



FACULTY OF LAW
Lund University

Frederic Emmanuel Courcambeck-
Wahlquist

Indigenous Peoples and the
United Nations: the Events of the
Year 2007

Master thesis
30 credits (30 ECTS)

Supervisor
Christian Häthén

Master's Programme in International Human Rights Law

Spring 2008

Contents

ACKNOWLEDGMENT	1
PREFACE	2
ABBREVIATIONS	4
1 INTRODUCTION	5
2 INDIGENOUS PEOPLES, RIGHT-BEARERS UNDER INTERNATIONAL LAW	8
2.1 The Existence of Indigenous Peoples: from Assimilation to Recognition	8
2.1.1 <i>Colonization and the League of Nations: a Duty to Civilize</i>	9
2.1.2 <i>The Spirit of the UN Charter: Individualism and Self-Determination</i>	11
2.1.3 <i>The First Attempt to Grasp "Indigeousness": the ILO Convention 107</i>	12
2.1.4 <i>The International Awakening: the Martinez-Cobo Study and the Revision of the ILO Convention 107</i>	14
2.1.5 <i>Introducing the Indigenous People to the UN Family</i>	17
2.2 The Question of Definition	19
2.2.1 <i>The Absence of Official Definition</i>	20
2.2.2 <i>The Working Definition as Identified by the Permanent Forum</i>	22
2.2.3 <i>Self-Identification and the UNDRIP</i>	24
2.3 The Nature of "Indigenous Rights" through the UN Declaration on the Rights of Indigenous Peoples	26
2.3.1 <i>Indigenusness and Human Rights: Group Rights and Special Measures</i>	26
2.3.2 <i>The Distinction between "Indigenous Rights" and "Minority Rights"</i>	28
2.3.3 <i>An Overview of the UN Declarations on the Rights of Indigenous Peoples</i>	32
3 THE CONTRIBUTION OF THE WORKING GROUP ON INDIGENOUS POPULATIONS	37
3.1 The Establishment of the Working Group on Indigenous Populations	38
3.1.1 <i>Context of Creation</i>	39
3.1.2 <i>Presentation of the Working Groups on Indigenous Populations</i>	43
3.1.3 <i>Policies of the Working Groups on Indigenous Populations</i>	46

3.2	Achievements of the Working Group on Indigenous Populations	49
3.2.1	<i>Winning the Trust of the World's Indigenous Peoples</i>	49
3.2.1.1	The Leadership of the Working Group on Indigenous Populations	49
3.2.1.2	Participation in the Working Group's Sessions	53
3.2.2	<i>Bridging the Jus Fori to the Jus Poli</i>	55
3.2.2.1	The Project of a Declaration	56
3.2.2.2	The Constitution of Draft Principles	58
3.3	The Draft Declaration on the Rights of Indigenous Peoples	61
3.3.1	<i>The Draft of 1994 and Its History</i>	63
4	THE LEGACY OF THE WORKING GROUP ON INDIGENOUS POPULATIONS	66
4.1	A Forseeable Abolishment?	66
4.1.1	<i>Institutional Weaknesses of the Working Group on Indigenous Populations</i>	67
4.1.2	<i>The Working Group's Last Years of Existence</i>	68
4.2	Feeling the Void within the UN Machinery	69
4.2.1	<i>Comparative Mandate Analysis of the Indigenous-Related Organs of the UN</i>	70
4.2.2	<i>Lobbying for a Succession</i>	71
4.3	Filling the Void: the Establishment of the Expert Group on the Rights of Indigenous Peoples	73
4.3.1	<i>The Informal Meeting of the 6th and 7th December 2007</i>	73
4.3.2	<i>The Establishment of the Expert Group on the Rights of Indigenous Peoples</i>	76
5	ANALYSIS	81
	ANNEX	90
	BIBLIOGRAPHY	98
	TABLE OF CASES	104

Acknowledgment

The accomplishment of this thesis would not have been possible without the help and support from different sources. Particularly, I want to thank my supervisor, Christian Häthén, for his advices and guidance in completing my research.

I am also deeply grateful to the Raoul Wallenberg Institute for Human Rights and Humanitarian Law, and more specifically my former supervisor Gudmundur Alfredsson for his comments on my work. I also wish to send my regards to Christina Johnsson, Asbjörn Eide, Lena Olsson, Habteab Tesfay and Anders Tröjer.

Last but not least, I want to thank my classmates Hari, Manjola and Ranyta for their unconditioned support, encouragement and friendship.

Pour leur presence, inspiration et amitié je tiens a dedier ce travail a ma famille, Yann, Yan et Sophie, Dorian, Fabien ainsi qu'a la famille Røjås-Halvarsson.

