Id.* art. 16.

108. *Id.*

109. *Id.* art. 20.

110. *Id.* arts. 21–23.

111. *Id.* arts. 24–25.

112. *Id.* arts. 26–31.

*B. The Draft U.N. Declaration*

*De lege ferenda*, the fundamental instrument on the protection and promotion of indigenous peoples' diversity, is the Draft U.N. Declaration on the Rights of Indigenous Peoples.<sup>113</sup> Although it was supposed to be adopted before the end of the first International Decade on Indigenous Peoples, the Draft U.N. Declaration is still currently under consideration by the U.N. Human Rights Commission.<sup>114</sup> Therefore, it is still in its provisional form as adopted by the Sub-Commission. When adopted, the Draft U.N. Declaration will only be a nonbinding, "soft law" instrument. However, it is upon this document that indigenous peoples rely in order to safeguard their rights and interests and to improve their status in international law. This may be for a number of reasons. Firstly, because the Draft U.N. Declaration would be the most advanced and comprehensive global instrument in this field. Secondly, it would have an enormous political value by helping raise the profile of indigenous peoples at the international level. Finally, because nonbinding instruments in international law often (especially in recent times) represent the first step of an evolution towards binding norms, either by serving as the basis for the adoption of a future treaty or by stimulating the creation of customary international law. Both the extreme caution that states are using when negotiating the text of the Draft U.N. Declaration and the reluctance to adopt it confirm the feeling that such an international instrument may gain a value that would go well beyond that of a simple "soft law" instrument.

The Draft U.N. Declaration is divided into nine parts and forty-five articles. It is firmly built on the principles of nondiscrimination and equality, the protection and promotion of the diversity of indigenous peoples (which constitutes a "common heritage of humankind"), the rejection of any assimilative policy, and the principle of self-determination.<sup>115</sup> According to the Draft U.N. Declaration, indigenous peoples enjoy all the human rights and fundamental freedoms that are recognized in international law, in particular the right to equality and nondiscrimination.<sup>116</sup> The latter is to be interpreted according to the usual

---

113. *Draft U.N. Declaration*, *supra* note 9. For a comment on the Draft U.N. Declaration, see generally EYASSU GAYIM, *THE U.N. DRAFT DECLARATION ON INDIGENOUS PEOPLES: ASSESSMENT OF THE DRAFT PREPARED BY THE WORKING GROUP ON INDIGENOUS POPULATIONS* (1994); THORNBERRY, *supra* note 1, at 370-96.

114. *See supra* note 10.

115. *Draft U.N. Declaration*, *supra* note 9, pmbl.

116. *Id.* arts. 1-2. The Draft U.N. Declaration also mentions the "rights to life, physical and mental integrity, liberty and security of [the] person"; the right to education; "all rights established under international labour law and national labour legislation"; and the right to health. *Id.* arts. 6, 15, 18, 24.



meaning identified above,<sup>117</sup> implying inter alia the need for positive, preferential measures by the state.<sup>118</sup>

The Draft U.N. Declaration embodies a well-articulated “right to diversity” for indigenous peoples, composed of a right to live and exist as distinct peoples with their own identity<sup>119</sup> and their own distinct political and juridical,<sup>120</sup> economic,<sup>121</sup> social, and cultural systems and characteristics.<sup>122</sup>

The most important aspect of the right to diversity, however, is the right to self-determination: “Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>123</sup>

As illustrated above, the Draft U.N. Declaration does not seem to add new elements to the principle of self-determination.<sup>124</sup> In particular, it does not seem to give indigenous peoples any right to secession or impulse against the territorial integrity of states.<sup>125</sup> In fact, it only explicitly gives them a right to self-government and autonomy in different matters:

---

117. See *supra* Part II.B.

118. “Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions.” *Draft U.N. Declaration*, *supra* note 9, art. 22.

119. *Id.* arts. 6, 8. This also includes freedom from genocide and cultural genocide, “[a] right to belong to . . . indigenous communit[ies] or nation[s],” and “to determine their own citizenship.” *Id.* arts. 6–7, 9, 32.

120. Indigenous peoples have, inter alia, the right to maintain and “develop their own indigenous decision-making institutions,” their own “institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards,” and “to determine the responsibilities of individuals to their communities.” *Id.* arts. 19, 33–34.

121. For example, indigenous peoples have a right “to engage freely in all their traditional and other economic activities” and “the right to determine and develop priorities and strategies for exercising their right to development.” *Id.* arts. 21, 23.

