

INDIGENOUS RIGHTS IN INTERNATIONAL LAW OVER THE LAST 10 YEARS AND FUTURE DEVELOPMENTS

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I INTRODUCTION

Indigenous rights have been a prominent issue in the international arena in the past decade. Although the major development in this area has been the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*¹ in 2007, other developments should not be underestimated: the establishment of ongoing mechanisms in the United Nations, specifically on the situation and concerns of indigenous peoples; the interpretation of general standards in a manner favourable to indigenous claims by international bodies; and the development of strong regional standards on indigenous rights are some of the most important. In all these developments, the transnational indigenous movement has been instrumental. Without overlooking differences — and at times tensions — between indigenous groups on claims and tactics, their common strategies have borne significant results.

II UN BODIES AND INDIGENOUS RIGHTS

In the last decade, indigenous matters have become more prominent in documents of UN monitoring mechanisms. The Human Rights Committee has continued to favour an interpretation of art 27 of the *International Covenant on Civil and Political Rights* ('*ICCPR*')² that includes strong indigenous land rights.³ In addition, the Committee on the Elimination of Racial Discrimination ('*CERD*') has intensified its monitoring of indigenous issues. Following its 1997 *General Recommendation 23* on indigenous peoples,⁴ CERD, through its monitoring process and interpretation of human rights standards, has positively

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¹ GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007) ('*Declaration*').

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³ *Äärelä and Näikkäläjärvi v Finland*, HRC, Communication No 779/1997, UN Doc CCPR/C/73/D/779/1997 (24 October 2001).

⁴ CERD, *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 52nd sess, Annex V, UN Doc A/52/18/(SUPP) (26 September 1997) (*General Recommendation No 23: Indigenous Peoples*).

contributed to indigenous rights, often promoting the collective element in indigenous rights. Importantly, it has 'intimated that a "hands-off", or "neutral" or "laissez-faire" policy is not enough'.⁵ CERD comments have encouraged many states to review their policies concerning indigenous peoples. On several occasions, CERD has even used the 'Urgent Action Procedure' to push states to change discriminatory policies. For example, in 2004, when New Zealand was the subject of an early warning procedure for the *Foreshore and Seabed Act* (2004),⁶ the fierce reaction by the state did not prevent the Committee from fulfilling its mandate. In March 2006, CERD issued a similar decision urging the United States to cease violation of Western Shoshone land rights.⁷ The matter had already been raised in the Inter-American system in 2002.⁸ Indeed, CERD often complements other international bodies in their quest for improving indigenous rights. For example, CERD often invites states that have not signed the *International Labour Organization Convention (No 169)*⁹ to do so.

Other treaty bodies have addressed specific issues with respect to indigenous rights. In view of the great disparities between indigenous and non-indigenous health, the contribution of the Committee on Economic, Social and Cultural Rights ('CESCR') has been particularly important. In its *General Comment No 14*,¹⁰ CESCR recognises the right of indigenous peoples to control their own health services and to have medical care delivered in a culturally appropriate manner. Importantly, CESCR asked for the protection of vital medicinal plants, animals and minerals necessary for indigenous peoples' health, and linked the deterioration of their health to forced displacement and a break in the symbiotic relationships with their lands. This comment facilitated the recognition of indigenous peoples' control over their health systems and the recognition of their intellectual property rights in the *Declaration*.

The UN has also placed particular emphasis on its machinery on the rights of indigenous peoples. The last decade has seen the establishment of several bodies on indigenous issues, including the Expert Mechanism, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, the Permanent Forum on Indigenous Issues and the UN Voluntary Fund for Indigenous Peoples. In 2007, the Expert Mechanism on the Rights of Indigenous Peoples replaced the Working Group as the body responsible for providing thematic assistance on indigenous issues to the Human Rights Council; this group's contribution may prove important in the post-*Declaration* era.

⁵ Patrick Thornberry, 'Confronting Racial Discrimination: A CERD Perspective' (2005) 5 *Human Rights Law Review* 239, 260.

⁶ *Foreshore and Seabed Act* (2004) (NZ); CERD, *Decision 1* (66): *New Zealand*, 66th sess, UN Doc CERD/C/DEC/NZL/1 (27 April 2005).

⁷ CERD, *Early Warning and Urgent Action Procedure, Decision 1* (68): *United States of America*, UN Doc CERD/C/USA/DEC/1 (11 April 2006).