A ceux qui font reperes dans l'absurde...

Preface

The year 2007 has been an important year for the world's Indigenous Peoples. History will certainly remember the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, maybe as the end of the post-colonialist age of International Law, maybe as an important step toward a dynamic understanding of Human Rights where individuality and collectivity are not antonyms, nor threats to the political stability of the order of States. Whatever this adoption will stand for in the eyes of the coming generations, the importance of this landmark declaration outlining the rights of the estimated 370 million indigenous people¹, outlawing discrimination against them, cannot be underestimated.

The declaration symbolizes also the end of a two decade- long history where politics and law proved to be each others hint. The scholar Russel Lawrence Barsh once entitled an article on the rights of Indigenous Peoples by using the expression "*a case of the immovable object and the irresistible force*". The expression is descriptive enough to embrace all the aspects of the international struggle for indigenous rights. As for the UN, the struggle was lead through the Working Group on Indigenous Populations (WGIP), designed in 1982 to produce legal standards. The Working Group managed to handle the irresistible force of the world's indigenous voices with the immovable mass formed by State Sovereignty and political reluctance. This improbable conciliation gave birth to the WGIP's draft declaration on the right of Indigenous Peoples in 1994, mother of the UN declaration. Cynically, 2007 is also the year of the Working Group's abolishment, as a side-effect of the ongoing UN reform of the Human Rights machinery. The irony of the coincidence is striking.

Despite the adoption of the declaration, the situation of the World's Indigenous Peoples remains urgent. Marginalization, extreme poverty, and conflicts of different kinds, are still the features of Indigenous People's every day experience, threatening their very existence. The UN declaration

¹ According to the United Nations statistics, the global indigenous population represents more than 370 millions repartee in some 70 countries.

meets, even after its adoption, strong resistance. The promotion of indigenous rights must continue, maybe focusing on the implementation of the standards recognized within the declaration. As being the declaration's biggest contributor, the absence of the Working Group is regrettable. To fill the void, the Human Rights Council (HRC), with a resolution adopted by consensus, decided on December the 13th 2007 to establish an Expert Mechanism on the Rights of Indigenous Peoples (EMORIP).

2009 has just begun. The new Expert group held its first session in November 2008. This chain of events, affecting the general comprehension of international minority rights within the UN system, is head-spinning. In such a context, the present Thesis sets out to critically seize the implications of the adoption of the declaration for the theory of indigenous rights since it clearly defines the Indigenous Peoples as right-bearers under International Law, the abolishment of the Working Group on Indigenous populations, as the decision to replace it with the so-called Expert Mechanism.

Abbreviations

ECOSOC	Economic and Social Council
EMORIP	Expert Mechanism on the Rights of Indigenous Peoples
GA	General Assembly
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural rights
ICJ	International Court of Justice
ILO	International Labour Office
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
PFII	Permanent Forum on Indigenous Issues
UNDHR	Universal Declaration on Human Rights
UNDRIP	United Nation Declaration on the Rights of Indigenous Peoples
WGDD	Working Group on the Draft Declaration
WGIP	Working Group on Indigenous Populations

1 Introduction

The present work aims to analyse the events of 2007 regarding the rights of Indigenous Peoples on the International level, namely the adoption of the UNDRIP, the abolishment of the WGIP and the establishment of the Expert Group on the Rights of Indigenous Peoples. These constitute the themes on which the structure of the analysis is drawn. Thus, the thesis contains three main chapters.

The scope of the first chapter is to give a reasonable and accurate image of the evolution of indigenusness, from a distinct category to subjects of law. Only then will it be possible to introduce an updated theory for indigenous rights: the declaration not only is a compromise between contending groups, but also embodies a coherent and defensible set of moral principles. After offering an historical background related to the different fashions indigenusness has been treated in public International Law, the chapter will deal with the legal approaches to define Indigenous Peoples. The reasoning will then address the question of the nature of the rights of Indigenous Peoples.

The first chapter will not only raise different problematic pertaining Indigenusness within Human Rights Law thinking, but also introduce the work of the WGIP, which will be the main focus for the second chapter .The contribution of the WGIP for the recognition and respect of indigenusness in the international order is incommensurable, and its history contains many lessons to be remembered. The aim of this chapter, consequently, is to present an analysis of the WGIP's contribution in the evolution of indigenusness as presented in the first chapter, assessing its achievements. However, the chapter will not present itself as a sole summary of activity. If Indigenusness tells the story of the forced incapacity of Indigenous Peoples to negotiate themselves the terms and conditions of their future and their own survival, then the WGIP crystallised the benefits of the rights discourse

and story-telling in institutionalized law-making organs as Robert A. Williams Jr legitimately stressed out². The contribution of the WGIP resides essentially in its innovative way to perform its mandate, and its history shows that it managed to break with the traditional view behind the enunciation of legal standards, through establishing a dialogue. Consequently, the reasoning will start from the establishment of the Working group to lead an analysis of its achievements enlightened with the remark above. To conclude, the chapter will propose a brief assessment of the draft declaration of 1994.

