Introduction

Indigenous Peoples and Human Rights: Institutions and Influences

FOR A LONG time indigenous peoples were scarcely mentioned in international human rights law. They appear neither in the Universal Declaration of Human Rights of 1948 nor in most of the major human rights conventions, including those on racial discrimination (1965), civil and political rights (1966), economic, social and cultural rights (1966), women's rights (1979), torture (1986), migrant workers (1990), or enforced disappearances (2007).[1] There is a only a fleeting reference to discrimination on the basis of indigenous origin in the UN Convention on the Rights of Persons with Disabilities 2006, and then only in the Preamble. Only the Convention on the Rights of the Child 1989 directly addresses indigenous peoples, in three contexts: media communication in indigenous languages; education in a pluralistic society; and the right to enjoy indigenous culture, religion and language.[2] As yet there is still no specialised treaty on indigenous rights, such as exists for some other vulnerable groups.

Despite the near absence of binding standards explicitly recognising indigenous rights, international and regional human rights systems have creatively adapted general human rights standards to protect a range of critical indigenous interests. This book focuses on the jurisprudence developed by United Nations human rights treaty bodies and regional human rights bodies in interpreting and adapting general human rights standards to the specific circumstances and experiences of indigenous peoples. Most of this work began in the 1980s and has accelerated since the 1990s.

[1] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171); International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981, 1249 UNTS 13); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003, 2220 UNTS 3); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010, 2716 UNTS 3).

[2] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3). Article 17(d) requires states to encourage the mass media to have regard to the linguistic needs of indigenous children. Article 29(1)(d) requires states to ensure that education prepares children for responsible life in a free society, 'in the spirit of … friendship amongst all peoples, ethnic, national and religious groups and persons of indigenous origin'. Article 30 guarantees that indigenous children '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 committees' jurisprudence has also helped to lay the intellectual groundwork for further standard-setting initiatives by other UN human rights bodies, while later interacting with the standards issued by those bodies.

UN TREATY COMMITTEE JURISPRUDENCE

Within the UN system, the focus is on the Human Rights Committee (HRC) (concerning civil and political rights) in chapter 2, and, in chapter 3, on the Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination Against Women (CEDAW Committee), Committee on the Rights of the Child (CRC) and Committee Against Torture (CAT).

The term 'jurisprudence' is deployed liberally in relation to the outputs of these bodies. The committees are not courts. Their 'general comments' providing guidance on particular rights, 'concluding observations' on states' periodic reports, and 'views' in individual cases (where states accept the complaints procedures) are recommendatory and not strictly binding at law. Their pronouncements are, however, highly authoritative interpretations of states' convention obligations, both at a standard setting level and in the resolution of particular factual and legal disputes in individual cases. As the HRC has stated in relation to its role in individual cases (and which applies equally to the other committees):

> While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions. …
>
> The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.[3]

Chapters 2 and 3 show that, in the absence of indigenous-specific standards in most human rights treaties, indigenous peoples have sought to apply general human rights standards in ways that are particular to their distinctive circumstances. Chapter 2 suggests the HRC's focus has been on adapting the right of minorities to take part in cultural life (ICCPR, Article 27) to indigenous circumstances, particularly to protect interests in land and resources. To a lesser extent the HRC has also tailored the right of self-determination and other civil and political rights to address the specificities of indigenous experiences. Chapter 3 reviews the practice of the remaining UN treaty committees. It shows that all have been concerned with cross-cutting

[3] HRC, *General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights* (5 November 2008), [11] and [13].

issues of discrimination, violence and a lack of access to justice affecting indigenous peoples. Most committees have been concerned to varying degrees about violations of economic and social rights, and particularly in relation to indigenous lands and resources. The CESCR has mostly focused on self-determination and cultural rights. The CERD and CEDAW have been especially interested in indigenous political participation, while the CRC has been most concerned with family rights and child rights in the family.

REGIONAL JURISPRUDENCE

At the regional level, the book's emphasis, in chapters 4 and 5, is on developments in the Inter-American and African human rights systems, where indigenous issues have been most prominently raised. Chapter 4 shows how these regions have developed a distinctive rights jurisprudence to protect distinctive indigenous interests in land, natural resources and culture, most commonly by expansively interpreting ordinary property rights. Chapter 5 then considers how the regional systems have creatively dealt with cultural, socio-economic and physical integrity rights in relation to indigenous peoples.

The lynchpin of the Inter-American system, a creation of the 35 members of the Organization of American States (OAS), is the binding American Convention on Human Rights 1969, and, to a lesser extent, the American Declaration on the Rights and Duties of Man 1948, which is formally non-binding but reflective of regional customary law. States' human rights performance is supervised through recommendations of the Inter-American Commission on Human Rights and binding decisions of the Inter-American Court of Human Rights. In the African system, the foundational instrument is the African Charter on Human and Peoples' Rights 1981, now part of the African Union (comprising 54 member states). States are monitored through recommendations of the African Commission on Human and Peoples' Rights (ACHPR) and binding decisions of the African Court of Human and Peoples' Rights (ACtHPR). The book touches to a lesser extent on European systems,[4] in which indigenous issues have been comparatively scarce. It does not, however, consider certain other sub-regional procedures which have occasionally protected indigenous rights.[5]

[4] Including under the: European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 2) (supervised by the European Court of Human Rights and the former European Commission on Human Rights until its abolition in 1998); Council of Europe Framework Convention on the Protection of National Minorities (adopted 1 February 1995, entered into force 1 February 1998, ETS No 157) (supervised by an Advisory Committee); and European Social Charter (adopted 18 October 1961, entered into force 26 February 1961, 529 UNTS 89) (supervised by the European Committee on Social Rights). The book does not consider the Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force 1 December 2009, OJ C364/01) or its enforcement by the European Court of Justice.

[5] Such as the Caribbean Court of Justice decision of 30 October 2015 ordering Belize to protect the customary and constitutional land tenure rights of Maya Toledo people and fund consultations for land demarcation: *Maya Leaders' Alliance and others v Attorney General of Belize* [2015] CCJ 15 (Appellate Jurisdiction).

Again, 'jurisprudence' is mentioned advisedly. Some regional bodies, such as the Inter-American and African courts, indeed issue binding judgments in particular cases, which have precedent-like effects, albeit confined to the respective regional system. At the same time, however, such decisions often have a wider, external influence on other regional systems and international law bodies grappling with indigenous issues. Horizontal judicial dialogue on indigenous rights, and legal borrowing and adaptation, is common. The opinions of the Inter-American and African human rights commissions, on the other hand, are only recommendatory not binding within their respective spheres. Nonetheless, they too have been influential in shaping regional and international norms on indigenous rights.

BACKGROUND INFLUENCES ON INTERNATIONAL AND REGIONAL JURISPRUDENCE

The articulation of indigenous rights by the UN treaty committees and regional bodies has not taken place in a vacuum. The respective international and regional treaty regimes are not self-contained, but have been permeated by an array of antecedent and concurrent background influences. While this book is limited to jurisprudence of the UN treaty committees and regional bodies, it must be emphasised that the contemporary international story of indigenous rights begins long before the post-Second World War UN and regional treaties.

