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To my students, whose passion for human rights is an inspiration and a source of great optimism.

Loescher, G. (2003). Refugees as grounds for international intervention. *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (ed. E. Newman and J. van Selm). Tokyo: United Nations University Press.

Argues the case for considering mass refugee outflows as a threat to international security, warranting intervention by the international community.

Loescher, G., Milner, J., Newman, E., and Troeller, G. (eds) (2008). *Protracted Refugee Situations: Political, Security and Human Rights Implications*. Tokyo: United Nations University Press.

Provides a comprehensive analysis of the political, security, and human rights implications of protracted exile.

Phuong, C. (2005). *The International Protection of Internally Displaced Persons*. Cambridge: Cambridge University Press.

Provides an analysis of the legal and political implications of protecting internally displaced persons.

Steiner, N., Gibney, M., and Loescher, G. (eds) (2003). *Problems of Protection: The UNHCR, Refugees and Human Rights in the 21st Century*. London: Routledge.

A number of experts discuss the ethical, legal, and political implications of refugee protection in the early twenty-first century.

UNHCR (2006). *The State of the World's Refugees: Human Displacement in the New Millennium*. Oxford: Oxford University Press.

Examines the changing dynamics of forced displacement and the challenges to the international community, and discusses possible solutions to protracted refugee situations and IDPs.

WEB LINKS

http://www.fmreview.org/. Forced Migration Review is a quarterly magazine reviewing current policy issues in the field of forced migration.

http://www.forcedmigration.org/ Forced Migration Online is the most comprehensive website listing research sources on forced migration issues around the world.

http://www.internal-displacement.org/ The website of the Internal Displacement Monitoring Centre provides comprehensive information and analysis of the problem of internally displaced persons.

http://www.prsproject.org The website of The PRS Project details the work of this policy research project based at Oxford University and related policy initiatives and research on the issue of protracted refugee situations.

http://www.refugeesinternational.org/ The website of Refugees International, a leading NGO that provides up-to-date news, research, and advocacy on refugee situations across the globe.

http://www.unhcr.org The website of the UNHCR contains up-to-date information about the organization and the refugee populations it protects and assists globally.

NOTE

1. This chapter draws upon some of my earlier writings, including Loescher (2001) and Betts, Loescher and Milner (2012).

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Indigenous Peoples' Human Rights

Paul Havemann

Chapter Contents

Reader's Guide

Indigenous peoples are among the most vulnerable people on Earth, yet states are ambivalent about recognizing their rights. Several factors explain this. First, Indigenous peoples have been denied legal personality since the fifteenth century because of cultural, political, and economic differences between them and Europeans, and because recognition was not compatible with colonization. Second, the liberal individualism of the contemporary human rights regime fails to protect and promote the group rights of Indigenous peoples to existence and self-determination. While Indigenous peoples see these rights as inextricably linked, states regard self-determination for Indigenous peoples as an unacceptable challenge to external sovereignty and internal stability.

Introduction

Those with power to determine who does and does not have rights have for centuries simultaneously acknowledged and denied the individual and group rights of Indigenous peoples. This ambivalence has dire consequences.

The chapter begins by defining who Indigenous peoples are. Some historical context provides the background as to how indigenous rights have evolved

since the 1970s and the negative consequences of ambivalence towards them. A case study examines climate change and Indigenous peoples, and the limited character of twenty-first century human rights discourse for Indigenous peoples. The chapter concludes with a brief explanation of ambivalence towards accommodating the group rights of Indigenous peoples and some principles that could inform stronger recognition.

Three Types of Rights

Three broad, interrelated, and interdependent types of human rights critical to Indigenous peoples inform the conceptual framework for this chapter: the right to existence, the right to self-determination, and individual human rights.

The right to existence is a group right inferred from the 1951 UN Genocide Convention (Thornberry, 1991) that established the right not to suffer genocide. The right to self-determination is a group right expressed in the 2007 UN Declaration on the Rights of Indigenous Peoples, which emphasizes self-government, participatory development, and free, prior, and informed consent.

Individual human rights, developed in international law within the UN framework since 1945, are expressed in conventions and declarations emanating from the UN and its specialized agencies. These rights comprise: civil and political rights; social, cultural, and economic rights; rights to development, and to a healthy and sustainable environment. Most recently, Indigenous peoples organizations are calling for the recognition of the Rights of Mother Earth (Cochabamaba Peoples Conference 2010). In the 1993 Vienna Declaration the UN declared human rights to be 'universal, indivisible, interdependent and interrelated'.

Who are Indigenous Peoples According to International Law?

Modern law and policy constantly categorize and classify people to determine eligibility for certain rights or services. For this reason, definitions of the categories 'Indigenous people', 'minority', 'peoples', and 'tribal peoples' are hotly contested (Capotorti, 1977; Daes and Eide, 2000). Moreover, the categories overlap with respect to several salient characteristics. Gudmundar Alfredsson (2005, pp. 163, 165) estimates that altogether there are 12,000 to 14,000 Indigenous and minority groups in the world who number 1.5 billion individuals and amount to about 25% of the world population.

The UN Permanent Forum for Indigenous Issues (PFII) estimates that there are 350 to 370 million Indigenous people spread across ninety states (UNPFII, 2006, 2008). Estimates suggest that there are at least 5,000 distinct Indigenous groups (IFAD fact sheet, undated). No country, not even Japan, which now grudgingly acknowledges the Ainu of Hokkaido (Hirano, 2007), is without an ethnic or national minority or Indigenous group(s).

Surprisingly, international law defines neither 'minorities' nor 'peoples'. José R. Martinez-Cobo, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, offered the most widely recognized definition of Indigenous peoples (see Box 14.1). Martin Scheinin (2005, p. 3) identifies three key characteristics of Indigenous people. First, they are distinctive from the dominant society and they self-identify as, and desire to be, different from that society. Second, Indigenous people are uniquely connected to their lands, which form the central element in their history, culture, economy, and spirituality. Third, Indigenous peoples assert that they are 'first in time': that they have occupied their land and territories since 'time immemorial'. Now-dominant populations colonized them, dispossessing them of their land and usurping their sovereignty. Finally, Indigenous peoples are under threat in all regions due to their subordination by dominant populations (Lattimer, 2010;DESA, 2009).

Two UN special rapporteurs found the following differences between Indigenous peoples and minorities (Daes and Eide, 2000): international human rights norms accord Indigenous people a degree of autonomous development, whereas minorities are assumed to have a duty to participate actively in the larger society; the 1992 UN Minorities Declaration, unlike the then draft Indigenous Declaration, did not address right to lands and natural resources; and the Minorities Declaration referred to the rights of a 'person belonging to a minority', whereas the Indigenous Declaration refers to 'peoples'.

KEY POINTS

Every state has minority or Indigenous people who are not dominant and are consequently under cultural, economic, or physical threat.

International human rights law distinguishes among Indigenous peoples, tribal peoples, and minorities. Indigenous peoples differ in that their occupation of territory pre-dated that of the majority of the state's present population.

Indigenous peoples human rights need to be considered in terms of group rights to existence and self-determination, as well as individual rights.

Centuries of Ambivalence about the Recognition of Indigenous Peoples

From first contact, explorers, colonists, and states displayed deep ambivalence towards recognizing Indigenous people as human beings with rights to life, liberty, and ownership of property. Denial of Indigenous people's rights made it so much easier to appropriate their land and resources.