The third and last chapter will come back to the blur resulting from the establishment of the Human Rights Council, in order to summarize and put in perspective all the elements taken into account in the creation of the WGIP's successor, the new Expert Mechanism on the Rights of Indigenous Peoples. The UN held the 6th and the 7th December an informal meeting in Geneva to discuss the most appropriate mechanism to continue the work of the Working Group on Indigenous Populations³. On December 13th 2007, in the closing hours of its 6th session, the United Nations Human Rights Council adopted by consensus a resolution to establish a new subsidiary body, the "Expert Mechanism on the Rights of Indigenous Peoples". These facts show by themselves that there is a surviving *affectio societatis*⁴ despite the termination of the working group's activity. Many questions come to the mind while reading about these events. What were the elements taken into consideration under this informal meeting? How is the new Expert Mechanism designed? In what way this new organ is seen to be the most appropriate mechanism to continue the work of the Working Group on Indigenous Populations?

² In his article entitled *Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples' survival in the world*, Robert A. Williams Jr, describes the central role of indigenous peoples' own stories in the Working Group's effort toward development of an internationally recognized legal instrument declaring the Human Rights of the Indigenous Peoples. The article is to be found in the *Duke Law Journal*, vol.1990, No 4, *Frontiers of Legal Thought III*, September 1990, pp 660-704.

³ Human rights council Resolution 6/16, 28 september 2007.

⁴ This Latin locution, used commonly in corporation law, expresses the will of different associates to pursue an agreed enterprise. It permits the author to conceptualize the events before the decision to establish the expert mechanism in a dynamic of inclusion.

The study of these historical events not only gives the jurist an updated and detailed picture on the topic of indigenusness on the international sphere. It permits, through the example of Indigenous Peoples, to put in perspective the whole Human Rights law theory from both an historical and philosophical point of view. Thus, and as concluding remarks, the thesis will propose an overall analysis recalling the relevance to follow closely the evolution of indigenusness within the political frames of International Public Law. The tale of Indigenous Peoples is not only a source of factual knowledge, but is an opportunity to ameliorate the teleology and the flexibility of the international juridical system.

The material used in carrying on the thesis is mainly constituted by articles and information contained on the OHCHR webpage and different NGO's. Scholarly work on Minority Rights, Indigenous Rights and legal philosophy also has been a big source of information and analysis for the chosen subject. The present work is not about the pragmatic implementation of International Standards. It rather interests itself on the relation between legal-related administrative designs and the dynamic of legal improvement. Consequently, the terminology of the thesis is interpreted in a broad manner. For example, the use of 'indigenous peoples' is to be understood as a concept, which is explained throughout the thesis. The presence of Case Law in the thesis is rare; and when it occurs, it is only as a source of law in Public international law.

2 Indigenous peoples, right-bearers under international law

Broadly taken, the declaration on the rights of Indigenous Peoples is the final and undeniable evidence that allows the qualification of Indigenous Peoples as Right-bearers under International Law. The scope of the first chapter is to give a reasonable and accurate image of the evolution of indigenusness, from a distinct category to subjects of law. Consequently, a historical background about indigenusness in Public International Law will set the frames to introduce the legal approaches to define Indigenous Peoples. The reasoning will then address the question of nature of the rights of Indigenous Peoples.

2.1 The Existence of Indigenous Peoples: from Assimilation to Recognition

Not all Countries are assumed to contain Indigenous Peoples. In practice, the unarticulated approaches assume an indigenous presence in obvious and documented cases as Australia, New Zealand, The Americas and the circumpolar countries. As an international concept, the term 'Indigenous' has come to designate persons who had variously been named aboriginal, Indians, Tribal people, natives, minorities, earth people, first people and even fourth world⁵.

Using the term 'indigenous' is to refer to the territorial origin of an individual. Etymologically speaking, the term 'indigenous' has its root in the Latin *indigenae*, which was used to distinguish between persons who were born in a particular place and those who arrived from elsewhere, the *advenae*. This distinction was already of legal importance under roman civil

⁵ Winston E. Langley, *Encyclopedia of Human Rights Issues since 1945*, Fitzroy Dearborn Publishers, 1999, p 151.

law, but it is following the discovery of the New Worlds that the term ‘indigenous’ began to be used as a generic category for groups of people, outside the norms and values of the European social and legal culture.