International Labour Organization

The contribution of the International Labour Organization (ILO), established in 1919 under the League of Nations, and later absorbed as a specialised agency of the UN from 1945, has been seminal. Prompted by concerns about forced labour and exploitation, seven conventions dealing with the labour rights of indigenous peoples were adopted by states through the ILO between 1936 and 1989.[6] While all remain in force, the first six are now closed for ratification ('shelved') and only the last, ILO Convention No 169 concerning Indigenous and Tribal Peoples 1989, is regarded

[6] ILO Convention No 50 concerning the Recruiting of Indigenous Workers (adopted 20 June 1936, entered into force 8 September 1939, 40 UNTS 110); ILO Convention No 64 concerning Contracts of Employment (Indigenous Workers) (adopted 27 June 1939, entered into force 8 July 1948, 40 UNTS 282); ILO Convention No 65 concerning Penal Sanctions (Indigenous Workers) (adopted 27 June 1939, entered into force 8 July 1948, 40 UNTS 312); ILO Convention No 86 concerning the Contracts of Employment (Indigenous Workers) (adopted 11 July 1947, entered into force 13 February 1953, 161 UNTS 114); ILO Convention No 104 concerning the Abolition of Penal Sanctions (Indigenous Workers) (adopted 21 June 1955, entered into force 7 June 1958, 305 UNTS 267); ILO Convention No 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (adopted 26 June 1957, entered into force 2 June 1959, 328 UNTS 247); ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991, 1650 UNTS 383). See also ILO, *Eliminating Discrimination against Indigenous and Tribal Peoples in Employment and Occupation: A Guide to ILO Convention No. 111* (ILO, Geneva, 2007).

as a contemporary standard (an 'up-to-date' convention). The ILO's definition of 'indigenous', stemming from these treaties, is discussed in chapter 1.

The earlier conventions are now regarded as paternalistic and/or assimilationist, even if, in their time, they were progressive in many respects. Convention No 107 of 1957, for instance, recognised indigenous land rights in Article 11. The current standard, Convention No 169, recognises an extensive array of indigenous rights to land, territory, natural resources and a healthy environment; protection from displacement; cultural, language, religious and education rights; recognition of customary laws and indigenous peoples' cultural, social and political institutions; participation and consultation in decision-making affecting them; control over development; and equality and non-discrimination.

The implementation of state obligations is supervised by a number of ILO mechanisms, themselves generative of a jurisprudence that is roughly comparable to that issued by the UN treaty bodies, namely through state reporting and individual complaints.[7] First, states must periodically report on their ratification and implementation of ILO conventions,[8] and in response the ILO's Committee of Experts on the Application of Conventions and Recommendations engages states through 'direct requests' for information and 'observations' on their compliance. States are encouraged, but not required, to consult with their indigenous peoples in relation to their implementation of Convention No 169 and their reporting to the ILO, but in practice this is rare (with Norway being the exception). Individual complaints have only been received from nine countries since 1989, and all but one came from Latin America.[9]

Secondly, while indigenous peoples cannot complain directly to the ILO,[10] workers' and employers' organisations can make representations' (on their behalf) about non-compliance with ILO conventions.[11] Representations are considered by a tripartite committee (of employer, worker and state representatives). The state is given an opportunity to respond before the committee reports its conclusions and recommendations to the ILO's Governing Body for adoption. The Committee of Experts may also be tasked to follow-up on the state's implementation of the recommendations.

Monitoring under the ILO system is more specific but less dense than that under the UN and regional procedures. It is more specific because ILO Convention No 169 is exclusively devoted to indigenous (and tribal) rights, whereas the UN and regional conventions articulate more general norms. But it is less dense because there are only

[7] See, eg, ILO, *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169* (ILO, Geneva, 2009) (compiling the comments of the ILO supervisory bodies); ILO, *Monitoring Indigenous and Tribal Peoples' Rights through ILO Conventions: A Compilation of ILO Supervisory Bodies' Comments 2009–2010* (ILO, Geneva, 2010); Fergus MacKay, *A Guide to Indigenous Peoples' Rights in the International Labour Organization* (Forest Peoples Programme, Moreton-in-Marsh, 2003); Tanja Joona, 'International Norms and Domestic Practices in Regard to ILO Convention No. 169, with Special Reference to Articles 1 and 13–19' (2010) 12 *International Community Law Review* 213. See also James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004), 228–30.

[8] ILO Constitution, Art 22.

[9] Argentina, Bolivia, Brazil, Colombia, Denmark, Guatemala, Ecuador, Mexico and Peru: ILO, *Indigenous and Tribal Peoples' Rights in Practice* (n 7) 182.

[10] Indigenous peoples can informally send information to the ILO, which may be included in country files.

[11] ILO Constitution, Art 24. States can also complain about other states' compliance under Art 26.

20 states party to ILO Convention No 169, whereas the regional conventions have roughly at least double that number,[12] while most states are parties to the key UN treaties. Admittedly the raw figures understate the normative effects of ILO mechanisms, since they also engage ILO member states on ILO instruments that states have not ratified, including Convention No 169.

Further, ILO Convention No 169 has been frequently considered outside of the ILO system, by international, regional and national courts, and has been particularly influential in Latin American courts,[13] the region where it has the highest number of ratifications. While the ILO treaties are confined to labour issues, they have influenced the evolution of wider human rights standards on indigenous peoples, including by shaping ideas about who is 'indigenous' (discussed in chapter 1) and catalysing the work of other UN bodies. ILO Convention No 169 is often mentioned by the UN committees and regional bodies when dealing with indigenous issues.

It must be noted, however, that ILO Convention No 169 is more restrictive in certain respects than contemporary international and regional standards on indigenous rights.[14] To mention just a few examples, it recognises aspects of internal autonomy but not a right of self-determination. It requires consultations on development projects to aim to secure indigenous consent but it does not require actual consent even where a project would jeopardize subsistence rights and cultural survival, and states retain ultimate decision-making authority. It protects indigenous rights in traditional land where it is currently used or occupied but not where indigenous peoples have been historically dispossessed from their lands. In recognises indigenous rights in land but not necessarily a right to full ownership. Its procedures for considering land claims are also not sufficiently protective or robust.

Other UN Mechanisms

Beyond the ILO, much of the standard setting on indigenous rights has been through the non-binding but normatively influential 'soft law'[15] developed by various political UN bodies. These have foremost emanated from the various special procedures and mechanisms devoted to indigenous issues in the UN system since the 1970s. Particularly important was a ground-breaking study undertaken by a UN Special Rapporteur, Martínez Cobo, from 1972–86, within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (under the then UN Commission on Human Rights). The Martínez Cobo study laid much of the conceptual groundwork for contemporary thinking about who are indigenous peoples (the subject of chapter 1 of this book), what are their legal rights, and areas for the progressive development

[12] Thirty-five states in the Inter-American and 53 in the African systems, respectively.

[13] See ILO, *Application of Convention No. 169 by Domestic and International Courts in Latin America: A Casebook* (ILO, Geneva, 2009).

[14] Mackay, *A Guide to Indigenous Peoples' Rights* (n 7) 16–19.