⁸ Inter-American Commission on Human Rights, *Mary and Carrie Dann v US*, Rep No 75/02, Case No 11.140 (27 December 2002).

⁹ *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 28 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) ('*Convention No 169*').

¹⁰ CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000) [27].

The International Labour Organization ('ILO') also intensified its efforts to disseminate and implement the provisions of *Convention No 169*. The last decade has seen virtually all Latin American states with substantial indigenous populations ratifying this Convention. It has also seen the ILO gaining indigenous peoples' trust by actively promoting their rights through national and regional projects.¹¹ On several occasions, the ILO has managed to reach indigenous groups that had not been active participants in the transnational indigenous movement and has raised awareness on their rights.¹² In addition, although the Convention has not in general attracted many signatories because of its progressive character, it has continued to provide important ammunition for indigenous claims around the world and is used in national systems. For example, in the Australian case of *Police v Abdulla*, Perry J referred to *Convention No 169*, which had not been ratified by the state, as 'an indication of the direction in which the international law is proceeding'.¹³

In addition, the last decade has seen the 2004 revision of the World Bank's *Draft Operational Policy 4.10*, which aims to contribute 'to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respect the dignity, human rights, economies and cultures of indigenous peoples'.¹⁴

III THE *DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*

Still, one cannot deny that the greatest development on indigenous rights in the last decade has been the adoption of the *Declaration*. The final version of the *Declaration* satisfies, to a large degree, the claims of indigenous representatives. It addresses specific concerns relating to indigenous life, integrity and security, including genocide, the militarisation of indigenous lands and the use of indigenous children as soldiers. It is focused on collective rights, although it also includes individual rights, and recognises the rights of indigenous peoples to self-determination, to decide on their membership, to the establishment of their own separate systems and institutions and to wide consultation and participation in matters that affect them. It also includes a wide range of land rights, including rights to traditional activities and natural resources, and rights to the development and management of indigenous lands.¹⁵ Intellectual property rights

¹¹ The Programme to Promote ILO Convention No 169 on Indigenous and Tribal Peoples ('PRO 169') aims to promote the rights and improve the socio-economic situation of indigenous and tribal peoples, in compliance with the principles of *Convention No 169*. At the international level, PRO 169 contributes to coordination through the UN Permanent Forum on Indigenous Issues and the Inter-Agency Support Group ('UNPFII') <<http://www.ilo.org/indigenous/Aboutus/PRO169/lang--en/index.htm>>.

¹² For example, in the Latin American region, there exist approximately 642 indigenous towns, with their combined population fluctuating between 30 and 50 million people. In various countries in the region, such as Bolivia or Guatemala, indigenous peoples constitute the majority of the population. Some of the indigenous groups from Latin America that the ILO assists include: Guatemala: Achí, Akateko, Awakateko, Ch'ortí, Chuj, Ixil, Itzá, Kaqchikel, K'iché, Mam; Honduras: Pech, Nahuas, Lencas, Tolupanes, Garífunas, Misquitos, Tawahkas, Chorti; Argentina: Wichí, Mocoví, Pilagá, Guaraní, Chiriguano, Chané, Chulupí <<http://www.ilo.org/indigenous/Activitiesbyregion/LatinAmerica/lang--en/index.htm>>.

¹³ *Police v Abdulla* (1999) 74 SASR 337, [37] (Perry J).

¹⁴ World Bank, *Operational Manual: OP 4.10: Indigenous Peoples* (July 2005) [1] available from <<http://www.worldbank.org>>.

¹⁵ *Declaration*, above n 1, art 23.

and rights to redress for past injustices have also been included in the final version of the text.¹⁶

The importance of the *Declaration* is twofold. First, it gives indigenous peoples around the world long-awaited protection of their rights. Although *Convention No 169* and its predecessor, the *International Labour Organization Convention (No 107)*¹⁷ have recognised a range of rights with respect to indigenous peoples — and in some cases, such as in the provision on the demarcation of indigenous lands, have gone further than the *Declaration* — their small number of signatories has limited the protection that they can give. In this respect, the *Declaration* is able to make an impact on a wider scale. Second, the *Declaration* also has a substantial impact beyond indigenous peoples: it significantly contributes to the clarification and evolution of several areas of international law. Although many provisions crystallise non-controversial rights for indigenous peoples, other provisions recognise rights that, although in accordance with current norms of international law, have not been explicitly included in general human rights instruments. An example is the prohibition of ethnocide, included in art 8 of the *Declaration*. Even more radical are provisions that actually push the contours of current international law.