2.1.1 Colonization and the League of Nations: a Duty to Civilize

One can find the use of ‘indigenous’ in a legal debate already in the 16th century, when dealing with European expansion overseas⁶. As an interesting matter of fact, it is also in that period that scholars find the oldest reference of the modern understanding of Human Rights⁷.

The Modern and Industrial Times would bring its share of colonization and massacre, mostly justified by the *Terra Nullius* doctrine or its descendant⁸. It is therefore interesting to note, that the Colonization period coincides with the rise of Democracy and Human rights thinking in the ‘West’⁹. ‘Socio-political Darwinism’, systematized with the help of Anthropology¹⁰, would make this paradox logical: the classic concept of “*Indigenoussness*

⁶ A debate attested as for example within the legal essays *De India* and *De Jure Belli* of Francisco De Vittoria (1539). In these essays is discussed the lawfulness of the land appropriation by European Powers in America through the *Terra Nullius* doctrine. This doctrine, meaning ‘*Land of no one*’ developed a legitimate way for States to appropriate Land through discovery, under the condition that it wasn’t under any Jurisdiction. De Vittoria’s position was that European powers could not conquer the land in America the latter being under the control of Indians.

⁷ According to Michel Villey, *Le droit et les droits de l’homme*, Presses Universitaires de France (puf), Paris, 1983, p.159: “*For chronological matters, the expression Jura Hominus (in the subjective sense) appears for the first time (...) with Volmerus, Histoia diplomatica rerum Bataviarum, col.4759, of 1537*”. (the author made the translation from French to English).

⁸ The *Terra Nullius* doctrine is constructed around notions like ‘jurisdiction’ and ‘sovereignty’. Those notions constitute the backbone of the ‘Nation-State’, the *nec plus ultra* European social construction.

⁹ Term here used not as the geographical location, but merely as referring to the legal practice and tradition.

¹⁰ ‘Socio-political Darwinism’ is a term chosen by the author for the purpose of the thesis only. It does not necessarily refer to specific denomination. Ever since the rise of a balance between equal powers in Europe (symbolized by the treaty of Westphalia, 1648), scholars have tried to analyze the origin of authority and sovereignty through the idea of a social contract in contrast to a (mythical) state of nature, prior to civilization. This approach was served by anthropology, considered as a “western European science [which] subject matter has, until recently been overwhelming the ‘primitive’”. Definition of ‘anthropology’ by A. Pagden, *European encounters with the New World*, Yale University Press, 1993, p184. Quoted in Thornberry, *Indigenous peoples and Human Rights*, Manchester University Press, 2002, p 72.

[denoting] the lowest position in the scale of civilization"¹¹, the 'Civilized' found as a pretext for invasion and colonization, a duty to civilize, and consequently, to eradicate 'Indigenoussness'.

It is therefore not surprising to find implicit statements of race in the language of the legal documents of the time. The League of Nations, as an example, enshrined in its art.22, as a "*sacred trust of civilization*" the duty of promoting the well-being and development of the "*indigenous population*" of those "*colonies and territories*" which remained under their control. Within the Covenant, a second level of qualification was added, characterizing "*indigenous populations*" as "*peoples not yet able to stand by themselves under the strenuous conditions of the modern world*", as contrasted to more "*advanced*" societies. The covenant speaks of 'tutelage' denoting a Eurocentric and one-way perspective; self-identification was out of consideration. With these conditions being cumulative, one sees that even if 'Indigenoussness' had a legal repercussion on the International level, the concept was understood restrictively¹² as a matter of policy rather than recognition. 'Indigenoussness' generally gave expression for an abnormality, a dysfunction in International Law that craves redress.

¹¹ *Indigenous peoples, Postcolonialism, and International Law*, Luis Rodriguez Pinero, Oxford University Press, 2005, p5.

¹² The working paper by Erica Irene Daes relates, as an illustration, the eloquent case of South Africa: in 1919, South Africa was not yet an independent State. It was still a part of the British Empire and, albeit self-governing in its local or internal affairs, subordinate to the British Parliament in London. Nevertheless, the League entrusted South Africa with a mandate, under Article 22, over the territory and population of Namibia. Within the conceptual framework of the Covenant, Namibia was "indigenous", in contradistinction to the "advanced" character of South Africa. The League did not conceive, however, that the African population of South Africa itself was "indigenous" in relation to recent Dutch and British settlers.

It is possible to identify one more important element of the evolving concept of "indigenous" in the case of South Africa. Article 22 of the covenant was applied to territories, as demarcated by internationally recognized borders, rather than to peoples who could be distinguished by sociological, historical or political factors. Thus, Namibia, as a territory geographically defined by the Great Powers, was deemed to be "indigenous", while the African population within South Africa was not so considered.