[15] Such as resolutions, reports, guidelines, and other texts with normative intentions or implications. Despite not being formally binding, soft law is often invoked by governments, courts, UN bodies, international organisations (such as the World Bank), NGOs and corporations when dealing with indigenous issues. Over time, soft law standards can crystallise into customary international law, given sufficiently widespread and representative state practice accompanied by the requisite legal intention (*opinio juris*).

of the law. While not binding, it has heavily influenced subsequent standard setting through the (non-binding) resolutions of the UN Commission on Human Rights and the work of other UN and regional human rights bodies.

Working Group on Indigenous Populations (WGIP) 1982–2007 and the UN Declaration on the Rights of Indigenous Peoples 2007

Next came the landmark establishment in 1982 of the Working Group on Indigenous Populations (WGIP), as a subsidiary organ of the Sub-Commission.[16] The Working Group met annually in Geneva until 2007 and had a mandate to review human rights developments and promote the evolution of international standards on indigenous rights. The Working Group consisted of independent experts and state members from the Sub-Commission representing all geopolitical regions. It was also open to indigenous peoples (with funding from the UN Voluntary Fund, established in 1985), non-governmental organisations (NGOs), states and UN agencies, and over time indigenous representatives became very active, even dominant, in its proceedings.[17]

Between 1985 and 1993, the WGIP prepared a draft declaration on the rights of indigenous peoples, which was eventually adopted by a resolution of the UN General Assembly in 2007,[18] after a long deliberative process involving states and indigenous peoples.[19] The instrument adopted, the UN Declaration on the Rights of Indigenous Peoples of 2007 (UNDRIP), covers a spectrum of rights, including on self-determination;[20] culture, identity, religion, language and history; non-discrimination; life, liberty and security; education, employment and health; participation in decision-making and sustainable development, including through free, prior and informed consent; and land, resources and the environment.

The UNDRIP is increasingly viewed, and utilised, as a cornerstone of contemporary international legal standards on indigenous rights. While it does not have the status of a binding treaty, there has been, and remains, considerable debate about the extent of its normative implications.[21] In the General Assembly in 2007, it was

[16] Pursuant to UN Economic and Social Council Resolution 1982/34, 'Study of the problem of discrimination against indigenous populations', 28th Plenary Session (7 May 1982).

[17] Anaya, *Indigenous Peoples in International Law* (n 7) 221.

[18] UN General Assembly Resolution 61/295, 'Declaration on the Rights of Indigenous Peoples' (13 September 2007) (144 states in favour, 4 against (Australia, Canada, New Zealand, United States), 11 abstaining). The WGIP's draft declaration was approved by the UN Sub-Commission in 1993, carried forward from 1995 by the UN Commission on Human Rights, and approved by the new UN Human Rights Council in Resolution 2006/2 (29 June 2006) (30 states in favour, 2 against, 12 abstentions, and 3 absentees).

[19] Benedict Kingsbury, 'Indigenous Peoples' in *Max Planck Encyclopedia of Public International Law*, online subscription database, [11]–[13].

[20] See Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 *European Journal of International Law* 141.

[21] See generally Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011); James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment', *Jurist*, 3 October 2007.

adopted by 144 votes in favour to four against, with 11 abstentions;[22] more states have since expressed their support,[23] including some which originally voted against it. The UN's Permanent Forum on Indigenous Issues (PFII), discussed below, has argued that the UNDRIP 'forms a part of universal human rights law' that was 'almost universally agreed upon' through an extensive deliberative process, and is 'part of a practice that has advanced a growing "rapprochement" between declarations and treaties'.[24] It has further suggested that the UNDRIP has a 'growing legal status' and that its 'entirety' may have already 'acquired the status of being part of binding international law', or at least some of its provisions have.[25] Certain scholars also support the view that all or most of the UNDRIP reflects customary law.[26]

Others are more sceptical, emphasising that some states view the UNDRIP as an aspirational political programme rather than as reflecting legal obligations.[27] The fact that only 20 states are parties to the only binding treaty on indigenous rights, ILO Convention No 169, is a stark reminder that many—if not most—states remain reluctant to assume binding legal obligations that are specific to indigenous peoples, notwithstanding that an overwhelming majority of states support the UNDRIP, and that almost 100 states have indigenous populations.

Insofar as the UNDRIP particularises general human rights law for indigenous peoples and circumstances,[28] it can hardly be opposed by states as reflecting binding international standards. Indeed, much of its content, and thus its normative force, stems from the particularised application, over recent decades, of general human rights law to indigenous peoples by the UN treaty committees, regional bodies and national legal practice, as discussed in this book. This was deliberate; the drafters of the UNDRIP paid careful attention to existing state practice in order to come up with a text that would maximise state support. However, the devil is in the detail of particular provisions, especially in how far the UNDRIP pushes the boundaries of the existing law in genuinely new directions, or recognises unique indigenous rights which cannot be readily extrapolated from general norms applicable to everyone. Certain issues, such as the scope of self-determination; the extent of consultation and consent; and the retrospective reach of indigenous rights in lands from which they have been historically dispossessed,[29] among others, remain contested.

[22] The four states against were Australia, Canada, New Zealand and the United States; the 11 abstentions were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.

[23] See, eg, OHCHR, *Outcome Document of the Durban Review Conference* (24 April 2009), [73] (the Outcome Document was adopted by consensus of 182 states).

[24] PFII, *Report on the Eighth Session to ECOSOC*, E/C.19/2009/L.3 (2009), Annex: General Comment No 1 (2009) on Article 42 of the UNDRIP, [7], [9], [10].

[25] Ibid [12].

[26] Anaya and Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples' (n 21).

[27] Stephen Allen, 'The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project' in Allen and Xanthaki (eds) (n 21), 226, 228–29, 254.

[28] Ibid 231.

[29] Article 28(1) of the UNDRIP recognises a right of restitution where 'lands, territories and resources which they have traditionally owned or otherwise occupied or used … have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent'. See Allen, 'The UN Declaration on the Rights of Indigenous Peoples' (n 27) 240.

Overall, the UNDRIP variously consolidates existing norms, clarifies certain rules, and progressively develops others. It is gradually filtering into the practice of the UN treaty committees, regional bodies and states, and its up-take and acceptance in this manner will be the ultimate litmus test of its normativity. In 2014, the General Assembly's World Conference on Indigenous Peoples encouraged the UN treaty committees to consider the UNDRIP in their work, and urged states to report to the committees (and the Human Rights Council's Universal Periodic Review) on measures taken to advance its objectives.[30]

While the WGIP has made a vital contribution to standard setting, a limitation of its mandate was its limited ability to formally monitor the situation of indigenous peoples on the ground. Certainly it informally received and reviewed information from governments and indigenous groups, NGOs and international organisations,[31] and in some cases acted as a de facto monitoring procedure and even issued public statements of concern about situations in particular countries.[32] However, it had no formal mandate to demand state reports, receive and resolve individual complaints, function as an early warning mechanism, or react to crises.[33] Once it had concluded the drafting of the UNDRIP, doubts about its effectiveness and future led to its replacement in 2007.

Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) 2007–present

The WGIP was replaced in 2007 by an Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), created as a subsidiary body of the Human Rights Council[34] comprised of five independent experts.[35] The EMRIP provides thematic advice (through studies and research) to the Council and can suggest proposals for its adoption. Its annual session is attended by states, indigenous peoples, NGOs, academics and interested UN bodies. Thus far its advices have addressed issues concerning education; participation in decision-making; languages and cultures; extractive industries; access to justice; restorative justice and indigenous legal systems; and disaster risk reduction.[36]

The EMRIP has also encouraged better state implementation of the UNDRIP. In 2014 it observed that few states have adopted comprehensive plans or strategies

[30] UN General Assembly Resolution 69/2, 'Outcome Document of the World Conference on Indigenous Peoples' (22 September 2014), [29].

[31] Anaya, *Indigenous Peoples in International Law* (n 7) 221.

[32] Ibid 222.

[33] Gaetano Pentassuglia, 'Evolving Protection of Minority Groups; Global Challenges and the Role of International Jurisprudence' (2009) 11 *International Community Law Review* 185, 191; Anaya, *Indigenous Peoples in International Law* (n 7) 222.

[34] By UN Human Rights Council Resolution 6/36 (11 December 2007).

[35] Having regard to indigenous origin, gender balance and geographic representation.

[36] Respectively, Advice Nos: 1 (2009) on the Rights of Indigenous Peoples to Education; 2 (2011) on Indigenous Peoples and the Right to Participate in Decision-making; 3 (2012) on Indigenous Peoples' Languages and Cultures; 4 (2012) on Indigenous Peoples and the Right to Participate in Decision-making, with A Focus on Extractive Industries; 5 (2013) on Access to Justice in the Promotion and Protection of the Rights of Indigenous People; 6 (2014) on Restorative Justice, Indigenous Juridical Systems and Access to Justice for Indigenous Women, Children and Youth, and Persons with Disabilities; and 7 (2014) on Promotion and Protection of the Rights of Indigenous Peoples in Disaster Risk Reduction Initiatives.

to implement it, or provided information to the EMRIP on the effectiveness of measures taken.[37] Some states have objected to ambiguities in the UNDRIP (such as who is indigenous) or perceive positive measures for indigenous peoples as unequal treatment.[38] At the World Conference on Indigenous Peoples in 2014, the UN General Assembly asked the Human Rights Council to consider improving the EMRIP so that it can more effectively promote respect for the UNDRIP.[39] It was specifically envisaged that the EMRIP could better assist states to monitor, evaluate and improve their implementation of the UNDRIP. The development of an Optional Protocol to the UNDRIP has been separately suggested to enable individual complaints and strengthen supervision and monitoring. That suggestion has, however, been controversial.[40]

UN Permanent Forum on Indigenous Issues (PFII) 2000–present

A fourth UN standard setting process is the UN Permanent Forum on Indigenous Issues (PFII),[41] established by ECOSOC in 2000 and meeting for the first time in 2002, following initial discussions at the Vienna Conference on Human Rights in 1993. The PFII is comprised of 16 independent experts serving in their personal capacity: eight nominated by governments, and eight by indigenous organisations in the various regions. The PFII advises ECOSOC on indigenous issues in six areas: economic and social development; culture; the environment; education; health; and human rights.[42] It provides expert advice and recommendations to the Human Rights Council and other UN bodies and programmes; raises awareness of indigenous issues, and coordination and integration, in the UN system; and prepares and disseminates information. Its initial focus was on review and coordination of UN bodies and programmes.[43]

The PFII also has a 'soft mandate' under Article 42 of the UNDRIP to 'promote respect for and full application of' the UNDRIP and to 'follow up … [its] effectiveness'. It has issued its own 'General Comment' (deliberately borrowing from the practice of the UN treaty bodies) and asserted an implied power to engage in dialogue with states about their compliance.[44] It has even conducted in-country investigations of alleged violations (as on forced labour and servitude amongst the Guaraní people in Bolivia and Paraguay).[45]

[37] EMRIP, *Report to the Human Rights Council*, A/HRC/27/67 (25 July 2014), 22.
[38] Ibid.
[39] UN General Assembly Resolution 69/2, *Outcome Document of the World Conference on Indigenous Peoples* (n 30), [28].
[40] See Permanent Forum on Indigenous Issues, *Expert Group Meeting on the Theme 'Dialogue on an Optional Protocol to the United Nations Declaration on the Rights of Indigenous Peoples'*, Note by the Secretariat, UN Doc E/C.19/2015/8 (17 February 2015).
[41] There is a 2015 proposal to change the name to the 'Permanent Forum on the Rights of Indigenous Peoples'.
[42] It also works on the cross-cutting topics of gender and women; children and youth; the Millennium Development Goals and the post-2015 Agenda; and data and indicators.
[43] Anaya, *Indigenous Peoples in International Law* (n 7) 220.
[44] PFII, *Report on the Eighth Session to ECOSOC*, E/C.19/2009/L.3 (2009), Annex: General Comment No 1 (2009) on Article 42 of the UNDRIP, [20]–[22]; see Kingsbury, 'Indigenous Peoples' (n 19), [16].
[45] Ibid.

The PFII contributes to soft law formation through elaborating on thematic issues and fleshing out the application of existing standards to particular factual situations. Thus far the PFII has issued reports on a wide variety of topics, many of which address legal and human rights issues. Some have considered normative and institutional questions, such as human rights mechanisms;[46] an Optional Protocol to the UNDRIP;[47] truth commissions;[48] the UNDRIP and national constitutions;[49] criminal defence rights;[50] the impact of the doctrine of discovery;[51] decolonisation in the Pacific;[52] and participation in Arctic governance and resource development.[53]

Many reports address land, resource and environment issues. These have included best practices in resolving land disputes and claims;[54] land tenure and management[55] (including the impact of oil palm and other commercial tree plantations, and monocropping);[56] fishing rights;[57] extractive industries;[58] corporations;[59] World Bank policies;[60] the rights of Mother Earth;[61] protecting traditional knowledge, genetic resources and folklore;[62] development;[63] and indicators of well-being, poverty and sustainability.[64] Climate change[65] and disaster risk reduction[66] have also received attention.

Some reports focus on sub-groups such as women (concerning violence[67] and political participation);[68] young people (concerning participation in decision-making,[69] boarding schools,[70] and the inclusion of indigenous knowledge in education;[71]