Denial of Individual and International Legal Personality

A basic organizing concept of law is that of *legal personality*. This concept allows legal orders to determine who has standing within each system to sue and be sued, own property, and enjoy the protection of the state. Those persons with standing are deemed to have the capacity to exercise rights, perform duties, bear liabilities, and exercise powers, coupled with the competence to use their capacities rationally with an understanding of the consequences of their choices. Slaves, women, and Indigenous persons (overlapping categories) were deemed to lack standing or personality on the grounds of their lack of capacity. The Euro-American legal order privileged the patriarchal authority of the individual and his right to property ownership among the bundle of individual rights accorded subjects and citizens. Citizens are eligible to participate fully in the state political-legal order. In many states citizenship was denied to Indigenous people until the late twentieth century. Initially, questions about their capacity turned on whether they were Christians and had souls and consciences to guide them. Later, states used eugenicist concepts derived

BOX 14.1: Martinez-Cobo's (1986) Definition of Indigenous Communities, Peoples, and Nations

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

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

(a) Occupation of ancestral lands, or at least of part of them;

(b) Common ancestry with the original occupants of these lands;

(c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an Indigenous community, dress, means of livelihood, lifestyle, etc.);

(d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);

(e) Residence in certain parts of the country, or in certain regions of the world;

(f) Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

from Darwinian evolutionary theory to label Indigenous peoples as not evolved or civilized enough to have sufficient capacity to be legal persons.

The concept of international legal personality evolved to identify which nations have standing as sovereign states. The Law of Nations that regulated the Westphalian model of inter-state relations from 1648 (Held, 1995) limited membership of the 'family of nations' to Christian sovereign states. Each had the right to make and enforce its own laws without interference from other states. Indigenous peoples did not qualify for international legal personality.

Much of the Westphalian model survived the creation of the UN in 1945. Only states have standing as members of the UN. International law sourced from UN activities reflects a compromise of state interests. Indigenous peoples, as peoples, have no standing due to the very limited enforceability of the self-determination right to assert their international legal personality (Meijknecht, 2001). Instead, their entitlements are expressed as duties imposed on states. In 2002 the PFII was set up to enhance indigenous participation in the UN—but half its membership is determined by states.

Territorial acquisition by European states through war, trade, and settlement profoundly affected Indigenous peoples and ecosystems all over the world (Keal, 2003). Acquisition gave the state sovereignty over the territory acquired, allowing for the establishment of extractive colonies to access raw materials and cheap labour, as well as for settler colonies where European states could send their surplus population. The Law of Nations authorized the following five modes of acquisition: prescription, the acquisition of territory based on its effective possession over a period of time; cession, the acquisition of the territory of another state through a treaty; accession or accretion, the acquisition of territory that has emerged through natural processes; conquest, the acquisition of territory by the victor in a war (Robertson, 2005); and finally occupation, the acquisition of territory not under the power of another sovereign. Such territories were sometimes described as *terra nullius* (Latin for 'land of no one', i.e. uninhabited).

Colonizing states often conflated the absence of an occupying sovereign with the absence of inhabitants with legal personality recognized by civilized nations. The fact that people were already inhabiting territory acquired by occupation was highly problematic, morally and legally, for the assertion of internal sovereignty over the land and, sometimes, external sovereignty against other states. Moral or legal niceties did not, however, inhibit the acquisition of the territories of Indigenous peoples by conquest and genocide, as well as by legal sleight of hand concerning the validity of treaties of cession or peace made with Indigenous peoples (Gotkowitz, 2008; Foster *et al.*, 2008; Speed, 2008; Hitchcock and Totten, 2010).

Centuries of Debate about Indigenous Rights

Continuity, rather than any doctrinal rupture, marks the debates over Indigenous peoples rights over the centuries (see Box 14.2).

In 1492 Christopher Columbus found the periphery of the Americas but claimed that he had discovered a new route to India. Upon this 'discovery' the Catholic Church debated the status of Indigenous peoples in territories conquered by Christian kingdoms such as Spain and Portugal. European colonizers understood the acquisition of sovereignty, and hence territory, as a matter of divine law (Castro, 2007). A moral–legal question was: Do Indigenous people have standing as human beings whose rights to life and property merit recognition by the conqueror? Some theologians thought not; others, asserting that ignorance of God's law ought not excuse the denial of rights to people such as the 'Indians' of the Americas, recognized the sometimes-conditional legal personality of Indigenous people. This implied their rights to life and possibly property, but not sovereignty.

In the seventeenth and eighteenth centuries other European states embarked upon imperial ventures, including the establishment of settler colonies in the New World. These states too debated the standing of Indigenous persons and peoples. Secular scholars rejected the notion that divine law conferred sovereignty, but they remained ambivalent about the standing of Indigenous people. Colonization was becoming an increasingly significant feature of imperialism, and recognizing Indigenous inhabitants as landowners would have impaired its progress. Nonetheless, one school of thought was inclined to recognize Indigenous peoples legal and indeed international legal personality.

Throughout the nineteenth and early twentieth centuries, settlers' rhetorical claims to liberal civilization clashed with their need to dispossess Indigenous peoples. The Law of Nations drew heavily on liberal

BOX 14.2 Ambivalence Toward Indigenous Legal Personality 1492–1945

1492 Pope Alexander VI promulgates a Papal Bull denying the legal personality of Indigenous peoples in newly discovered territories unless they are converted to Christianity.

1514 Dominican priest Bartholemé de Las Casas advocates for the rights of the 'Indians' of the Spanish Indies.

1539 Theologian Franciscus de Victoria advocates the recognition of Indigenous peoples' rights to life and property.

1550 In a formal debate with Las Casas convened by the King of Spain, scholar Juan Gines de Sepulveda describes 'Indians' as 'natural slaves' without rights.

1552 In *The Devastation of the Indies: A Brief Account* Las Casas (1992) documents genocide and enslavement of Indians in the Spanish Indies (Cuba) and advocates the recognition of their legal personality.

1604, 1625 Dutch legal scholar Hugo Grotius advocates recognizing Indigenous peoples legal personality and international legal personality, and restricting territorial acquisition under the doctrine of occupation to places that are truly *terra nullius*.

1690 English philosopher and public servant John Locke in *Two Treatises of Government* (Locke, 1960) denies the individual and international legal personality of Indian people of North America because they live in a primitive 'state of nature', lack a recognizable political system, and do not cultivate the land as Europeans do.

1743 German legal scholar J. G. Heinecius equates international legal personality with the power to resist domination and exclude other states from territory.

1763 The King of England issues a *Royal Proclamation* to regulate settler behaviour in British North America and stabilize relations with Indian nations or tribes. It reserves lands west of the Appalachians for Indians and recognizes their rights as property owners and as tribes, implying a collective legal personality.

1765 English legal scholar William Blackstone states in his *Commentaries on the Laws of England* (Blackstone, 1765–9) that Indigenous peoples live in 'primeval simplicity' and therefore lack individual or international legal personality.

1776 Captain James Cook of the British Royal Navy sets out on a voyage of discovery with orders to acquire 'with the consent of the natives' any territory found. Landing on the southeast coast of Australia he finds ample evidence of Indigenous people but claims to have discovered an empty continent (*terra nullius*).

1787 The *Constitution of the United States* seemingly recognizes the international legal personality of Indian Tribes. The Commerce Clause (Article 1, section 8) states: 'The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the . . . Indian Tribes.'

1787 The United States Congress passes the *Northwest Ordinance* Article III concerning the government of territories northwest of the Ohio River; this law recognizes the legal personality of Indians.

1823 The US Supreme Court in *Johnson v. McIntosh* rejects the power of Indian Chiefs to deal in land on behalf of the Tribes, thereby denying their individual and international legal personality.

1831 The US Supreme Court in *Cherokee v. State of Georgia* recognizes the standing of Indian Tribes to have group rights in the form of limited self-government as 'dependent domestic nations', thus endowing them with partial legal personality as a group.

1837 The British Parliament accepts a report from the Select *Committee on Aborigines* containing widespread evidence of massacres of Indigenous people in Australian colonies and resolves that Indigenous peoples as British subjects shall be respected, protected, and assimilated, thereby endowing them with partial legal personality.