2.1.2 The Spirit of the UN Charter: Individualism and Self-Determination

Even relieved from its 'civilisatory' assumptions, International Law in its post-war era, would look upon 'Indigenoussness' as a matter of Integration/assimilation. The United Nations, within its Universal Declaration of Human Rights originally aimed at achieving international peace through an individualistic conception of inalienable rights, and the principle of self-determination of peoples. This conception, "[sought] the disappearing of any legal space between the State and the Individual"¹³, in order to prevent legal positivism and State's discretion to breed an altogether new World War. This brought some scholars to think that "*[despite] occasional claims that the U.N. system has moved firmly beyond the era of decolonization (...) identity issues that engage human rights law are still derived from, or related to, the experience of European imperialism and colonialism*"¹⁴.

The term 'indigenous' is not to be found in the language of the charter, as opposed to the Covenant of the League of Nations. Article 73 of the Charter only refers to "*territories whose peoples have not yet attained a full measure of self-government*". These 'non-self-Governing territories' would receive a definition with the GA resolution 1541 (XV). Accordingly, a non-self-governing territory falling under art.73 is a territory, "*geographically separate and distinct ethnically and/or culturally from the country administering*". The 'position or status of subordination' may be advanced to support this presumption, but is not in fact required. The non-self governing territory doctrine bears provisions not without resemblance to the 'tutelage' system above-mentioned, and clearly establishes the European Nation-State construction as a model to be followed and encouraged. In fact, "*at the time of the Charter's drafting, self-government or independence was*

¹³ Ibid 3, p5.

¹⁴ Harvard Human Rights Journal, *Decolonizing Law: Identity Politics, Human Rights, and the United Nations*, Darren C. Zook, volume 19 spring 2006, p 99.

envisaged only for trust territories, ie., those detached from enemy States as a result of WW2”¹⁵.

In 1951, the government of Belgium provoked a controversy by arguing that Article 73 of the Charter should be interpreted in the light of the concept of "indigenous" found in Article 22 of the Covenant of the League of Nations. According to the delegation of Belgium, the reporting obligations of Article 73 applied not only to overseas colonies, but to "backward indigenous peoples" living within the borders of independent States in all regions of the world¹⁶. Article 73 is concerned with matters of statehood in a geographical perspective, and consequently failed to address the problem of ethnic minorities inside already existing states. The protection of peoples' rights would be systematized with the subsequent adoption and promulgation of the universal declaration, the two international covenants and other Human Rights treaties that comprise the UN's International Bill of Human Rights.

2.1.3 The First Attempt to Grasp "Indigeousness": the ILO Convention 107

Even if the researcher can find treaties with indigenous parties, the first International Legal treaty on the subject is the International Labour Organization's convention 107¹⁷, which defines in its article 1 the term "tribal" in terms reminiscent of the League Covenant. The treaty, concerned with the situation of indigenous groups in the labour market, confirms a Darwinist approach, within its article 1 (a) and (b). The term 'semi-tribal'

¹⁵ Sarah Pritchard, *The Rights of Indigenous Peoples to Self-Determination under International Law*, *Aboriginal Law Bulletin*, 1992. Article to be found at <http://www.austlii.edu.au/au/journals/AboriginalLB/1992/16.html>.

¹⁶ UNdoc A/Ac.67/2, pp3-31. During the course of the debate in the General Assembly, the Belgian representative introduced the controversy noticing that “ *a number of States were administratering within their own frontiers, territories which were not governed by ordinary law; territories with well-defined limits, inhabited by homogenous peoples differing from the rest of the populations in race, language and culture. These populations were disenfranchised; they took no part in national life; they did not enjoy Self-government in any sense of the word*”.

¹⁷ ILO Convention of 1957. Instrument to be found in the webpage, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107>.

and 'tribal' refer to groups which "*social and economic conditions are at a less advanced stage*" in comparison with their neighbours, and "[*living*] *under separate laws*", either of their own volition or imposed by the State. Some "tribal" peoples, moreover, "*are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization*" and remain socially, economically and culturally distinct¹⁸. Even though article 1(a) applies to both tribal and semi-tribal populations, article 2 takes good care explaining what is meant by the expression 'semi-tribal', thus: "*For the purposes of this Convention, the term semi-tribal includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community*"¹⁹.

By such a wording the ILO convention 107 sets forward as a criterion, a certain element of distinctness, from a social and economic perspective. If one finds an explicit reference to 'conquest' and 'colonization' to characterize Indigenous populations, this formal distinction does not have any practical impact: the Convention guarantees both categories of people exactly the same rights. Consequently, all 'indigenous' peoples are 'tribal', but not all 'tribal' peoples are 'indigenous'... Nothing about discrimination and dominion as a criterion.