[46] E/C.19/2008/2 (19 December 2007).
[47] E/C.19/2014/7 (4 March 2014).
[48] E/C.19/2013/13 (14 February 2013).
[49] E/C.19/2013/18 (20 February 2013).
[50] E/C.19/2011/4 (8 February 2011).
[51] E/C.19/2014/3 (20 February 2014); E/C.19/2010/13 (4 February 2010).
[52] E/C.19/2013/12 (20 February 2013).
[53] E/C.19/2012/10 (3 March 2012).
[54] E/C.19/2014/4 (27 February 2014).
[55] E/C.19/2010/CRP. 7 (21 April 2009).
[56] E/C.19/2007/CRP.6 (7 May 2007).
[57] E/C.19/2010/2 (8 January 2010) (Australia and Norway).
[58] E/C.19/2013/11 (14 February 2013) (in Mexico); E/C.19/2013/16 (20 February 2013) (consolidated report); E/C.19/2013/20 (5 March 2013) (in Australia).
[59] E/C.19/2012/3 (24 April 2012); E/C.19/2011/12 (10 March 2011); E/C.19/2010 CRP.1 (19 January 2010).
[60] E/C.19/2013/15 (20 February 2013).
[61] E/C.19/2010/4 (15 January 2010).
[62] E/C.19/2014/2 (19 February 2014) (in Africa); E/C.19/2007/10 (20 March 2007) (traditional knowledge).
[63] E/C.19/2010/CRP. 4 (25 March 2010).
[64] E/C.19/2008/9 (20 February 2008).
[65] E/C.19/2013/7 (12 February 2013) (rights and safeguards in emissions reduction projects involving deforestation and forest degradation); E/C.19/2012/4 (23 February 2012) (impact on reindeer herding); E/C.19/2010/7 (2 February 2010) (consistency of policies and projects with the UNDRIP); E/C.19/2010/15 (12 February 2010) (impacts of adaptation and mitigation measures on reindeer herding); E/C.19/2010/18 (4 March 2010) (implications of Copenhagen meeting for indigenous local adaptation and mitigation measures); E/C.19/2008/10 (20 March 2008) (impact of mitigation measures).
[66] E/C.19/2013/14 (20 February 2013).
[67] E/C.19/2013/9 (12 February 2013).
[68] E/C.19/2013/10 (19 February 2013).
[69] E/C.19/2013/8 (12 February 2013).
[70] E/C.19/2010/11 (1 February 2010).
[71] E/C.19/2013/17 (20 February 2013).

and their living conditions in Mesoamerica[72]); and indigenous people with disabilities.[73] Geographical case studies have also featured, such as the implementation of the Chittagong Hill Tracts Accord 1997 in Bangladesh;[74] and participation in democracy and elections in Latin America.[75]

The Permanent Forum is still a relatively new body. Criticism of its work thus far has centred on its capacity to influence other states or other UN bodies,[76] as well as whether it has marginalised or co-opted alternative indigenous voices and 'deradicalised' resistance.[77] There is also discussion about its representativeness,[78] since half of its members are nominated by states rather than indigenous peoples, although indigenous peoples may attend its meetings. Concerns have also been expressed about resource and expertise limitations.[79]

UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples 2001–present

A final UN standard setting process is the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, established by the Commission on Human Rights in 2001[80] and subsequently maintained by the Human Rights Council. The Special Rapporteur is an independent expert mandated to promote good laws and practices on the implementation of international standards; report on indigenous rights in particular countries; address specific violations of indigenous rights; conduct thematic studies; and cooperate with other UN bodies.

Specialised Branches of International Law

Beyond these UN mechanisms dedicated to indigenous issues, three other areas of international law, also of concern to specialised UN bodies, have influenced the appreciation of indigenous issues by the UN treaty committees and regional human rights bodies. These include aspects of international environmental law; cultural heritage and cultural property law; and international law concerning finance and development.[81]

[72] E/C.19/2014/5 (27 February 2014).
[73] E/C.19/2013/6 (5 February 2013).
[74] E/C.19/2011/6 (18 February 2011).
[75] E/C.19/2014/6 (26 February 2014).
[76] Mary Lawlor, 'Indigenous Internationalism: Native Rights and the UN' (2003) 1 *Comparative American Studies: A Journal* 351.
[77] Isabelle Schulte-Tenckhoff and Adil Hasan Khan, 'The Permanent Quest for a Mandate: Assessing the UN Permanent Forum on Indigenous Issues' (2011) 20 *Griffith Law Review* 673.
[78] Irene Watson, 'De-colonisation and Aboriginal Peoples: Past and Future Strategies, Sharon Venne Interviewed by Irene Watson' (2007) 26 *Australian Feminist Law Journal* 111, 112.
[79] Anaya, *Indigenous Peoples in International Law* (n 7) 220.
[80] UN Human Rights Council Resolution 15/14, 'Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples' (6 October 2010).
[81] Indigenous peoples have shaped many other areas of international law not considered here, including on sovereignty, acquisition of title to territory (by conquest, discovery and occupation of *terra nullius*, treaty and the like), statehood, legal personality, law of treaties, law of the sea, international criminal law

International Environmental Law

Environmental regulation is one of the few areas of international law to establish binding treaty standards protecting indigenous interests and has informed human rights interpretation. First, indigenous sealing, whaling and polar bear hunting are permitted in certain circumstances under the relevant conventions,[82] exceptions which admit the cultural and economic importance of those traditional activities. Secondly, local communities (implicitly including indigenous peoples) must be consulted, and 'local and traditional knowledge' protected, under the UN Convention to Combat Desertification 1994.[83] Thirdly, and most significantly, the Convention on Biological Diversity 1992 recognises the role of indigenous communities in conserving and sustainably using biological diversity, by requiring states to:

> respect, 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 approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.[84]

The subsequent Nagoya Protocol to the Convention on Biological Diversity 2010 further regulates genetic resources and the fair and equitable sharing of benefits from their utilisation.[85] Article 12 addresses indigenous traditional knowledge (including customary laws, community protocols and procedures) associated with genetic resources. States must secure indigenous communities' prior informed consent, and fair and equitable benefit-sharing, in the light of community laws and procedures and customary use and exchange.

(particularly 'cultural' genocide, slavery, forced labour, apartheid, and crimes against humanity), diplomatic protection, and procedural doctrines (such as estoppel, acquiescence, good faith, abuse of rights and laches): see, eg, Benedict Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 *American Journal of International Law* 414, 436–37; Ben Saul, 'Indigenous Peoples, Laws and Customs in the Teaching of Public and Private International Law' (2012) 4 *Ngiya: Talk the Law* 63. With the adoption of the UN Charter 1945, indigenous peoples have shaped decolonisation, self-determination, and the doctrines of inter-temporal law (whereby an act is judged by the law in force at the time) (see *Island of Palmas* (*Netherlands v United States*) (1928) 2 RIAA 829) and the stability of territorial boundaries (*uti possidetis*) (see Anaya, *Indigenous Peoples in International Law* (n 7) 107–8).

[82] Respectively: Convention on the Conservation of North Pacific Fur Seals, Art VII (adopted 7 May 1976, entered into force 12 October 1976, 314 UNTS 105); International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948, 161 UNTS 72), as amended by the International Whaling Commission Amendments to the Schedule, 24 October 1997, [13(b)(2)]; International Agreement for the Conservation of Polar Bears, Art 3(d) (adopted 15 November 1973, entered into force 26 May 1976).

[83] Convention to Combat Desertification, Art 16(g) (adopted 17 June 1994, entered into force 26 December 1996, 1954 UNTS 3).

[84] Convention on Biological Diversity, Art 8(j) (adopted 5 June 1992, entered into force 29 December 1993, 1760 UNTS 79).

[85] Nagoya Protocol on Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entered into force 12 October 2014).