The recognition of indigenous self-determination is a notable example; one that has the potential to change indigenous groups' situations, but which also significantly evolves the standards of international law. During the 25 years of the elaboration of the *Declaration*, the inclusion of the right to self-determination in the text often seemed too ambitious. States were very vocal in their opinions that such a right is only recognised to whole populations of states; and prior practice and the prevailing interpretations were generally not favourable to indigenous peoples.¹⁸ Although many could see that the recognition of only the internal aspect of self-determination would fall short of both indigenous peoples' status and their needs, the compromised solution of international self-determination started gaining more weight in the later stages of the elaboration of the draft. The final version is indeed a huge success for indigenous peoples and human rights: art 3 recognises indigenous peoples' full and unqualified right of self-determination, art 4 focuses specifically on self-government and autonomy, and art 46(1) repeats the usual caveat of territorial integrity. Hence, indigenous peoples are accorded an unqualified right to self-determination that does not extend to secession, and focuses on — but is not limited to — self-government. In essence, the extent of their right is no different from that of any other current beneficiary of the right. This is a major step forward: international law and practice have never before agreed to recognise the unqualified right of self-determination to sub-national groups.

The *Declaration* also put an end to discussions about the recognition — or non-recognition — of collective rights for sub-national groups in current international law. The language of art 27 of the *ICCPR* and the 1992 *Declaration*

¹⁶ Ibid arts 11, 31.

¹⁷ *International Labour Organization Convention (No 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959).

¹⁸ Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (2007) 133–4.

on the *Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*¹⁹ did not go as far as explicitly recognising the collective rights of these minorities. Although *Convention No 169* recognised a wide range of collective rights in 1989, the collective focus of the *Declaration* was one of the most controversial issues during its elaboration. Even though the US fought for the adoption of the language of the *Declaration on Minorities*, the final version maintained its focus on collective rights. This language gives a new, powerful argument that current international law *does* recognise collective rights to wider sub-national groups. Therefore, the next step — the recognition of collective rights for minorities — does not seem that far away.

The *Declaration* also recognises indigenous peoples' 'right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'.²⁰ Land issues represent a grey area in international law, as the right to property has not acquired as strong protection as have other rights. Until the adoption of the *Declaration*, indigenous peoples' land rights were mainly pursued by reference to *Convention No 169*, or the opinions of the UN monitoring bodies, or state practice.²¹ The inclusion of strong land rights in the *Declaration* is a positive development for indigenous peoples and international law. Notwithstanding this, ownership, possession, development and control are limited to lands that indigenous peoples presently possess; their rights to lands from which they have been expelled is recognised,²² but the content of this right remains very vague. Also, even in cases of lands presently occupied, the language of the *Declaration* does not specify whether indigenous peoples have the right to *ownership*; rather, it adopts a broad approach that may include ownership *or* possession. Still, the provision includes the right to development and control over indigenous lands; hence, the mere recognition of the right to usage, an approach often favoured by states, would fall short of the standards. Also, the text recognises the traditional ways of acquiring ownership: legal recognition is to be determined through taking indigenous land tenure systems into account. Indigenous rights to 'own, use, develop and control' the natural resources of the lands they possess is another groundbreaking provision for international law, as ownership and use of natural resources has always been the monopoly of the state. This right even goes a step further than *Convention No 169*, which recognised the indigenous right to use natural resources.

Intellectual property rights for indigenous peoples are also recognised in the *Declaration* in a manner that implies the creation of a *sui generis* system. The recognition of intellectual property rights in the final draft was doubtful during negotiations, since the Western preoccupation with individual expression that underpins these rights are at odds with indigenous collective experiences of cultural expression. National copyright law systems usually require individual authorship and original expressions, which do not sit well with indigenous

¹⁹ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 3rd Comm, 47th sess, 92nd plen mtg, Annex, Agenda Item 97(b), UN Doc A/RES/47/135 (3 February 1993) ('*Declaration on Minorities*').

²⁰ *Declaration*, above n 1, art 26(1).

²¹ Xanthaki, above n 18; see also, Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (2006).