¹⁸ Article 1 reads:

This Convention applies to:

- a) *members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;*
- b) *members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.*

¹⁹ Article 2 reads:

For the purposes of this Convention, the term semi-tribal includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.

‘Indigenous’, as presented and developed in Convention 107, refers to a specific target, a distinct bloc of a State’s *demos*, for development policies. The recognition of a group as ‘indigenous’ relies on the State’s appreciation. The will of the integrationist, is found explicitly in art.2: Governments have the primary responsibility for a progressive integration of those populations, and such integration shall be realized through “*the fostering of individual dignity and the advancement of individual usefulness and initiative*”²⁰. The article also says, that “*artificial assimilation*” shall be avoided²¹. Strangely enough, article 2 (4) speaks of “*the recourse to force or coercion as a mean of promoting the integration of these populations into the national community shall be excluded*”. “Excluded”, it is respectfully noted, and not prohibited²². Moreover, certain confusion between integration and assimilation is noticeable while reading the articles 7(2) and 8: Indigenous populations shall be “*allowed to retain their custom and institution*” as long as “*these are not incompatible with the national legal system or the objectives of integration programmes*”²³, and are “*consistent with the interests of the national community*”²⁴.

2.1.4 The International Awakening: the Martinez-Cobo Study and the Revision of the ILO Convention 107

The promulgation of the two Human Rights covenants²⁵ and the identification of discrimination as a threat to equal enjoyment of Human

²⁰ Art.2(3).

²¹ Art.2(c).

²² Alexandra Xanthaki reports that several countries found this exclusion difficult to accept. She cites as an example the United Kingdom’s statement that “*the government would be completely ineffective if it was unable to have recourse to compulsion in the last resort if that was clearly in the interest of the people concerned*”. This statement could be used to show how reluctant governments are to give up on some of their sovereignty prerogative, in International law, broadly, and in indigenous matters specifically. Quote to be found in Alexandra Xanthaki, *Indigenous Rights and United Nations Standards*, Cambridge University Press, 2007, p 55.

²³ Art.7(2)

²⁴ Art.8.

²⁵ That is to say the ICCPR and the ICESCR.

Rights, and to some extent, international peace and security, would cast a new light upon 'Indigenesness'. In his study of the Problem of Discrimination Against Indigenous Populations²⁶, the special Rapporteur of the sub-commission, Mr J. Martinez Cobo, comes back to the elements incorporated in the ILO Convention 107 through a preliminary analysis of the term 'indigenous' as a concept as follows:

"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 in 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 systems".

Mr. Martinez Cobo's analysis contains many subtleties of primary importance. Unlike Convention 107, the 'Indigenous' are formed by "*communities, peoples and nations*": the rather descriptive and clinical term of 'populations' is left aside. Along with the mention of a "*historical continuity*" on a '*defined territory*' prior to '*invasion*' and '*colonization*', the rapporteur identifies the 'indigenous' as a *people* echoing key-notions of Public International Law to recognize (territorial) sovereignty. This, in effect, underlines the injustice of invasion and colonization suffered by these people, and simultaneously, recognizes indigenous peoples as the true owner of the land seized. If the distinctiveness element is kept as a criterion, an important change has been introduced: it is now a matter of 'self-identification' for the concerned that has to be expressed through a will, a determination 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 systems*". At last, 'dominion'

²⁶ E/CN. 4/Sub. 2/1986/7 and Add. 1-4.

is recognized as an element of ‘indigenoussness’, suggesting the existence of systematic discrimination or marginalization.

The Study of the Special Rapporteur is without any precedent, and thus contributes to a better understanding of the legal challenges the term ‘indigenous’ contains. Following the analysis of Mr. Cobo, Convention 107 was revised in the form of ILO Convention 169²⁷. The motivation behind the adoption of a new convention, found in its preamble, reads: the “*developments in international law since 1957*” and the in the situation of indigenous and Tribal peoples, made appropriate to “*remove the assimilationist orientation*” of previous standards. It also recognizes the aspiration of these peoples to determine their own fate, within the framework of the States in which they live, and has a special mention of the “*distinctive contribution of indigenous and tribal peoples to the cultural diversity and social and economical harmony of Humankind*”. Consequently, art.1 of the Convention keeps a similar language to the analysis of Mr. Martinez Cobo²⁸.