1895 English legal scholar John Westlake asserts that treaties made with Indigenous peoples need not be honoured, as Indigenous peoples are uncivilized and therefore do not have legal personality.

1919 In *Re Southern Rhodesia* (AC 211) the Privy Council, highest court of appeal in the British Empire, rejects the legal personality of certain Indigenous peoples who 'are so low on the scale of social organization that their usages and concepts of rights and duties are not to be reconciled with the institutions and legal ideas of civilized society.'

1921 In *Amodu Tijani v. Secretary, Southern Nigeria* the Privy Council holds that the legal personality of peoples in conquered or ceded territory ought to be recognized.

1928 In the *Island of Palmas* case the Permanent Court of International Arbitration dismisses Indigenous peoples' standing, characterizing them as 'savage', semi-civilized peoples with no international legal personality.

1933 In the *Legal Status of Eastern Greenland* case the Permanent Court of International Justice deems Greenland to be a *terra nullius*; Indigenous Inuit peoples—the majority of the population—are not considered to have legal personality relevant to the case.

1930s Various International Labour Organization (ILO) conventions aim to overcome the virtual slavery of Indigenous workers by suppressing their forced recruitment and forced labour, and abolishing penal and corporal sanctions for breach of employment contracts.

legal ideology from the English-speaking world. This was exemplified by respect for sovereignty, property rights, and principles such as the rule of law to fetter the power of the state over individuals. The state was supposed to protect the rights of individual citizens to life, liberty, and property. However, the development of new political economies in the colonies was obstructed by the presence and rights claims of Indigenous peoples. The need to dispossess, disperse, or assimilate them led to coercion and unofficial genocidal practices rationalized by eugenics (distorted Darwinian evolutionary theory), infantilization, and the denial of the legal personality of Indigenous people and nations on the basis of cultural differences. Despite instances of humanitarianism and fidelity to liberal principles, in this period the overwhelming practice of states, rationalized by the official jurisprudence, was to deny Indigenous people both legal personality as individuals and international legal personality as peoples.

After the First World War (1918), the League of Nations and the International Labour Organization (ILO) were established as state-based intergovernmental organizations (IGOs). The League principally focused on protecting national minorities as groups, but 'native' inhabitants were of concern too. It mandated some victorious states to ensure good government, including the supervision of the well-being of Indigenous peoples in the colonial territories of defeated European powers.[2]

The ILO was created, and still operates, as a tripartite organization representing states, employers, and employees in the setting and monitoring of labour standards. It became the first and most prominent IGO to focus on Indigenous people. ILO conventions impose duties on states rather than recognize indigenous rights.

Similarly, national and international courts and international law jurists also denied the international legal personality of Indigenous peoples, and so ruled them out of participating in determining their own destiny. A. H. Snow's report on the 'Question of Aborigines and the Practice of Nations' (1918) for the US State Department exemplified the dominant line of reasoning between 1918 and 1945. He constructed the relationship between 'backwards races' and 'civilized nations' as that of ward and guardian. Thus, agreements with Indigenous peoples could not be described as 'treaties' because backward peoples had insufficient capacity as legal persons to enter into such binding international transactions.

Lack of international legal personality as peoples, tribes, or nations meant that Indigenous peoples occupation of territory was acknowledged as merely factual occupation, not recognizable by law, until the International Court of Justice in the *Western Sahara* case repudiated the *terra nullius* doctrine in 1975. Not until 1992 in *Mabo* v. *Queensland* did the High Court of Australia repudiate the occupation of *terra nullius* as the basis of Australia's title to its territory.

KEY POINTS

The chief legal justification for the denial of rights to Indigenous people has historically been refusal to recognize their standing at law. Standing depends upon possession of legal personality as an individual and international legal personality as a sovereign state.

Between the fifteenth and twentieth centuries the legal personality of Indigenous peoples was recognized in very limited forms.

Indigenous peoples were denied standing as 'sovereign' states. Sovereign states were those Christian states regulated by the Westphalian Law of Nations governing war and territorial acquisition.

Until 1975 territorial acquisition by occupation meant that territory not ruled by a sovereign state could be claimed as *terra nullius* and the rights of the Indigenous inhabitants could be ignored.

During the nineteenth and twentieth centuries, eugenics was used to characterize Indigenous peoples as 'backwards' and Europeans as 'civilized' to legitimate the non-recognition of Indigenous peoples rights.

After 1919 the ILO assumed a key role in the protection of Indigenous workers in colonial territories.

The United Nations and Indigenous Group Rights

The global character of the Second World War, the failure of the League of Nations, and the experience of the Holocaust precipitated a radical rethinking of the architecture of international governance. The ILO survived. In place of the League of Nations, the UN was created to address international peace, security, and well-being.

The Triumph of Individual Human Rights Discourse 1945–75

A new world order centred on the UN and its specialized agencies took shape. The Charter states that the 'peoples' (strangely, not the 'nations') of the UN reaffirm 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'. The basic innovation of the UN-centred world order was the adoption of a platform of human rights for all human beings. The assumption was that the individual human rights regime would deliver equality and make group rights largely irrelevant, except in extreme circumstances. Group rights to freedom from genocide (right to existence) and to self-determination have major symbolic significance, yet yield little practical benefit to Indigenous peoples and minority groups (Thornberry, 2002).

Ignoring the Link Between Existence and Self-Determination

Indigenous peoples see their right to existence and their right to self-determination as being inextricably linked, while states regard their own sovereignty and territorial integrity as non-negotiable.

The right to existence

The 1951 Genocide Convention implies the right to existence as a group and the recognition of group rights under certain circumstances. Under Article 2, genocide involves specified acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group....' This right is limited in three important ways. First, the Convention requires proof of intent. Intention has been hard to establish. Further, the Convention omits linguistic groups. Language is often the nexus that binds the group into its culture and distinguishes Indigenous and minority groups from the dominant population. Finally, the Convention eschews the broader concept of cultural genocide or ethnocide. It took until 1998 for the first individuals to be prosecuted for offences under the Convention. These prosecutions arose from the Rwanda genocide (see Chapter 16). Only in 2007 were states first found liable, in a case against Serbia and Montenegro brought by Bosnia and Herzegovina concerning genocidal actions. The Convention has never been invoked to protect Indigenous peoples.

In 1957 the ILO Convention on the Protection and Integration of Indigenous, Tribal, Semi-Tribal Peoples (No. 107) articulated standards in terms of individual as well as, for the first time, group rights. The Convention attempted to reconcile integrationist and cultural preservationist discourses surrounding Indigenous people. Only twenty-seven state parties ratified it. Indigenous peoples repudiated it on the grounds of its paternalism and perceived assimilationist objectives, which they regarded as undermining their right to existence as peoples, tribes, and nations.

The right to self-determination

Self-determination was intended as the path to decolonization for peoples in the overseas colonies of European powers (the saltwater or blue water thesis), not for minority or Indigenous peoples within these colonies or within other established states. The group right to self-determination was first articulated in the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples. Paragraphs 1 and 2 champion Indigenous peoples' rights; yet paragraphs 6 and 7 severely qualify the circumstances in which the right to self-determination may be invoked, illustrating the tension between preserving the 'national unity and the territorial integrity of a country' while at the same time urging 'respect for the sovereign rights of all peoples and their territorial integrity'.