²² *Declaration*, above n 1, art 28(1).

cultural expressions. Copyright protection may not apply to traditional knowledge, where the material is deemed unoriginal and in the public domain, or where the misappropriation is a legitimate adaptation under copyright law. Also, current rules defy duration, as after a certain period of time, the object becomes part of public domain, and require a fixed object, rather than oral and expressive forms of culture.

The *Declaration* also deals with the right to redress. Reparations for past wrongs, an issue with which, traditionally, international law has not been at ease is again strengthened by the *Declaration's* references to it.²³

IV REGIONAL BODIES

The triumph of the adoption of the *Declaration* should not obscure the importance of the Inter-American jurisprudence on indigenous issues developed in the last decade. Both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have become a point of reference at the international level for land rights and natural resources. The decision in *Awás Tingni v Nicaragua* has been viewed as the definitive point.²⁴ In this case, Nicaragua argued that the indigenous group in question did not have formal entitlement over their lands because they did not have a formal title deed. The Inter-American Court however accepted that the right to property under the *American Convention on Human Rights*²⁵ should also uphold indigenous title deriving from customary law, and found a positive state obligation to recognise indigenous land tenure through demarcation.²⁶ This was the first binding international decision to recognise such a collective right to indigenous peoples and to interpret the *American Convention* in such manner that recognises indigenous collective rights. This was subsequently confirmed by the Inter-American Commission on Human Rights in *Marie and Carrie Dann v US*,²⁷ where the Commission accepted that for reasons of equality, indigenous peoples' own connections with their lands are a form of property and fall within the protection of art 23 of the *American Declaration on the Rights and Duties of Man*,²⁸ irrespective of the individual focus of the instrument.²⁹ In the *Yakye Axa Community Case*, the Inter-American Court identified the 'close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture' and upheld that they 'must be safeguarded

²³ See George Ulrich and Louise Krabbe Boserup (eds), *Human Rights in Development Yearbook 2001: Reparations: Redressing Past Wrongs* (2003).

²⁴ *Mayagna (Sumo) Awás Tingni Community v Nicaragua* [2001] Inter-Am Court HR (ser C) No 79; Luis Rodríguez-Piñero, 'The Inter-American System and the UN Declaration: Mutual Reinforcement' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2009) (forthcoming).

²⁵ Opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) ('*American Convention*').

²⁶ For the complete documents of this case, see 'Symposium' (2002) 19(1) *Arizona Journal of International and Comparative Law*.

²⁷ Inter-American Commission on Human Rights, *Mary and Carrie Dann v US*, Rep No 75/02, Case No 11.140 (27 December 2002).

²⁸ *American Declaration of the Rights and Duties of Man*, OAS Res XXX (1948).

²⁹ For an analysis of this case, see S James Anaya, 'Keynote Address: Indigenous Peoples and Their Mark on the International System' (2007) 31 *American Indian Law Review* 257.

by Article 21 of the *American Convention*'.³⁰ In the *Saramaka Case*, the Court concluded that:

the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.³¹

In the last decade, the Inter-American Court has also discussed indigenous participation rights³² and indigenous right to life and security in cases of indigenous massacres and extrajudicial killings.³³ In *Sawhoyamaxa*, the lack of access to their traditional lands led to poor sanitary and health conditions of the Sawhoyamaxa community, which resulted in the deaths of indigenous children and elders. As the state knew of these conditions, the Court found a violation of the right to life, because it did not adopt the necessary measures to prevent risking the right to life of the indigenous people.³⁴ In all the above cases, the Court referred to reparations for the indigenous communities affected with considerable sensitivity.³⁵

Developments in indigenous rights also occurred within the African system of human rights protection. Despite the collective focus of the *African Charter on Human and Peoples' Rights*, indigenous rights had not appeared as an item on the agenda of the African Commission until 1999.³⁶ The following year, the Working Group on the Rights of Indigenous Populations/Communities in Africa was established.³⁷ Its establishment soon triggered discussions on indigenous rights in other parts of the African Commission's work.³⁸ The first report of the Group, published in 2003, was a major development for indigenous rights in Africa, in that it included hunter-gatherers and pastoralists within the concept of 'indigenous peoples' and confirmed that indigenous groups are 'discriminated in

³⁰ *Yakye Axa Indigenous Community v Paraguay* [2005] Inter-Am Court HR (ser C) No 125 [137]. See also Inter-American Commission on Human Rights, *Yakye Axa Indigenous Community of the Enxet-Lengua People v Paraguay*, Rep No 2/02, Pet 12.313 (27 February 2002); *Sawhoyamaxa Indigenous Community v Paraguay* [2006] Inter-Am Court HR (ser C) No 146; *Moiwana Community v Suriname* [2005] Inter-Am Court HR (ser C) No 124.