Article 1 contains a statement of bare generality rather than a specific definition, and speaks both of tribal and Indigenous Peoples. This distinction is not a duplication of concepts: the San or the Massai are tribal peoples who may not have lived in the region they inhabit longer than other population groups. Article 1 keeps as criteria the distinctiveness of and the descent from the population prior to conquest, colonization or the establishment of present state boundaries.

²⁷ Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries. Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, entry into force 5 September 1991

²⁸ (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

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

The Convention outlines the responsibilities of governments in promoting and protecting the Human Rights of Indigenous Peoples. It is a comprehensive instrument, covering a wide range of issues, including land rights, access to natural resources, health, education, vocational training, conditions of employment and contacts across borders. The fundamental concepts of Convention No. 169 are consultation and participation, implying that Indigenous and Tribal Peoples have the right to be consulted and to participate in policy, legislative, administrative and development processes that affect them, and to decide their own priorities for development.

The ILO Convention No. 169 is the only legally binding international instrument for the protection of Indigenous Peoples' rights. The Convention, at the date of writing, has been ratified by 19 countries: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Norway, Paraguay, Peru, Spain, and Bolivarian Republic of Venezuela.²⁹

2.1.5 Introducing the Indigenous People to the UN Family

Following the Martinez-Cobo study, Indigenous matters were more prominently on the agenda of the UN. This paragraph only introduces the different foras for Indigenous Peoples within the UN System, prior the establishment of the EMORIP. The information is taken from the document IMGWIP/2007/CRP.1, which contains a matrix of United Nations Mechanism and Bodies on Indigenous Peoples. This document was specially elaborated before the informal meeting to discuss the most appropriate mechanism to continue the work of the working group on

²⁹ ILOLEX 29.12.2007source, the ILO website, http://training.itcilo.it/ils/ils_indigenous/training_activities/2006/A900616/english/coursedescription1.htm.

indigenous populations that had convened in Geneva on December the 6th and 7th 2007.

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people

Created in 2001 by the commission of human Rights (resolution 2001/57), the special rapporteur on the situation of Human rights and fundamental freedoms of Indigenous Peoples, is an independent expert whose mandate enables him to conduct official missions to countries. The special rapporteur submits annual thematic reports on issues regarding the rights of Indigenous Peoples to the Human Rights Council, and may send urgent appeals to governments in case of imminent danger of violations of these. In case of lesser urgent violations or those that have already occurred, the special rapporteur sends allegation letters. A summary of all communications sent (and the responses received) is to be found as an annex to the annual rapports.

The Permanent Forum on Indigenous Issues

Even though formally established in 2000 through the ECOSOC resolution 2000/22, the Permanent Forum on Indigenous Issues held its first meeting in 2002. The Permanent Forum discusses indigenous issues relating to economic and social development, culture, the environment, education, health and Human Rights. It submits annual reports to the ECOSOC including recommendations and matters for consideration by the UN system. It can also give advice to the ECOSOC and organize expert meetings. Its mandate is to give expert advice and recommendations on indigenous issues, to raise awareness and promote integration and coordination of activities relating to indigenous issues within the United Nations system and to prepare information on indigenous issues. The permanent forum is composed of 16 members, half of whom are elected by

the ECOSOC, and members appointed by the president of the ECOSOC on the basis of consultation with indigenous organizations.

2.2 The Question of Definition

As it is visible through the history of minority rights starting from the adoption of the ICCPR and the ICESCR, the emergence of new international norms regarding Indigenous Peoples is part of a broader shift regarding the rights of ‘national’ minorities. In that sense, Political theory helps understanding the unpolished features of indigenusness within the frames of Nation States. For Kymlicka, the concept ‘national minorities’ refer to groups “*who have settled for centuries on a territory they view as homeland; groups who typically see themselves as distinct ‘nations’ or ‘peoples’, but who have been incorporated (often involuntary) into larger state*”³⁰. ‘National minorities’ include consequently Indigenous Peoples but also other incorporated groups like the Scots in Britain, the Quebecois in Canada, the Bretons in France. Sometimes called ‘stateless nations’ or ‘ethnonational groups’ these groups have a determining feature that distinguish them from Indigenous Peoples, worth to be mentioned before tackling the question of the definition. As demonstrated by Will Kymlicka, the difference remains in the role those different groups played in the process of State formation. Generally, stateless nations were “*contenders but losers in the process of European State formation, whereas Indigenous Peoples were entirely isolated from that process until very recently (...). Stateless nations would have liked to form their own states but lost in the struggle for political power, whereas Indigenous Peoples existed outside this system of European states*”. The remark enables the introduction of key-notions proper to indigenous peoples relevant for this part: cultural distinctness, marginalization, peoples.

³⁰ Will Kymlicka, review of *Indigenous peoples in International Law* by S. James Anaya, the University of Toronto Law Journal, Vol.49, No.2 (Spring 1999), pp.281-293, p 282.