Similar ambivalence is clear in the 1965 UN Convention on the Elimination of All Forms of Racial Discrimination (CERD). This Convention reflects the international condemnation of apartheid in South Africa. It reiterates the right to equality and freedom from discrimination on the grounds of the race of individuals. Where CERD does acknowledge group rights through provision of special measures, such measures can only be temporary (Article 4). This implies that, once individual equality is achieved through the recognition of separate rights for the group, these special measures (for instance, self-government or the ownership of communal lands) would cease.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both recognize the right to self-determination in their first articles. Despite the plain meaning of the text, there is broad legal and diplomatic consensus that the right to self-determination does not apply to Indigenous peoples and minorities in the sense of secession from a state (Castellino, 2005), though it may

imply self-government and limited autonomy within a state—i.e. internal self-government. Since 1977 the UN *Human Rights Committee*[3] has construed Article 27 of the ICESCR, which concerns the rights of persons 'in community with the other members of their group', as implicitly protecting group as well as individual rights (Orlin *et al.*, 2000).

After 1975: Beginning to Link Existence with Self-Determination?

By the end of the 1970s, Indigenous people and supportive non-governmental organizations (NGOs) had become an effective lobby group in the UN system as well as within some states. Canada, New Zealand, the Nordic states, and some Latin American states gave some constitutional recognition to indigenous rights to self-government. Incrementally the UN has created mechanisms to allow Indigenous peoples to campaign for greater recognition of their rights in the international arenas.

For instance, in 1977 Indigenous participants at the UN NGO Committee on Human Rights and the Indigenous NGO Conference on Discrimination against Indigenous Populations framed a draft declaration that signalled the emergence of indigenous activism that would ultimately lead to the 2007 UN Declaration on the Rights of Indigenous Peoples.

Throughout the 1980s the World Bank adopted new policies on involuntary resettlement in response to evidence of massive displacement of Indigenous people by Bank-financed projects such as dam building in Latin America. In 1982 the World Bank published *'Tribal Peoples and Economic Development: Human Ecologic Considerations'*. This report stressed the link between Indigenous people and the environment, and the risks that developments funded by the World Bank pose to them. However, rather than promoting self-determination, the report promoted the concept of reserves for some Indigenous people, as well as their 'acculturation' into the mainstream political economy. Such official policy statements operate as soft law. They illustrate the power of international financial institutions (IFIs) such as the World Bank to impact radically on the life chances of millions of people in the developing world (Eastwood, 2011).

The *UN Economic, Social, and Cultural Organization* (UNESCO) hosted a committee of experts who passed the San José Declaration Against Ethnocide in 1981. This defined ethnocide to mean that 'an ethnic group is denied the right to enjoy, develop, and transmit its own culture and its own language, whether collectively or individually' and declared it to be equivalent to genocide.

In 1982 the UN set up an expert Working Group on Indigenous Populations (WGIP). Until 2002 this was the sole mechanism available to Indigenous peoples in the UN context. The word 'populations' in its title carefully avoids recognizing Indigenous *peoples* as potentially self-determining peoples who could be the subjects of international law (i.e. like states, persons with standing in the international legal system). In 1986 UN Special Rapporteur Juan Martinez-Cobo delivered his major report, 'Study of the Problem of Discrimination Against Indigenous Populations', which highlighted the plight of Indigenous peoples as being among the least advantaged groups on Earth.

By the mid 1980s indigenous claims were world news, and Indigenous leaders used the politics of embarrassment to highlight injustices perpetrated by host states. In 1984 Atlantic coast Indigenous people complained to the Inter-American Commission on Human Rights about their forced integration in Nicaragua by the Sandinista Government. As a result of the Commission's findings, Nicaragua granted significant self-government to Indigenous people in the region under the 'Autonomy Statute of the Atlantic Regions of Nicaragua' (1987). This was the first recognition of indigenous self-government rights in Central America (Hannum, 1990).

The ILO continued its work with a new Convention concerning Indigenous and Tribal Peoples in Independent Countries, intended to replace the unpopular one of 1957. The new Convention (No. 169) made a modest shift in the direction of self-government for Indigenous peoples, but ambivalence about self-determination was expressed by the proviso in Article 1(3): 'The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.' The Convention nonetheless articulated the governance principle of free, prior, and informed consent as well as the right to free participation in all levels of decision making that impact upon Indigenous and tribal peoples. Further, the Convention imposed on states a duty of consultation concerning any measures affecting Indigenous peoples (Articles 6 and 7). This right to participate was subsequently affirmed in new World Bank policies requiring the participation of Indigenous peoples as well as assurances from beneficiaries of loans that Indigenous people are likely to benefit from Bank projects. The new policy also stresses the sustainability of cultural distinctiveness rather than economic growth.

Indigenous peoples' rights achieved unprecedented recognition in 1992 at the UN Conference on Environment and Development in Rio de Janeiro, also known as the Earth Summit. Participation by states (172) and NGOs (2,400) was on a scale never seen before. Even an alternative summit attracted 17,000 people. Rio Earth Summit instruments identified the duty of states to respect the traditional environmental knowledge (TEK), closeness to nature, and stewardship duties of Indigenous peoples. Four instruments—Agenda 21, the Rio Declaration on Environment and Development, the Statement of Forest Principles, and the United Nations Convention on Biological Diversity—explicitly recognized Indigenous peoples' rights, connectedness to the environment, and role in environmental conservation. One instrument, however, did not: the United Nations Framework Convention on Climate Change (UNFCCC).

In 1993—the UN International Year of Indigenous People—the UN World Conference on Human Rights issued the Vienna Declaration, which, on the one hand, stressed the importance of the 'effective realization of this right' (of self-determination), but on the other stressed 'the territorial integrity or political unity of sovereign and independent States . . . possessed of a Government representing the whole people belonging to the territory without distinction of any kind'. The latter concern appears to be directed at discouraging outside interference from other states in the affairs of 'States conducting themselves in compliance with the principle of equal rights and self-determination of peoples'. Principle 20 of the Declaration exhorts states to honour their obligations to Indigenous peoples in 'recognizing the value and diversity of their distinct identities, cultures and social organization', but simultaneously assumes the absolute value of 'political and social stability', which seems to preclude rights of self-determination for Indigenous peoples.

Recognition that the right to existence is inextricably bound up with the right to self-determination—the viewpoint of Indigenous peoples' organizations—was not much evident in the UN-sponsored human rights discourse of the 1990s. The exception was the expert WGIP, which presented a draft Declaration on the Rights of Indigenous Peoples to the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in 1993. State parties, the WGIP, and Indigenous peoples' organizations worked continuously on successive drafts, but states remained adamant that the right to self-determination was not to be explicitly stated. In 2001 this unresolved tension led the UN to appoint a Special Rapporteur on the Situation of Human Rights and Freedoms of Indigenous Peoples, with a role complementary to that of the WGIP. A year later the UN created the PFII to supersede the WGIP.

The PFII may reflect a shift from a state-centred world governance structure toward a somewhat more multi-actor, multi-centric, and multi-layered, networked form of global governance (Held, 2004; Slaughter, 2004) as no other non-state group as yet has permanent representation within the UN. The Permanent Forum serves as an advisory body to the Economic and Social Council of the UN (ECSOC) concerning indigenous issues such as economic and social development, culture, the environment, education, health, and human rights. Its mandate is: to provide expert advice and recommendations on indigenous issues to the Council and, through the Council, to funds, agencies, and programmes of the United Nations; to raise awareness and promote the integration and coordination of activities related to indigenous issues within the UN system; and to prepare and disseminate information on indigenous issues.

Still, the very name given to this Permanent Forum, referring to 'Indigenous *Issues*' rather than *'Peoples'*, signifies the continued wariness of state parties about self-determination claims. The state-centric model also remains explicit in the form and process of PFII membership. ECSOC elects eight of the sixteen members from the nominees of states; the other eight are nominated by indigenous organizations, but ultimately appointed by the President of ECSOC. Members serve as individual experts and are not representatives of peoples. Membership reflects vast regions designated by the UN: Africa; Asia; Central and South America and the Caribbean; the Arctic; Central and Eastern Europe, Russian Federation, Central Asia and Transcaucasia; North America; and the Pacific.