³¹ *Saramaka People v Suriname* [2007] Inter-Am Court HR (ser C) No 172 [122].

³² *Yatama v Nicaragua* [2005] Inter-Am Court HR (ser C) No 127.

³³ *Plan de Sánchez Massacre v Guatemala* [2004] Inter-Am Court HR (ser C) No 105; *Moiwana Village v Suriname* [2005] Inter-Am Court HR (ser C) No 145; *Moiwana Community v Suriname* [2005] Inter-Am Court HR (ser C) No 124.

³⁴ *Sawhoyamaxa Indigenous Community v Paraguay* [2005] Inter-Am Court HR (ser C) No 125, 178.

³⁵ Gabriella Citroni and Karla I Quintana Osuna, 'Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (2008) 317.

³⁶ African Commission on Human and Peoples' Rights, *Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights: 1998–1999* (ACHPR Report No AHG/215 (XXXV), 1999) 17.

³⁷ African Commission on Human and Peoples' Rights, *Resolution on the Rights of Indigenous Peoples' Communities in Africa*, ACHPR Doc No ACHPR/Res.51 (XXVIII)00 (6 November 2000).

³⁸ Rachel Murray, 'The UN Declaration in Africa: The Approach of the Regional Organisation to Indigenous Peoples' in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2009) (forthcoming).

particular ways because of their particular culture, mode of production and marginalized position within the state'.³⁹

Unfortunately, despite the hard work of the Working Group in the following years, as the *Declaration* progressed to the Human Rights Council, the African Union Assembly adopted a decision in 2007 that challenged the concept of indigenous peoples and questioned indigenous self-determination, control and participation, and land rights.⁴⁰ An Advisory Opinion addressed the concerns of the African states and informed them of the work of the Working Group.⁴¹ After further lobbying by non-governmental groups, other states and experts, the African states no longer posed a threat to the adoption of the *Declaration*. At its forty-second session, the African Commission extended the mandate of the Working Group for a further two years until November 2010,⁴² and adopted a communiqué that welcomed the adoption of the *Declaration* by the General Assembly and noted that 'the UN Declaration ... is in line with the position and work of the African Commission on indigenous peoples' rights'.⁴³

Currently, the first indigenous case is proceeding through the system of the African Commission.⁴⁴ National cases in African states have also taken notice of the recent standards set with respect to indigenous rights: the South African Constitutional Court ruling in the *Richtersveld* case held that South African law could recognise traditional land tenure and hence land rights to an indigenous community.⁴⁵ In 2006, the High Court of Botswana also recognised land rights to San hunter-gatherers, relying heavily on the principles of the *Declaration*.⁴⁶ The future will hopefully see more national courts applying the international standards recently adopted.

V THE FUTURE OF INDIGENOUS RIGHTS

Indigenous rights have never been given as much attention at the international level as they are presently receiving. The protection of indigenous rights is multi-layered, as it comes from several bodies within the international system as well as from regional bodies. Nevertheless, although progress has been made, it

³⁹ African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (2005) 88.

⁴⁰ Assembly of the African Union, *Decision on the United Nations Declaration on the Rights of Indigenous Peoples*, 8th ord sess, AU Doc Assembly/AU/Dec141(VIII)Add.6 (29–30 January 2007) 6.

⁴¹ African Commission on Human and Peoples' Rights, *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (adopted by the 41st ord sess, 16–30 May 2007).

⁴² African Commission on Human and Peoples' Rights, *Resolution on the Composition and Renewal of the Mandate of the Working Group on Indigenous Populations/Communities in Africa*, Doc No ACHPR/Res.123 (XXXXII) 07 (28 November 2007).

⁴³ African Commission on Human and Peoples' Rights, *Communiqué on the UN Declaration on the Rights of Indigenous Peoples* (28 November 2007). The Communiqué was adopted by *Resolution on the United Nations Declaration on the Rights of Indigenous Peoples*, Doc No ACHPR/Res.121 (XXXXII) 07 (28 November 2007).