At the level of soft law, the Rio UN Conference on Environment and Development of 1992 also acknowledges certain indigenous interests. States committed to a non-binding action plan on sustainable development, Agenda 21, Chapter 26 of which is dedicated to 'Recognising and Strengthening the Role of Indigenous Peoples and their Communities'. Its objectives include establishing processes to empower indigenous peoples, and strengthening their participation in resource management, sustainable development and conservation. Further, the UN Forest Principles of 1992 encourage national forest policies to recognise and protect indigenous peoples' rights, including economic rights in forest exploitation.[86] Other actors have also developed their own policy guidance, including the International Union for Conservation of Nature and Natural Resources.[87]

International Cultural Heritage and Cultural Property Law

Given the centrality of cultural distinctiveness to the conceptualisation of peoples as indigenous (as discussed in chapter 1), international law has afforded some express protection to indigenous cultural heritage and property.[88] Cultural heritage and property overlap with, but are legally distinct from, the human right to take part in cultural life (ICESCR, Article 15) and the cultural rights of minorities (ICCPR, Article 27). International cultural heritage and cultural property law have influenced the interpretation of those cultural rights.

Indigenous peoples are modestly mentioned in two recent treaties adopted under the auspices of the UN Educational, Scientific and Cultural Organization (UNESCO). First, the Preamble to the Convention for the Safeguarding of the Intangible Cultural Heritage 2003 recognises that 'communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity'. Intangible cultural heritage is defined as 'the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their

[86] UN General Assembly, 'Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Forests' in *Report of the UN Conference on Environment and Development*, UN Doc A/CONF 151/26 (14 August 1992), vol III, Art 5(a).

[87] Javier Beltran, *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies*, World Commission on Protected Areas, Best Practice Protected Areas Guideline Series No 4 (International Union for Conservation of Nature and Natural Resources (IUCN), Cardiff University, and World Wildlife Fund, 2000).

[88] See generally Alexandra Xanthaki, 'Indigenous Cultural Rights in International Law' (2000) *European Journal of Law Reform* 343; Anaya, *Indigenous Peoples in International Law* (n 7), 131–41; Tony Simpson, 'Claims of Indigenous Peoples to Cultural Property in Canada, Australia, and New Zealand' (1995) 18 *Hastings International and Comparative Law Review* 195; Robert Paterson, 'Claiming Possession of the Material Cultural Property of Indigenous Peoples' (2001) 16 *Connecticut Journal of International Law* 283; Maureen Tehan, 'To Be or Not to Be (Property): Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage' (1996) 15 *University of Tasmania Law Review* 273.

cultural heritage'.[89] The Convention's operative provisions, however, apply to indigenous communities in the same way as to other groups.

Secondly, an operative provision of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 calls for equal respect for all cultures, including 'indigenous peoples'.[90] It also calls on the parties to pay 'due attention to the special circumstances and needs of various social groups, including … indigenous peoples'.[91] Again, indigenous peoples are entitled to the same protections as other groups. The Preamble emphasises the importance of traditional knowledge, particularly indigenous knowledge, as a source of intangible and material wealth and in contributing to sustainable development.

Indigenous peoples are not mentioned in other important UNESCO instruments that may affect them, including standards on underwater cultural heritage, world cultural and natural heritage, illicit dealings in cultural property, the protection of cultural property in conflict, and copyright and intellectual property.[92] While indigenous peoples may be able to benefit from the norms in some of these conventions, the lack of specific attention to indigenous issues has sometimes been controversial. For example, indigenous peoples have criticised the failure of the World Heritage Committee, under the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, to enable indigenous participation and consultation in the nomination, declaration and management of World Heritage sites. In some cases, World Heritage listing can negatively impact on indigenous land, resource and cultural rights.[93] Proposals to formalise indigenous involvement in these processes have thus far been unsuccessful.[94]

Some soft law standards issued by UNESCO have mentioned indigenous peoples. For example, its Universal Declaration on Cultural Diversity 2002 guarantees the cultural diversity of indigenous peoples,[95] while in 1982 UNESCO and the World Intellectual Property Organization (WIPO) adopted model provisions on the protection of folklore.[96]

[89] Convention for the Safeguarding of the Intangible Cultural Heritage, Art 2(1) (adopted 17 October 2003, entered into force 20 April 2006, 2368 UNTS 1).

[90] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Art 2(3) (adopted 20 October 2005, entered into force 18 March 2007, 2440 UNTS 311).

[91] Ibid Art 7(1)(a).

[92] Respectively: UNESCO Convention for the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009, 2562 UNTS 3); Convention for the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975, 1037 UNTS 151); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972, 823 UNTS 231); Convention on the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention (adopted 14 May 1954, entered into force 7 August 1956, 249 UNTS 215); and Universal Copyright Convention (adopted 6 September 1952, entered into force 16 September 1955, 216 UNTS 132) as revised (24 July 1971, entered into force 10 July 1974, 943 UNTS 178).

[93] IWGIA, *The Indigenous World 2013* (IWGIA, Copenhagen, 2013), 476–83.

[94] See Lynn Meskell, 'UNESCO and the Fate of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE)' (2013) 20 *International Journal of Cultural Property* 155.

[95] UNESCO, Universal Declaration on Cultural Diversity, Art 4 (adopted 2 November 2001).

[96] UNESCO and WIPO, Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (1985).

It should also be noted that the extent of protection for indigenous culture has been controversial in some areas of international law. For example, during the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide 1948,[97] a proposal to specifically prohibit 'cultural genocide'[98] was rejected. In part this was because of objections by states that had problematic relations with their indigenous peoples.[99] The last remaining vestige of a concept of cultural genocide in the Convention concerns the forced transfer of children from one group to another, where intended to destroy (in whole or in part) the first national, ethnical, racial or religious group (Article II(e)). That practice has been claimed to constitute genocide, for example, in past Australian indigenous policies.[100] More broadly, a number of national courts have convicted persons of genocide for the attempted physical extermination of indigenous peoples,[101] while there has been national political acknowledgement of genocide against indigenous peoples in a number of other cases.[102]

International Intellectual Property Law

There has also been much debate about the adequacy of the related field of international intellectual property law in protecting indigenous interests in their natural resources (such as wildlife and plant products), genetic material, and traditional knowledge.[103] The WIPO's Intergovernmental Committee on Intellectual Property

[97] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force on 12 January 1951, 78 UNTS 277).

[98] ECOSOC, Ad Hoc Committee on Genocide, *Report of the Committee and Draft Convention Drawn up by the Committee*, UN Doc E/794 (24 May 1948), 17–19 (Draft Article III: 'any deliberate act committed with the intent to destroy the language, religion or cultural of a national, racial or religious group on grounds of national or racial origin or religious belief').

[99] William Schabas, *Genocide in International Law* (Cambridge University Press, Cambridge, 2000), 184 (such as Sweden, Brazil, New Zealand, Canada and South Africa).

[100] Human Rights and Equal Opportunity Commission, *National Inquiry into the Separation of Aboriginal and Tomes Strait Islander Children from their Families, Bringing Them Home* (April 1997); cf *Nulyarimma v Thompson* [1997] Federal Court of Australia 1192 (the international crime of genocide cannot be prosecuted in Australia in the absence of domestic legislative incorporation); *Kruger v Commonwealth (Stolen Generations Case)* (1997) 190 Commonwealth Law Reports 1 (the High Court of Australia found that even if genocide were a crime, the removal of Aboriginal children from the parents, in their own best interests by welfare authorities, would not constitute genocide). See Ben Saul, 'The International Crime of Genocide in Australian Law' (2000) 22 *Sydney Law Review* 527. Genocide was legislatively criminalised in Australia in 2002.