In 2007 the Declaration of the Rights of Indigenous Peoples was finally adopted. Notable among the opposing states were initially the African states as well as Canada, Australia, New Zealand, and the US. The Declaration reflects compromises that attempt to address flaws in preceding drafts as well as the existing human rights regime from the differing perspectives of both states and Indigenous peoples. The Declaration does crystallize and highlight existing Indigenous rights under international law. So, for the first time, a UN instrument benchmarks specific Indigenous human rights standards (Allen and

Xanthaki, 2010; Charters and Stavenhagen, 2009) for states, IGOs, multinational corporations (MNCs), IFIs, and non-governmental organizations (NGOS) to meet.

Individual rights are reconciled with collective rights in Article 1. The right to existence as a group and as individuals is articulated in Article 7. This Article, incidentally, subsumes the forcible removal of children under 'any act of genocide or any other act of violence', thus neatly skirting the issue of whether forcibly removing children (as in Australia's stolen generations) constitutes genocide. Article 3 leaves open the question of external self-determination; Articles 4 and 5 favour internal self-determination. Other articles concern: participatory development and other economic and social rights; the principle of free, prior, and informed consent; the right to consultation about activities on their lands; and the right to determine membership of and to maintain indigenous institutions, as well as relations between and within states that affect Indigenous peoples.

Consequences of Denial of Rights

Indigenous peoples are among the most discriminated-against groups, regardless of recognition, in nearly all states. The Special Rapporteur for the UNPFII (Stavenhagen, 2007), the UN High Commissioner for Refugees (UNHCR, 2006), and NGOs, such as US-based Survival International and Denmark-based International Work Group on Indigenous Affairs, report evidence of the denial of group and individual rights.

Genocide, persecution, and discrimination continue; social exclusion and pauperization are the common experience of Indigenous and tribal peoples. Large-scale infrastructure developments frequently force their displacement within the state or cause them to become economic, environmental, or political refugees elsewhere. Extractive industries pollute their lands and resources (Anaya, 2011a).

States frequently facilitate the dispossession of Indigenous people from their traditional lands and territories and their exclusion from access to natural resources fundamental to their way of life and survival. Coercive assimilation through education, child welfare, and market economics leads to the loss of language, culture, and skills. Paternalist and non-inclusive governance and service delivery models perpetuate the denial of culture and the denial of the right to existence as self-determining groups, and exacerbate the participation deficit. Worldwide, dependency and disempowerment make the preservation of cultural, political, social, and economic integrity and social and economic development virtually impossible. Life expectancy, health, and well-being are markedly lower for Indigenous and tribal peoples than for the dominant population almost everywhere (DESA, 2009).

Mental health suffers, too. After enduring centuries of colonization accompanied by a denial of rights by the dominant population, many Indigenous people suffer from 'historical trauma' or intergenerational post-traumatic stress disorder (Kirmayer and Valaskakis, 2009; Czyzewski, 2011).

Figure 14.1 links colonialism, globalization, and ethnocide to global warming and ecocide (the killing of ecosystems, including planet Earth), illustrating the multiple jeopardy suffered by Indigenous peoples.

KEY POINTS

After the Second World War the UN established an individual human rights regime anchored in the Universal Declaration of Human Rights, namely, the ICCPR and the ICESCR. The group right of self-determination is referred to in both covenants but applied only to the beneficiaries of decolonization by European powers.

A corresponding group right to existence is inferred from the prohibition and punishment of the crime of genocide, but the Genocide Convention has seldom been invoked against individuals or states and never in the protection of Indigenous peoples.

Indigenous peoples became an effective lobby group in the 1970s. Agitation for a UN Declaration on the Rights of Indigenous Peoples started in 1977 but the meaning and implications of the rights to self-determination in drafts of the declaration were to be a major stumbling block for states for thirty years.

In the 1980s, rights of consultation, participation, and prior informed consent emerged in various quarters, including the Earth Summit, the WGIP, and the ILO.

Set up in 2002, the PFII is the first UN body to give standing to peoples who are not states in the context of the UN's state-based system. The UN and states, however, control its membership. The 2007 Declaration on the Rights of Indigenous Peoples conferred the right of internal self-determination on Indigenous peoples but failed to establish a framework for relations involving Indigenous peoples, states, and the UN.

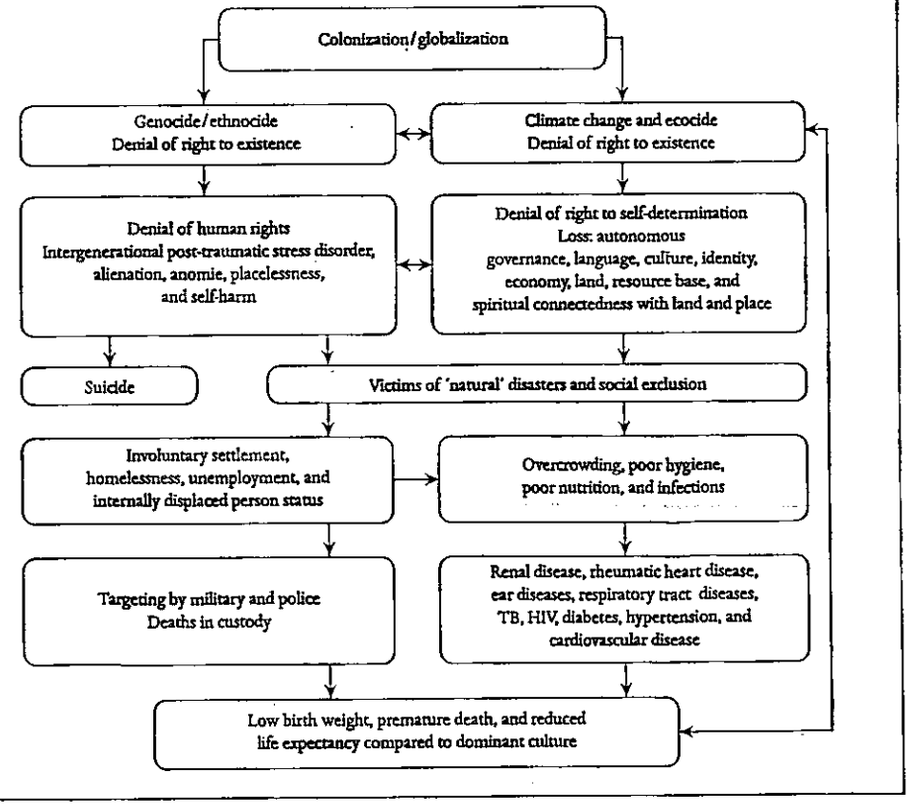
Genocide, dispossession of their territories, and the denial of their rights as legal persons and nations through colonization and globalization have placed Indigenous people among the most vulnerable groups in the world.

Case Study: Indigenous Peoples and Climate Change

Climate change-precipitated disasters underline the importance of basic human rights for millions of poor people, many of them Indigenous (Tauli-Corpuz and Lynge, 2008). Indigenous peoples are among those already experiencing negative impacts of climate change that include loss of food security, sea level rise and coastal erosion, desertification, deforestation, intensification and frequency of 'natural' disasters, unprecedented species extinction, and the spread of vector-borne diseases. Further, climate change has already displaced twenty-five million people worldwide (Institute for the Study of International Migration and Brookings-Bern Project, 2008). These people are among the most vulnerable to the abrogation of (failure to honour) all types of human rights.

By the end of 2007 most states had unequivocally accepted a direct link between human activity and global climate change. The UN Intergovernmental Panel on Climate Change (IPCC) presents compelling evidence for this link in its fourth report (IPCC, 2007). The UN Environment Programme and the World Meteorological Organization set up the IPCC in 1988 to assess relevant scientific, technical, and socio-economic information. Consensus in favour of urgent global human intervention to stop the growth of greenhouse gas emissions was reflected first in the 1992 UNFCCC and then in the 2005 Kyoto Protocol to the UNFCCC. The Framework Convention obliges states to reduce emissions and to take measures to mitigate and adapt to the profound ecological, economic (Stern, 2006), political, social, and cultural effects of climate change.