⁴⁴ *CEMIRIDE (on behalf of the Endorois Welfare Council) v Kenya*, Communication 276/2003, cited in Clive Baldwin and Cynthia Morel, 'Group Rights' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights, The System in Practice 1986–2006* (2nd ed, 2008) 244, 270.

⁴⁵ *Alexkor Ltd v Richtersveld Community* [2004] 5 SA 460 (CC) ('*Richtersveld*').

⁴⁶ *Sesana & ors v Attorney General* (52/2002) [2006] BWHC 1.

is questionable whether the developments at the international level are being translated adequately into the national level and whether in effect these developments will be able to bring substantial change to the situations of indigenous peoples.

It is hoped that the *Declaration* will make such a substantial difference, even though, as the *Declaration* is a General Assembly resolution, it is not legally binding. The real need to have its standards translated into national practice has pushed commentators to declare its content ‘customary international law’. Anaya and Wiessner have argued that a number of indigenous rights have crystallised into customary international law, including the rights to ‘demarcation, ownership, development, control and the use of lands that [indigenous peoples] have traditionally owned or otherwise occupied and used’.⁴⁷ Indeed, Wiessner’s 1999 comparative research on state practice on indigenous matters revealed many positive changes in national legislations and practices,⁴⁸ which proved to him that at least indigenous land rights and rights to natural resources had acquired the status of customary international law.⁴⁹ The Inter-American Commission on Human Rights seems to support his argument; in *Awas Tingni*, the Commission asserted that ‘there is an international customary law norm which affirms the rights of indigenous peoples to their traditional lands’.⁵⁰ In *Maya v Belize*, the Belize Supreme Court also supported this opinion: the senior judge argued that ‘both customary international law and general principles of international law would require that Belize respect the rights of its indigenous peoples to their lands and resources’.⁵¹ Turning to indigenous sovereignty, Frederico Lenzerini has argued that state practice recognising indigenous sovereignty ‘has today reached a worldwide dimension and is rather constantly reiterated’;⁵² combined with *opinio juris*, this right falls according to him within current international law.

General Assembly resolutions could provide evidence of customary law,⁵³ as long as there is ‘overwhelming evidence of a long-established rule, or some very authoritative evidence of a recently established rule (such as a decision of the ICJ or a sufficiently widely accepted treaty provision)’.⁵⁴ In the last decade indigenous peoples have indeed acquired much better protection in many countries around the world and the *Declaration* has initiated further positive developments at the national level; however, the suggestion that indigenous

⁴⁷ S James Anaya and Siegfried Wiessner, ‘The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment’, *Jurist Legal News and Research — Forum* (US) (3 October 2007) [11] <<http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>>.

⁴⁸ Siegfried Wiessner, ‘Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Perspective’ (1999) 12 *Harvard Human Rights Journal* 57.

⁴⁹ Siegfried Wiessner, ‘Indigenous Sovereignty: A Reassessment in light of the UN Declaration on the Rights of Indigenous Peoples’ (2008) 41 *Vanderbilt Journal of Transnational Law* 1141.

⁵⁰ *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] Inter-Am Court HR (ser C) No 79, 71.

⁵¹ *Aurelio Cal v Attorney-General of Belize*, Claim 121/2007 (Supreme Court, Belize, 18 October 2007) 127.

⁵² Frederico Lenzerini, ‘Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples’ (2007) 42 *Texas International Law Journal* 155, 180.

⁵³ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

⁵⁴ Richard Gardiner, *International Law* (2003) 104–5.

rights already constitute uniform state practice seems over-ambitious. Such a suggestion actually undermines the importance of the *Declaration*: its adoption was such a success exactly because it anticipated changes to indigenous rights in national systems; changes that unfortunately have not yet occurred universally. To suggest that the *Declaration* crystallises already existing uniform practice seems a position that perhaps overlooks the practices regarding indigenous peoples of states beyond the Americas, Australia and New Zealand.