[101] Such as convictions in Brazil's courts for private attacks by Brazilian nationals on the Yanomami in Venezuela (see *Yanomami Indigenous People of Xaximu v Venezuela (Friendly Settlement)*, IACHR, Report No 32/12, Petition 11.706, 20 March 2012); the conviction of the former President of Equatorial Guinea for targeting the Bubi indigenous minority and the deaths of 80,000 people (of a population of 300,000) (see Alejandro Artucio, *The Trial of Macias in Equatorial Guinea: The Story of A Dictatorship* (International Commission of Jurists and the International University Exchange Fund, 1979)).

[102] Such as Germany's 2004 apology for imperial Germany's killing of 100,000 Herero indigenous people in south-west Africa, between 1904 and 1908; and the Report of Guatemala's Historical Clarification Commission (Comisión para el Esclarecimiento Histórico), *Memory of Silence* (25 February 1999), finding that the armed forces committed genocide against the Mayans between 1980–83, and a Presidential apology in 2009 for genocide against the Mayan people.

[103] Silke von Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (2nd edn, Kluwer Law International, 2008); Chidi Oguamanam, *International Law and Indigenous Knowledge: Intellectual Property Rights, Plant Biodiversity and Traditional Medicine* (University of Toronto Press, 2006); Tony Simpson, *Indigenous Heritage and Self-Determination: The Cultural and Intellectual Property Rights of Indigenous Peoples* (International Work Group for

and Genetic Resources, Traditional Knowledge and Folklore (IGC), established in 2000, has been attempting to develop binding instruments on genetic resources, traditional knowledge and traditional cultural expressions. The instruments would apply to indigenous peoples but also certain other groups. The first set of Draft Articles would prevent misappropriation of *genetic resources* and associated traditional knowledge through the intellectual property system, including by preventing patenting. Traditional knowledge is defined as that held by indigenous peoples, and which is traditionally generated, dynamic and evolving, and inter-generationally transmitted.[104]

A second set of Draft Articles would enable indigenous peoples to prevent misappropriation, misuse or unauthorised use of their *traditional knowledge*; control how such knowledge is used in non-traditional ways; share equitably in the benefits from its use with prior informed consent; and encourage its creation and innovation.[105] Traditional knowledge refers to know-how, skills, innovations, practices, teachings and learnings of indigenous peoples, and may be associated with agriculture, the environment, healthcare and medicine, biodiversity, traditional lifestyles, natural or genetic resources, and architecture and construction. It would be protected where it is linked to indigenous cultural and social identity and cultural heritage and is intergenerationally transmitted, and regardless whether it is in codified, oral or other form, or is dynamic and evolving.[106] One proposal suggests traditional knowledge must have persisted for at least 50 years to gain protection.

A third set of Draft Articles would enable indigenous peoples to prevent the misappropriation and misuse of their *[traditional] cultural expressions*; control non-traditional uses; prevent the unauthorised or inappropriate grant or exercise of intellectual property rights over them, while enabling fair use; provide legal certainty; promote equitable sharing of benefits from their use with prior informed consent; and encourage their creation and innovation.[107] Traditional cultural expressions are defined to include any forms of artistic and literary, creative and other spiritual expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, verbal and written, and regardless of form.[108] Again,

Indigenous Affairs, 2007); Sarah Harding, 'Defining Traditional Knowledge: Lessons from Cultural Property' (2004) 11 *Cardozo Journal of International and Comparative Law* 511; David Jordan, 'Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can it Fit?' (2001) 25 *American Indian Law Review* 93; Terri Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (1999) 22 *UNSW Law Journal* 631; Robert Paterson and Dennis Karjala, 'Looking beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples' (2004) 11 *Cardozo Journal of International and Comparative Law* 633; Tamara Kagan, 'Recovering Aboriginal Cultural Property at Common Law: A Contextual Approach' (2005) 63 *University of Toronto Faculty Law Review* 1; Angela Riley, 'Straight Stealing: Towards an Indigenous System of Cultural Property Protection' (2005) 80 *Washington Law Review* 69.

[104] WIPO IGC, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, Rev. 2, 26th Session, WIPO/GRTKF/IC/26/4 (3–7 February 2014), Annex, List of Terms (the definition is subject to debate).

[105] WIPO IGC, 'The Protection of Traditional Knowledge: Draft Articles, Rev. 2', WIPO/GRTKF/IC/27/4 (28 March 2014), Policy Objectives.

[106] Ibid Art 1 (the elements of definition remain subject to debate).

[107] WIPO IGC, 'The Protection of Traditional Cultural Expressions, Rev. 2', WIPO/GRTKF/IC/25/7 (19 July 2013), Objectives.

[108] Ibid, List of Terms (the elements of definition remain subject to debate).

such expression must be associated with the cultural and social identity and cultural heritage of indigenous peoples, be inter-generationally transmitted, persist for a minimum period, and may be dynamic and evolving.[109]

Development Finance and Investment

A final domain of international law which has (grudgingly) acknowledged indigenous rights is development finance and investment, which has also influenced human rights interpretation in those contexts. Most prominently, in multilateral development financing, the World Bank has adopted a detailed operational safeguard policy which requires borrowers in its projects to engage in a process of free, prior and informed consultation and to secure broad community support.[110] Measures must be adopted to avoid adverse effects on indigenous peoples or to minimise, mitigate or compensate for such effects. The Bank's policy has influenced other development banks, financial institutions and corporations, and had trickle-down effects into the national laws of state beneficiaries of the Bank's finance.

The International Finance Corporation (IFC) has adopted Performance Standard 7 on Indigenous Peoples[111] to guide businesses involved in projects which have social and environmental impacts. It addresses the avoidance of adverse impacts; the participation and consent of indigenous peoples in development; a higher obligation of free, prior and informed consent where a project impacts on indigenous lands and resources, would involve relocation, or affect critical cultural property; and the mitigation of impacts and benefit sharing.

Other financial institutions have adopted the Equator Principles to assess and manage environmental and social risks in projects.[112] Principle 5 recognises the vulnerability of indigenous peoples and requires a process of informed consultation and participation. Following the IFC, it further requires free, prior and informed consent for projects which have particular adverse impacts. Independent environmental and social assessment is also required for projects affecting indigenous peoples and their cultural systems and values. More broadly, the commentary to the UN Guiding Principles on Business and Human Rights of 2011 encourages corporations to take into account indigenous peoples' rights, although the Guiding Principles themselves do not explicitly draw attention to indigenous peoples.

Besides banks, financial institutions and corporations, other development actors have developed policies addressing indigenous peoples. The UN Development Group, a consortium of 27 UN actors, adopted Guidelines on Indigenous Peoples' Issues in 2008, which advise on international human rights standards and practical programme design. Some field agencies have developed their own guidance, including the UN Development Programme (UNDP), UN Children's Fund (UNICEF), and

[109] Ibid Art 1.
[110] World Bank Operational Policy 4.10: Indigenous Peoples (July 2005).
[111] International Finance Corporation, Performance Standard 7 (1 January 2012).
[112] Equator Principles (June 2013).