Figure 14.1 Colonization, globalization, ethnocide, and ecocide.



Unabated, climate change seems likely to derail the attainment of the UN's eight Millennium Development Goals and thus cause the poorest of the poor, of whom Indigenous peoples constitute a high proportion, to suffer profound adverse impacts (UNDP, 2010). UN Secretary General Ban Ki-moon (Ban, 2007) recognized that those least responsible and least able to cope bear the greatest burden, yet the rights of Indigenous peoples to participate in discussions about climate change mitigation and adaptation are still limited.

In every region on Earth, Indigenous people are on the front line of climate change—frequently in parts of the developing world where the state is least equipped or willing to respond. In the Arctic region, very rapid climate change is fundamentally threatening the health and food security of Indigenous Inuit people at a speed and on a scale that makes mitigation and adaptation very difficult. In Southern Africa, drought and temperature rise leading to desertification are rendering 2.5 million hectares of the Kalahari area unusable for grazing or as a source of food for the Indigenous San people. In Asia, rising temperatures and decreased rainfall are leading to forest system collapse, crop failures, and mass fires. Coastal zones of Bangladesh and China are experiencing erosion, salt water dilution of fresh water supplies, and population dislocation. In the Himalayas, glaciers are melting and high altitude ecosystems collapsing while, downstream, flooding causes people to move from low-lying areas, increasing population pressures on Indigenous populations. In Central and South America and the Caribbean, deforestation is widespread from the Amazon basin to the alpine forests of the Andes. Altered weather patterns are disrupting traditional agriculture and threatening food security. Coastal erosion is making areas of many small island developing states uninhabitable, forcing population movement onto scarce land. In the Pacific regions, coastal erosion, high tides, and stormy seas are threatening Tuvalu, the Cook Islands, and Kiribati and leading to migrations in the Marshall Islands and Papua New Guinea that force traditional owners into conflict with newcomers.

The predicament of Indigenous peoples also stems from adverse factors attributable to the lingering ideology of colonization (Macchi *et al.*, 2008), which denies rights to existence and self-determination. Climate change exacerbates vulnerability to continuing poverty and poor health. Absence of political and economic power limits the ability to defend and assert rights to land, natural resources, and diversified traditional livelihoods in an increasingly cut-throat competitive environment. Restricted access to information communication technologies further limits the ability to adapt to or mitigate the effects of climate change.

The Right to Participate in Mitigation and Adaptation?

State party signatories to the UNFCCC are committed to formulate and implement regional mitigation and adaptation programmes. These include irrigation and rainwater catchment, disaster planning, measures to address coastal erosion, and forest management schemes that intrude directly upon Indigenous peoples' existing way of life. Participation, prior informed consent, and consultation rights, as well as recognition of TEK and respect for land and natural resources rights, have long been areas of struggle between states and Indigenous peoples.

Until 2010 state parties to the UNFCCC ignored repeated requests from the International Forum of Indigenous Peoples on Climate Change (IFIPCC) to participate—for instance to create an Expert Group on Indigenous People, though they have been allowed to attend and make statements, along with NGOs and industry lobbyists. This posture abrogated rights to participation, to prior informed consent, and to consultation, supposedly enshrined in international human rights law. While the UNFCCC and Kyoto Protocol oblige developed states to assist developing countries, these instruments had not acknowledged either the situation of Indigenous peoples or the contribution that TEK can make to successful adaptation. Indigenous peoples at present have no formal place in the work of expert bodies that advise the UNFCCC.

The IPCC neglected Indigenous people in its analysis of the data or presented them as 'helpless victims of changes beyond their control' (Salick and Byg, 2007)—though it does acknowledge the importance of TEK in assisting scientists and policy makers, as well as Indigenous and traditional communities in adapting to climate change (Parry *et al.*, 2007).

In May 2008 the UNPFII held its seventh session on 'Climate change, bio-cultural diversity and livelihoods: the stewardship role of Indigenous peoples and new challenges'. This session repeated the call for better recognition by the UNFCCC, inclusion of Indigenous peoples' issues in the work of the IPCC, and acceptance by states that the Declaration on the Rights of Indigenous Peoples should be the framework for further interaction between states and Indigenous peoples nationally as well as internationally. Finally, in 2010 at the Cancun a subsidiary body of UNFCCC, the Ad hoc Working Group on Long-term Co-operative Action (AWG-LCA) (UNFCCC, 2010) acknowledged some of the UNPFII 's concerns about the exclusion of Indigenous peoples. Recognizing the implications of the UNDRIP's (2007), the AWG-LCA has undertaken to seek options for Indigenous participation in mitigation and adaptation schemes and for recognition of the importance of TEK; whether this undertaking is gestural or authentic is yet to be seen. A human rights and ecosystem-based approach to the participation of Indigenous peoples in the work of entities such as the UN, the World Bank, and NGOs is critically important as these bodies are designing and implementing global measures for climate change mitigation and adaptation that affect Indigenous people profoundly (Tauli-Corpuz *et al*, 2009; UNDP/RIIP, 2010). For instance, under the Kyoto Protocol three market-based mechanisms for reducing emissions have been introduced. These include 'clean development mechanisms', such as emissions trading, and hydropower and dam building. Dams often cause involuntary resettlement that is likely to infringe rights. Emissions trading encourages the development of plantation crops such as oil palms for bio-fuels. In Asia, planting single crops for bio-fuels contributes to the deforestation of vast areas of tropical rainforest and to declines in food security and biodiversity, again infringing Indigenous peoples rights. In Uganda, reforestation for voluntary carbon offset businesses in Europe has infringed indigenous rights through the forced eviction of peoples from their lands (Tauli-Corpuz and Tamang, 2007).

The World Bank's Forest Carbon Partnership Facility (FCPF) is a dominant player in the UN-sponsored emerging carbon market. Notably the FCPF contributes millions of dollars to the UNFCCC programme of action for reducing emissions from forest degradation (REDDs) and deforestation (Barnsley, 2009). NGOs suggest that the approach is seriously flawed: it neglects the Bank's own policies and obligations regarding respect for the participation, consultation, and informed consent rights of Indigenous peoples (Dooley *et al.*, 2011).

Unfortunately, the reluctance of parties to the UNFCCC and the World Bank to recognize the standing of Indigenous peoples and to allow their active participation and consultation not only robs Indigenous peoples of their rights and increases their vulnerability, but also robs humanity as a whole of the contribution Indigenous people stand ready to make.

Climate Change and the Human Rights of Persons Affected by Disasters

Because they are among the estimated 200 million people per year affected by so-called 'natural' disasters (many of them related to climate change) (Brookings-Bern Project on Internal Displacement, 2007), Indigenous peoples are among those most in need of the human rights-based approach to disaster relief that the UN Inter-Agency Standing Committee advocates (Brookings-Bern Project on Internal Displacement, 2008). A human rights-based approach to reducing, mitigating, and adapting to climate change requires putting into practice the principle that all human rights are 'universal, indivisible, interdependent and interrelated'.

Basic to existence are rights to life, adequate food, water, health, shelter, and freedom from torture, found in the UDHR and many other UN human rights instruments (Von Doussa *et al.*, 2008). International law is weak in articulating an individual right to a healthy planetary ecosystem as a basic right of existence. The Rio Declaration's Principles suggest that rights derive from states' duties, for example: to consider environmental needs of future generations (Principle 3); to conserve, protect, and restore the health of the Earth's ecosystems (Principle 7—echoed in Article 29 of the Indigenous Peoples Rights Declaration); and to take a precautionary approach despite the absence of full scientific certainty where irreversible damage is threatened (Principle 15).