122. *Id.* arts. 4, 7, 12, 21. This means, inter alia, their right to cultural integrity and to have their cultural diversity appropriately reflected in all forms of education and public information; a “right to practise and revitalize their cultural traditions and customs,” and “to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies”; a right to use their languages; to establish and control their educational systems and institutions, in their own language and according to their own methods; a right their own media; a “right to their traditional medicines and health practices”; and a “right to maintain and strengthen their distinctive spiritual and material relationship with the lands” and the environment. *Id.* arts. 7, 12–16, 24–25.

123. *Id.* art. 3.

124. See *supra* Part II.C.1; see also Foster, *supra* note 49, at 142 (discussing self-determination as articulated in the Draft U.N. Declaration).

125. See *Draft U.N. Declaration*, *supra* note 9, art. 45 (“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.”).

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.<sup>126</sup>

The exact content of such autonomy cannot be explained or deduced in theory. The right is articulated, and its content can be obtained, through the more specific rights falling under the general umbrella of the right to diversity explained above or other land and environmental rights contained in the Draft U.N. Declaration itself.

There may seem to be a “tension” between the right to diversity and autonomy, on the one hand, and a right to participate in the life of the nation where indigenous peoples live, on the other. However, the right to maintain a separate identity and not to be assimilated does not mean marginalization: indigenous peoples have the right to citizenship and “to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”<sup>127</sup> In particular, they have “the right to participate . . . at all levels of decision-making in matters which may affect [them]” and “in devising legislative or administrative measures that may affect them.”<sup>128</sup>

A far-reaching and, therefore, crucial part of the Draft U.N. Declaration concerns the right to land. In this regard, article 26 provides:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.<sup>129</sup>

---

126. *Id.* art. 31.

127. *Id.* arts. 4–5.

128. *Id.* arts. 19–20.

129. *Id.* art. 26.

The right is further implemented through an obligation of “restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent” and a subsidiary duty of compensation when restitution is not possible.<sup>130</sup> Rights to land are supplemented by extensive provisions on environmental protection and management of natural resources. They establish a right to “conservation, restoration and protection of the total environment and the productive capacity of . . . lands, territories and resources,”<sup>131</sup> as well as a right to determine priorities and strategies for the development or use of their lands, territories, and resources.<sup>132</sup> This implies, in particular, the duty of the state to obtain the consent of indigenous peoples before approving activities affecting their land and resources, and to provide “just and fair compensation” for such activities pursuant to agreement with the indigenous peoples concerned.<sup>133</sup> It also entails the right for indigenous peoples to own, control, develop, and protect their cultural and intellectual property, sciences, technologies, and cultural manifestations, including human and other genetic resources, medicines, knowledge, traditions, and arts.<sup>134</sup> These are strict obligations with potentially enormous implications. Even bearing in mind that the Draft U.N. Declaration is a nonbinding instrument, it is still highly probable that strong resistance by the states will eventually lead to some changes in the wording of this provision.

The final provisions in the Declaration require states to take measures to give effect to its rights, including financial assistance and dispute resolution mechanisms.<sup>135</sup> The creation of an ad hoc U.N. body “with special competence in this field” is also suggested.<sup>136</sup> The nonbinding nature of this instrument leads to questions, however, as to how effective these final operational and institutional provisions will ultimately be.

#### CONCLUSION

The legal status of indigenous peoples in international law has improved significantly since their first appearance in the international arena. However, the international community has yet to develop an entirely satisfactory legal regime concerning their diversity.

---

130. *Id.* art. 27.

131. *Id.* art. 28. The right is further specified with a prohibition to undertake military activities on such land or to use it to dispose of hazardous wastes. *Id.*

132. *Id.* art. 30.

133. *Id.* arts. 27, 30.

134. *Id.* art. 29.

135. *Id.* arts. 37–39.

136. *Id.* art. 41.

Although there has been a clear and definitive shift in international law from the previous assimilative approach towards one that recognizes and accepts the diversity of indigenous peoples and aims to safeguard it, when it comes to articulating and implementing this conclusion through detailed rights and obligations, the international legal framework does not appear to be fully equipped for the task. In fact, the latter protects different aspects of indigenous diversity with different rights embodied in different international instruments. In other words, it has developed in a piecemeal way. *De lege lata* indigenous peoples have a right to exist as diverse peoples with their own identity as a consequence of the customary international obligations relating to the prohibition of genocide. They are indirectly protected by general instruments securing the human rights of individuals, especially under the nondiscrimination and equality principle or by those provisions protecting members of minorities. They are further safeguarded by human rights instruments providing, directly or indirectly (i.e., through progressive judicial interpretation), essential, supplemental, collective rights, such as in the case of the African Charter or the American Convention. Moreover, specific aspects of their diversity are dealt with under norms that have been elaborated within other sectors of international law such as obligations on the protection of biological or cultural diversity or on public participation.