Food and Agriculture Organization (FAO), among others.[113] UNESCO launched a process to adopt guidelines on indigenous peoples in 2011.[114]

Finally, some multilateral and bilateral free trade agreements contain safeguard provisions that allow states to adopt special measures for indigenous peoples without infringing equal treatment protection for foreign investors.[115] There are, however, serious concerns about the adverse impacts of free trade and investment treaties on indigenous economic self-determination, control of lands and resources, environmental health and cultural rights.

Grey Law: 'Treaties' with Indigenous Peoples

As suggested above, the application of human rights law to indigenous peoples is affected by a penumbra of other international norms and soft standards that influence interpretation. One further source of external normative influence is relevant: 'treaties' with indigenous peoples, which often preserve certain indigenous rights in land, resources and self-governance (albeit usually not within a modern human rights framework). Historically many agreements were concluded between indigenous peoples and colonial 'white settler' societies such as the United States, Canada and New Zealand, many of which remain in effect. More than 370 treaties were agreed between the United States and native American (or 'American Indian') nations under the treaty-making powers of the US Constitution.[116]

At the time, the states entering into such treaties seemed to recognise a distinctive international legal personality of indigenous peoples, since the treaties often purported to transfer 'sovereignty' (as it was then understood in western international law); they were not typically understood as mere contracts for the sale of land. The status of such treaties in international law has, however, been controversial. In the legal systems of the states concerned, over time many treaties have been 'reduced to domestic law' by court decisions or legislation,[117] precisely so as to avoid international legal complications or challenges to the manner of acquiring sovereignty. On the international plane, indigenous peoples have often not subsequently been recognised as bearing a legal personality equivalent or opposable to states, or the capacity to make international claims and seek remedies for breaches of the treaties.

[113] See UNDP, *UNDP and Indigenous Peoples: A Practice Note on Engagement* (2001); UNICEF, *Indigenous and Minority Children* (3 September 2013), available at www.unicef.org/policyanalysis/rights/index_60331.html; FAO, *FAO Policy on Indigenous and Tribal Peoples* (2010).

[114] UNESCO, 'Indigenous Peoples: Knowledge Systems, Knowledge Diversity, Knowledge Societies: Towards a UNESCO Policy on Engaging with Indigenous Peoples', available at www.unesco.org/new/en/indigenous-peoples/related-info/unesco-policy-on-indigenous-peoples/launch-event-policy-on-indigenous-people/.

[115] Kingsbury, 'Indigenous Peoples' (n 19) [26] (citing the North American Free Trade Agreement 1992, Canada-Chile Free Trade Agreement 1996, New Zealand-Singapore Closer Economic Partnership Agreement 2000, Australia-US Free Trade Agreement 2004, and Singapore-Australia Free Trade Agreement 2003).

[116] Gudmundur Alfredsson, 'Indigenous Peoples, Treaties with', in *Max Planck Encyclopedia of Public International Law*, online entry (last updated March 2011).

[117] Ibid.

So far, international courts and tribunals have not provided much comfort to indigenous peoples. In a well-known case involving the international law on territorial disputes, the *Island of Palmas* case (1928), the Permanent Court of Arbitration refused to recognise treaties between indigenous peoples and the Dutch East India Company[118] (the latter being a corporation representing a state). A similar denial of legal personality occurred in the *Cayuga Indian Claims Arbitration* (1926) between the United Kingdom and the United States.[119] In the *Western Sahara Advisory Opinion* (1975), however, the International Court of Justice appeared to implicitly acknowledge that the socially and politically organised nomadic peoples there had a recognisable legal personality. The Court observed that agreements between colonial powers and such peoples conferred 'derivative roots of title, and not original titles obtained by occupation of terrae nullius'.[120]

The modern international law of treaties does not exclude the possibility of international agreements involving subjects of international law other than states.[121] A UN study concluded in 1999 that treaties with indigenous peoples are agreements under international law and remain in effect.[122] Article 37 of the UNDRIP 2007 recognises the legal force of such treaties:

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

On the one hand, the enforcement of such treaties can provide important strategic points of leverage by which indigenous peoples can seek to vindicate their interests. Treaties often protect indigenous interests in land, resources, culture and self-governance, matters which have rough correlates in modern human rights standards. At the same time, the validity of such treaties is often questionable because of their manner of adoption, as where tainted by fraud, error or coercion, or undermined by material breaches by states.[123] While the political settlement agreed in a treaty can sometimes deliver indigenous peoples more than the more limited guarantees of modern human rights law, the content of treaties can equally fall short of guaranteeing

[118] Claire Charters, 'Indigenous Peoples and International Law and Policy' in Benjamin Richardson, Shin Imai and Kent McNeill (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009), 162; see *Island of Palmas* (*United States v Netherlands*) (1928) 2 RIAA 829.

[119] Ibid; see *Cayuga Indians (Great Britain) v United States* (1926) 6 RIAA 173.

[120] *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 39.

[121] Vienna Convention on the Law of Treaties, Art 3 (adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331).

[122] UN Special Rapporteur Miguel Alfonso Martínez, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations: Final Report*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999).

[123] Alfredsson, 'Indigenous Peoples, Treaties with' (n 116).

contemporary protections. Much depends on the bargaining power of the parties at the time, and indigenous peoples were rarely in a position of equality with adversary states.

In practice, treaties perhaps operate as *sui generis* instruments: neither the same as treaties between states, nor purely domestic law, but grey law somewhere in between. They often confer an entrenched or privileged legal status in domestic law, albeit subject to the state's purportedly superior sovereignty. They can lie dormant for long periods, before reviving with the right confluence of political and legal factors, as with the resurrection of New Zealand's Treaty of Waitangi 1840 from the 1970s onwards.

Importantly, treaties are not just historical artefacts but continue to be created; the Draft Nordic Saami Convention is a case in point, under negotiation between Sweden, Norway, Finland and their Saami peoples since 2011. There was also a recent, inconclusive debate about the need for a treaty in Australia, where no treaties were concluded with indigenous peoples during the British colonial conquest from 1788. The prospect of future treaties with indigenous peoples also offers an opportunity to entrench human rights standards in specific, binding contracts with the state (as long as international standards are not bargained away).

This book is mindful of these many external influences on the application and development of human rights standards relating to indigenous peoples. Before turning to the practice of the UN treaty committees and regional human rights bodies in chapters 2 to 5, one critical threshold issue first needs to be considered: who qualifies as an 'indigenous' people and which individuals are entitled to be recognised as members of those indigenous communities.

Chapter 1 accordingly considers various international and regional efforts to identify the indigenous peoples entitled to the rights and protections that have been incrementally recognised and tailored to their needs. In a world of startlingly diverse indigenous communities, and of governments with divergent political interests and ideologies, the question of who is indigenous has been notoriously difficult and controversial to resolve. As will be seen, however, although no definitive answer has been possible, the absence of a conclusive definition has not precluded the international community from forging a workable, functional understanding of who is 'indigenous'—and thus of who benefits from that status.