Self-determination is a fundamental dimension of disaster management. The bundle of rights associated with self-determination include self-government, participation in mitigation planning, and access to information, found in the ILO Convention (No. 169), the UN Declaration on the Rights of Indigenous Peoples, Agenda 21, the Dublin Declaration on Access to Environmental Information, and the Aarhus Convention on Public Participation in Environmental Matters.

Linking rights to existence, self-determination, and individual human rights in an active rights and ecosystems-based approach to climate change will demand unprecedented and hitherto unachieved whole-of-system involvement in recognizing, respecting, and protecting all types of human rights (Tauli-Corpuz *et al.* 2009).

KEY POINTS

Scientific evidence shows that Indigenous peoples are among those being hit hardest by climate change.

IPCC research supports the contention of Indigenous peoples that TEK can contribute to mitigation and adaptation measures.

After repeatedly denying requests from the IFIPCC and the UNPFII between 2000 and 2009, UNFCCC agreed in 2010 to recognize Indigenous peoples rights to participation in deliberations about mitigation and adaptation.

Some UN agencies advocate a human rights-based approach to climate change measures, including the use of the UNDRIP as a benchmark for standards.

Reconciling Indigenous Self-Determination with State Sovereignty?

Indigenous peoples conceive their right to existence as indivisible from, interconnected with, and interdependent upon their right to self-determination. Consequently, indigenous movements since the last quarter of the twentieth century have pursued self-determination.

Jorge Valadez (2000, pp. 185–234) categorizes three strands within these movements: *accommodationists* will settle for a degree of self-determination within the structures of the state; autonomists seek self-determination through autonomous institutional arrangements within the state. The UNDRIP reinforces the legitimacy of rights to autonomous governance (Anaya, 2010) *secessionists* seek to form independent states. Among Indigeous peoples secessionists are a minority. Even so, states have persistently interpreted Indigenous peoples' assertion of rights to self-determination as claims to external self-determination—tantamount to rights of secession. Most states perceive aspirations to self-determination as threats to their territorial integrity and sovereignty.

Many Indigenous leaders accept that the greatest gains are likely if self-determination is delimited as internal—ideally, along lines that 'autonomists' would accept. They recognize that self-determination can be a trap condemning peoples to long conflictual struggles with states (Weller, 2009). Indeed, Indigenous peoples have mostly pursued rights within the state, for instance, to their own political–legal institutions, to participate in and be consulted about decisions concerning them, to benefit from sharing, and to give prior informed consent to the implementation of decisions concerning or impacting upon them by the state. As the country reports of the Special Rapporteur on Indigenous rights attest, despite UNDRIP, states remain reluctant to respect these rights, even in the context of IGOs such as the UNFCCC that make decisions of direct and mortal relevance to Indigenous people (Special Rapporteur on Indigenous Rights, 2011).

Even recognizing a right to internal quasi-autonomous self-government that is not a claim to statehood presently appears to be beyond the scope of the traditional liberal model of the democratic state (Muehlebach, 2003) that is anchored in the non-indigenous Westphalian concept of sovereignty (Alfred, 2008). In such a state citizenship is universal, equal, and individual. Democracy is majoritarian. There is one law, and one set of rights, for everyone. Introducing separate forms of autonomous self-government for Indigenous peoples challenges this model. States have mostly pursued the assimilation of Indigenous peoples as individual citizens, denying their claims to group rights and autonomy. Modest exceptions to assimilationist institutions are found in Nordic states (Anaya, 2011b). Developments in Bolivia under its Indigenous president Evo Morales represent a radical attempt to depart from past state practices. There, the state has been redefined as plurinational, reflecting that a large proportion of the population is Indigenous. This project is highly contentious and very much a work-in-progress (Webber, 2011; Gustafson, 2009). Further, to try to counter the impact of untrammelled resource extraction and to reflect Indigenous rights, Bolivia has also enacted law recognizing the Rights of Mother Earth (Pachmama) (Vidal, 2011).

Some liberal theorists and some democratic states do recognize that imposing one model on everyone regardless of culture or history may violate liberal values of tolerance and recognition of difference (Taylor, 1994). Furthermore, they accept that principles of good governance such as inclusiveness, subsidiarity, and equivalence require the authentic involvement of those whose life expectancy—let alone life choices and life chances (Held, 2005, pp. 258–259)—are most affected.

Liberal theorist Will Kymlicka (1995, pp. 6–8, 30–41) suggests a compromise between assimilation and separation, universalism and relativism. He suggests that liberalism requires three kinds of rights to accommodate Indigenous peoples and help them realize equal citizenship through recognition of differences. He proposes rights of self-government over internal affairs based on traditional mechanisms and institutions, such as in the Territory of Nunavut in Canada; polyethnic rights to protecting traditional religious practice, hunting and fishing, and stewardship of land and natural resources, such as some native title rights in Australia; and representation rights that would give groups a voice in state institutions when these deliberate matters directly affecting the groups, such as the Saami Parliaments in the Nordic states. Differentiated citizenship can be justified in various contexts and on several grounds: in treaty obligations that bind the state to honour its historical undertakings; in special measures to assist those whose right to existence has been jeopardized by state practices; or, as a means of empowering Indigenous peoples to perform duties to the environment for the benefit of humankind.

In addition, international human rights relating to Indigenous peoples, tribal peoples, and minorities since the 1989 ILO Convention are premised on the idea that preserving a distinct human culture—its laws and institutions, language, religion, and way of life—is a good in itself and that states have a duty to take measures to ensure this preservation.

The sticking point for liberal democratic states in recognizing differentiated citizenship arises when apparently universal, individual citizenship rights appear to be abrogated by the exercise of indigenous self-government powers (Badger, 2011), for example through rules discriminating against women. For a state to condone a denial of the rights of a citizen would be to fail in the duty to protect and promote the human rights of all citizens equally. This would imply that citizenship rights are not universal but depend on one's identity or status—totally contradicting the idea of citizenship and the principle that human rights are interconnected, interrelated, and indivisible.

Seyla Benhabib (2002, pp. 18–19, 147–148) suggests that a resolution to the universalist v. relativist conundrum posed by differentiated citizenship could be guided by principles that protect the individual's rights from being sacrificed for the sake of the group without denying the right of the group to exist and govern itself within these limits. These principles recognize that state power should be shared by all, that minorities should not have fewer rights than the majority, that group membership must be voluntary and not imposed, and that group members should have a meaningful right of exit from the group.

Another challenge—apparent in connection with issues such as climate change—is that the world increasingly has to be understood as a single place for governance purposes (Rosenau, 1997). Yet intensified globalization processes correlate with intensified secessionist pressures upon states (Hechter, 2000) by peoples without states (Guibernau, 1999), such as Indigenous peoples.

KEY POINTS

Indigenous peoples conceive the right to existence as indivisible from, interconnected with, and interdependent upon their right to self-determination.

States ascribe secessionist motives to Indigenous peoples' claims to self-determination.

The accommodation of Indigenous peoples' self-determination with state sovereignty is possible when states recognize that internal self-determination is compatible with as well as necessary for good governance.

Good governance requires the adoption of basic principles such as inclusiveness, subsidiarity, and equivalence to accommodate the rights and needs of distinct communities to differentiated citizenship within the state.

Conclusion

Much of the explanation for ambivalence about the rights of Indigenous peoples lies in the politics and economics of colonialism. Profit in the context of international competition depends upon access to territory, raw materials, cheap labour at the lowest compliance, and monetary costs. Even partial recognition of Indigenous peoples' rights would have raised the cost and stalled the pace of growth. The neoliberal ideology driving much of globalization today perceives the same problem and overcomes it in much the same way.