This fragmented legal framework may provide some protection, especially in specific cases, but coordination is needed for it to be fully effective. International courts, tribunals, and compliance bodies may play a decisive role in this respect. These may resort to article 31.3(c) of the Vienna Convention on the Law of Treaties, which requires the interpreter to take into account “[a]ny relevant rules of international law applicable in the relations between the parties” when interpreting a treaty.<sup>137</sup> This hermeneutical tool may enable the interpreter, when dealing with indigenous issues under one particular instrument (e.g., a treaty on human rights protection), to take into account other instruments of the same “area” of international law (e.g., another human rights treaty) or of a different one (e.g., a multilateral environmental agreement), including the relevant jurisprudence. This approach has already been used in other sectors of international law, for example, to interpret rules of international economic law according to applicable norms of international environmental law.<sup>138</sup>

---

137. Vienna Convention on the Law of Treaties art. 31.3(c), May 23, 1969, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679.

138. See, for example, the WTO-related *Shrimp* and *Gasoline* disputes. Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, para. 129, WT/DS58/AB/R (Oct. 12, 1998); Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, at 14, 16, WT/DS2/AB/R (Apr. 29, 1996).

This “cross-fertilization” between different realms of international law<sup>139</sup> could be used to build a comprehensive, coherent, and systematic international legal framework for indigenous peoples’ rights at the jurisprudential level, taking into account at the same time all relevant rules of international law.

Effective as it may be, this jurisprudential-coordination approach depends on the willingness, ability, and policies of the relevant judicial (or quasi-judicial) bodies and may be implemented to resolve specific cases. In the long term, however, the overall profile of the legal status of indigenous peoples at the global level may be raised only by a coherent, global legal framework, i.e., through the adoption and effective implementation of ad hoc instruments. These should inter alia provide for a comprehensive approach to indigenous peoples’ protection, merging in one instrument the different layers of protection currently found in the different relevant international instruments. Such a comprehensive approach is essential, since the existence and respect for the diversity of indigenous peoples depend, in many cases, upon the coherent synergy between such interdependent rights as the right to life, the right to land, the right to control over natural resources, and the right to environmental protection.

ILO Convention No. 169 *de lege lata*, and the Draft U.N. Declaration *de lege ferenda*, represent the attempts to achieve these objectives, albeit with ambiguous results. The ILO Convention is legally binding, but its provisions are not always strict, and it has not gained much success. The Draft Declaration, thus far, is much stricter, more detailed, and more complete, but it is not legally binding. It could have an enormous political value, but this will have to be assessed in the future, if it is eventually adopted by the U.N. General Assembly, and if its final form is not radically changed by ongoing negotiations.

In substance, any truly effective international legal framework on indigenous peoples should be based on at least four principles: equality and nondiscrimination; participation (both at the domestic and international level); self-determination (in the form of a certain degree of autonomy within the state); and the right to land, including the right to environmental protection and control over natural resources.

---

139. Gabrielle Marceau, *A Call for Coherence in International Law: Praises for the Prohibition Against “Clinical Isolation” in WTO Dispute Settlement*, 33 J. WORLD TRADE 87, 87 (1999); Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and Other Treaties*, 35 J. WORLD TRADE 1081, 1081 (2001); Philippe Sands, *Sustainable Development: Treaty, Custom, and the Cross-Fertilization of International Law*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 39, 39 (Alan Boyle & David Freestone eds., 1999).

While the first two principles are already widely recognized in international law, the same cannot be said for the other two. The right to land is crucial for indigenous peoples, but it is also difficult to implement in practice (e.g., in terms of procedural rights to restitution) given the strong opposing interests involved. Self-determination is still an unclear concept as far as indigenous peoples are concerned. While it seems fair to conclude that the principle does not entail a general right to independence for indigenous peoples, and that it may simply mean a right to autonomy, its exact content is not provided for by customary international law. It must therefore be articulated through many different procedural and substantive rights and obligations in different instruments, ensuring the continuity of indigenous peoples' diversity and identity. The jurisprudential approach has been helpful in implementing the right to land but not as far as the right to self-determination is concerned. For both principles, the provisions of the Draft U.N. Declaration are thus far stronger than those of the ILO Convention. This may be a reason to be optimistic, as it may show a positive trend towards the improvement of indigenous peoples' rights. However, the failure to adopt the Draft U.N. Declaration within the original timeframe (i.e., the first Decade of Indigenous Peoples) is not a good sign. Negotiations are proving difficult, despite this being a nonbinding instrument, and this may be due precisely to great resistance against strong land rights and self-determination provisions.

Until these crucial questions are resolved in international law, it is unlikely that the rights of indigenous peoples will be effectively recognized and protected, and that their differences will be accommodated. The outcome of the Draft U.N. Declaration's negotiations is likely to be the parameter by which success or failure will be assessed in this regard.