Is it maybe possible to establish a norm of customary international law only through *opinio juris* followed by some evidence of state practice? The 2000 ILA *Statement of Principles Applicable to the Formation of General Customary International Law* has accepted that resolutions can create customary international law, provided that they have been accepted unanimously or almost unanimously and that there is a clear intention on the part of their supporters to lay down a rule of international law.⁵⁵ Unfortunately though, the *Declaration* cannot fall within this category, as the US, Canada, Australia and New Zealand — countries with substantial indigenous communities — voted against its adoption. Also, statements of some states who voted in favour of the *Declaration* made it rather obvious that they did not intend to lay down a rule of customary international law. In fact, the language of the *Declaration* itself does not support its reading as customary international law. The Preamble ‘solemnly proclaims the [Declaration] as a standard of achievement to be pursued in a spirit of partnership and mutual respect’. Other phrases such as ‘a common standard of achievement’, striving ‘by teaching and education to promote respect’ and incorporating ‘progressive measures’ all point towards the view that the rights included are not to be legally binding.⁵⁶

Therefore, viewing the *Declaration* or substantial parts of it as customary international law may be rather premature. Does this nullify its position within current international law? Does it prevent the instrument from setting standards that must be respected within national systems? Certainly not. Boyle notes that declarations constitute ‘at least an element of good faith commitment, evidencing in some cases a desire to influence state practice or expressing some measure of law-making intention and progressive development’.⁵⁷ This is especially true in the area of international human rights, where declarations are often more appropriate instruments than hard law. Moreover, states never perceived the provisions of the *Declaration* as mere aspirations or they would not have been so active in its elaboration. The text is substantially informed by international law, the rights it proclaims are consistent with general international law and the development of international standards on indigenous rights is widely perceived as an international law project. In addition, the *Declaration* can be perceived as agreed interpretation of the various UN human rights treaties concerning indigenous rights. Boyle notes that ‘interaction with related treaties may

⁵⁵ International Law Association, *Final Report of the Committee on Formation of Customary (General) International Law: Statement of Principles Applicable to the Formation of General Customary International Law* (2000) [32].

⁵⁶ Stephen Allen, ‘The UN Declaration on the Rights of Indigenous Peoples: Towards a Global Legal Order?’ in Andrew Halpin and Volker Roeben (eds), *Theorising the Global Legal Order* (2009) (forthcoming).

⁵⁷ Alan Boyle, ‘Soft Law in International Law-Making’ in Malcolm Evans (ed), *International Law* (2nd ed, 2006) 141, 143.

transform [declarations'] legal status into something more'.⁵⁸ In any case, this is an instrument solidly based within current international law.

As long as the *Declaration* is used by international and national bodies as an authority on indigenous standards, it will be able to change indigenous national situations irrespective of its specific international status. Indeed, since its adoption, many bodies have established the *Declaration* as the source of standards on indigenous rights. In addition to national and international case law referred to above, the UNPFII has agreed that the *Declaration* will guide its work. Similarly, the UN Development Group, composed of all the various UN programs, bodies and agencies working on development, has acknowledged the *Declaration* as the appropriate framework for the implementation of their *Guidelines on Indigenous Peoples' Issues*.⁵⁹ Also, the Ninth Conference of Parties to the Convention on Biological Diversity, held in May 2008, also included the *Declaration* in several of the decisions of the various working groups. The international monitoring of the standards set in the *Declaration* has already been initiated by the UN Special Rapporteur on Indigenous Issues, who has made it clear that he will follow the standards set by the *Declaration*, and the Expert Mechanism on Indigenous Rights, who will also use the *Declaration* as its basis.

It is hoped that shortly the *Declaration* will be widely recognised as the interpretative source of the human rights treaties on indigenous rights, and that its position as the international benchmark by which national indigenous policies are judged will be unquestionable. Domestic and international litigation continues to be crucial. It is also hoped that other international instruments, such as the *Inter-American Declaration on Indigenous Peoples*, will clarify and promote indigenous rights even further. Will these undoubtedly positive developments on indigenous rights also bring developments to other sub-national groups? Unfortunately, in contrast to the indigenous rise, national security concerns have brought a decline to minority rights in the last decade.⁶⁰ Whether other groups will benefit from the opportunities that the development of indigenous rights have created, and the strategies the indigenous movement has highlighted, remains to be seen.

⁵⁸ Ibid 148.

⁵⁹ See UN Development Group, *Guidelines on Indigenous Peoples' Issues* (1 February 2008).

⁶⁰ Will Kymlicka, 'Beyond the Indigenous/Minority Dichotomy' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2010) (forthcoming).