The Law of Nations, constituted from the coalescence of Euro-American, Judaeo–Christian, liberal legal, and capitalist ideologies, has rationalized, justified, and regulated territorial acquisition. Differences between Indigenous peoples and settlers (such as not being Christian, or farmers, or gardeners, and not having a European-style political society, or economy, or concept of individual private property) were used to justify the denial of recognition of legal personality to Indigenous peoples. This denial prevented Indigenous peoples from exercising or enjoying sovereignty and self-determination, as well as many other individual and group human rights associated with the right to existence. Despite the rhetoric of today's international law, for Indigenous peoples, deep ambivalence concerning the recognition of these rights remains evident at both national and international levels.

States and IGOs must work toward models of governance that provide both for Indigenous peoples' rights to participation in the global arena and for the right to self-determination within the state. State recognition of Indigenous peoples' rights in these ways is an expression of state sovereignty and not a restriction upon it, and ensures that local as well as global governance is inclusive, not exclusive, of those whose life choices and life chances are most affected by decisions.

QUESTIONS

Individual Study Questions

1. Distinguish group or collective rights from individual rights. As a group debate whether individual rights are a necessary and sufficient type of right for the protection of Indigenous peoples human rights.
2. According to UN experts and international conventions, how are Indigenous peoples distinguishable from other peoples?
3. The ILO was created in 1919 and became a UN specialist agency after 1945. What has been its contribution to identifying the rights of Indigenous and tribal peoples?
4. In international law, how is the crime of genocide defined? Why is it linked to the right to existence?
5. What is meant by legal personality for individuals and for peoples or nations? Why has refusal to recognize their legal personality contributed to the vulnerable economic, political, cultural, and ecological position of Indigenous peoples and minorities?
6. What are the political and economic drivers of colonization? Why is the recognition of Indigenous peoples' rights seemingly incompatible with governance principles of liberal states and capitalist economies?
7. Contrast internal and external self-determination. Do you think that the states that drafted and adopted the ILO Convention (No. 169) in 1989 or the UN Declaration on the Rights of Indigenous Peoples in 2007 intended to endow Indigenous peoples with the right to internal or external self-determination?
8. Which international environmental law instruments were adopted by states at the 1992 Rio Earth Summit? Which Indigenous peoples' rights and duties were singled out by most of these?
9. Why are Indigenous peoples particularly vulnerable to climate change? How, and with respect to what aspect of responding to climate change, do Indigenous peoples seek a greater voice at the conferences of the parties (COPs) of the UNFCCC and in the work of the IPCC?

Group Discussion Questions

1. Debate the indigenous case for, and the state case against, self-determination for Indigenous peoples.
2. Evaluate Indigenous peoples claim that they ought to have a distinct place in climate change governance processes.

FURTHER READING

Anaya, S. James.[4] (2004). *Indigenous Peoples in International Law*. Oxford: Oxford University Press.

This is the classic exposition of the development of Indigenous peoples rights in International law by the current UN Special Rapporteur on Indigenous rights. It offers a thorough and detailed historical overview of the emergence of Indigenous peoples rights, as well as a very rigorous analysis of the right to self-determination and its changing meaning and attributes in the late twentieth century.

Allen, Stephen and Xanthaki, Alexandra. (eds.) (2010). *Reflections on the UN Declaration on the Rights of Indigenous Peoples (Studies in International Law)*. Oxford: Hart Publishing.

This is one of the first assessments of the UNDRIP. This collection contains contributions from key players in the development of the Declaration, notably a regional analysis of the possible reception of the Declaration in different parts of the world and assessments of the future impact of the Declaration on state and IGO practice.

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

Kymlicka evaluates how the rights and status of minority cultures, such as Indigenous peoples, can be accommodated within liberal democracies. It argues that certain collective rights of minority cultures are consistent with liberal democratic principles, and that standard liberal objections to such rights can be answered.

Tauli-Corpuz, Vitoria et al. (2009) *Guide on Climate Change & Indigenous Peoples* (2nd edn). Baguio City, Philippines: Tebtebba Foundation.

This guide by Indigenous authors is a thorough and accessible introduction to climate change and its impact on Indigenous peoples as well as to the UN climate governance regime. The guide outlines what rights Indigenous peoples seek to secure within the complex process of climate change deliberations.

Valadez, J. (2000). *Deliberative Democracy, Political Legitimacy, and Self-Determination in Multi-Cultural Societies*. Boulder, CO: Westview.

This examines some of the fundamental issues in political theory concerning democratic deliberation in multicultural societies, the nature of self-determination, the justification of distinct human rights such as cultural rights, as well as the rationale for regional self-governance and secession.

WEB LINKS

http://social.un.org/index/IndigenousPeoples.aspx Website of the UN Permanent Forum on Indigenous Issues.

http://www.tebtebba.org Website of Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education): a Philippines-based Indigenous peoples' NGO advocating that the rights of Indigenous peoples are recognized, respected, and protected worldwide.

http://www2.ohchr.org/english/issues/indigenous/rapporteur/ Website of the Special Rapporteur on the rights of Indigenous peoples in the Office of the UN High Commissioner for Human Rights. The Rapporteur conducts detailed and critical studies of the way Indigenous peoples human rights are respected worldwide.

http://www.iwgia.org Website of a Denmark-based NGO supporting Indigenous peoples' struggle for human rights and self-determination.

http://www.forestpeoples.org The FPP is a UK-based NGO whose mission is to bridge the gap between policy makers and forest peoples through advocacy, practical projects, and capacity building.

NOTES

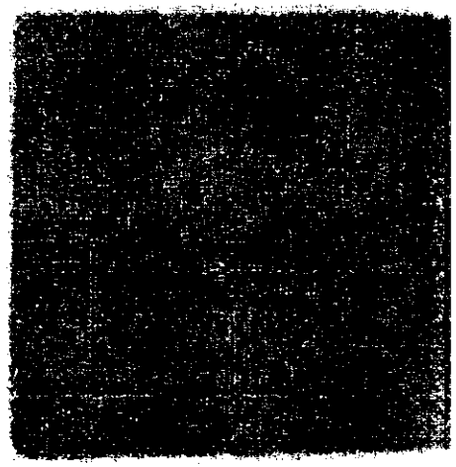
1. For brevity, the phrase 'Indigenous peoples rights' (with no apostrophe) refers to both Indigenous people's rights as individuals and Indigenous peoples' rights as groups—though most of this chapter concerns their group rights.
2. For instance, the Dominion of South Africa's mandate in German Southwest Africa.
3. *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada* (Communication No. 167/1984). Views adopted 26 March 1990. Report of the Human Rights Committee, GAOR, 38th Session. Suppl. No. 40(A/38/40), 1–30.
4. The OHCHR appointed Professor S. James Anaya as a Special Rapporteur in 2008.

Visit the Online Resource Centre that accompanies this book for updates and a range of other resources: http://www.oxfordtextbooks.co.uk/orc/goodhart2e/

15

Trafficking for Sexual Exploitation

Andrea M. Bertone



Chapter Contents

Reader's Guide

Human trafficking for sexual and labour exploitation is undoubtedly one of the major human rights concerns of our time, as it affects men, women, and children in nearly every country. Persons of any race, age, or socio-economic status can be trafficked, and a country may be a destination, transit, and/or origin for trafficking victims. Human trafficking, simultaneously defined as a process (recruitment and transportation) and a severely exploitative work situation (psychological and physical control), is not a new phenomenon. In fact, sexual and labour exploitation in their many forms have always been a part of the human condition. However, political leaders, activists, advocates, academics, and other concerned individuals have recently taken an intense interest in the issue of trafficking due in part to the greater global awareness of human rights issues in general and the development of anti-trafficking advocacy networks across countries in particular.