2.2.1 The Absence of Official Definition

At the time of writing, there is no universal legal definition of the term “Indigenous peoples”. Such an absence can be surprising, since the Rule of Law demands legal definitions, incorporated in a coherent and omnipresent ensemble. In fact, the reasons of this absence are multiple. Some of them depend on the difficulty of such a task, whereas some depend on a rational choice not to have one.

As Erica-Irene Daes noted, “*no single definition could capture the diversity worldwide, and it was not desirable or possible to arrive at a Universal definition at the present time*”³¹. Brownlie, moreover, expressed his hostility towards a Categorization of Indigenous Peoples, “*on the ground that inter alia it smacks of nominalism and a sort of snobbery*”³². The conceptual problem of a definition echoes the confrontation between universalism and nominalism. Following the criticism of Joseph de Maistre (1753- 1821) addressed to the universalistic approach of traditional Human Rights thinking³³, one can wonder if there is such ‘Indigenous Peoples’. There are Inuits, Cherokees and even Ainus. But Indigenous Peoples? Moreover, how could a common and basic definition of indigenusness cover and explain in the same time the Samis, and the Aborigines?

Significant discussions on the subject have been held within the context of the preparation of a Draft Declaration on the Rights of Indigenous Peoples by the Working Group on Indigenous Populations since 1982. During the many years of the debate, indigenous organizations consistently rejected the idea of a formal definition that would be adopted by States³⁴. Back in

³¹ UN. Doc. E/CN.4/Sub.2/1997/14.

³² Ian Brownlie, *Treaties and Indigenous Peoples*, Calendon Press- Oxford, 1992, p 63.

³³ « *La constitution de 1795, comme ses aînées, est faite pour l’homme. Or il n’y a point d’homme dans le monde. J’ai vu dans ma vie des français, des Italiens, des Russes, etc. ; je sais même, grâce a Montesquieu, qu’on peut être persan : mais quand a l’homme, je déclare ne jamais l’avoir rencontré de ma vie ; s’il existe c’est bien a mon insu* ». Joseph de Maistre, *Considérations sur la France*, 1796.

³⁴ as example, UN Doc. E/CN.4/Sub.2/1996/21. Such a position can be drawn from the dynamics of the principle of self identification.

context, and maybe more pragmatically, the question of definition was secondary in regard to the situation of Indigenous peoples; the UN agency already had the analysis of the Martinez-Cobo Study. Consequently, the absence was not felt as a hint for the drafting of the declaration.

The question of definition also leads to the problem of terminology. Until recently, the official bodies would speak of indigenous groups, minorities, populations and even people. This lexical hesitation is more than suspicious for the language of Law. Gudmundur Alfredsson explains: *“one easy way to avoid self-determination claim is based on a word play and has been actively pursued by Governments, partly behind the scenes. Instead of the “peoples” terminology, the use of ‘people’ (without the “s”) now in fashion or even ‘indigenous populations’ is intended to get away from the problem”*³⁵.

The strategy was to avoid the use of the term ‘peoples’, the latter being legally qualified. Referring to Indigenous populations as ‘peoples’ would be the expression of an *opinio juris*, to grant them the controversial right of ‘self-determination’, as the formulation of the Human Rights Covenants literally suggest: common art.1 of the ICCPR and the ICESCR speaks :*“All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”*.

If the ILO Convention uses the expression of ‘Indigenous Peoples’ in its first article, its third article hustles to add, *“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”*. In fact, the first United Nations document to use the expression ‘Indigenous Peoples’ instead of ‘people’ or ‘population’ is the Durban Declaration and programme of Action of 2001. Without denying the importance of this

³⁵ Statement to be found in *Autonomy: Applications and implications*, Kluwer Law International, Institute of Human Rights Åbo Akademi, chapter VII, p.132

innovation, the lawyer cannot pass on the nature of a declaration, that is to say a legal instrument with no binding force.

The controversy is now over. The argument for indigenous communities is *peoples*, since the adoption of the declaration.

2.2.2 The Working Definition as Identified by the Permanent Forum

The working definition of the UN still remains the analysis of the Special rapporteur Martinez-Cobo. His analysis above mentioned identifies the historical event of a community suffering invasion or colonization; the group's self-identification as distinct from other parts of the national society; a present non-dominant status of the community, and the group's determination to preserve its ancestral lands. The rapporteur lists some indicia to help the lawyer in recognize indigenusness in practice. After identifying the 'historical continuity' as a precondition for indigenusness, the study elaborates that:

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 part of them;
- b) Common ancestry with the original occupation 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 on certain parts of the country, or in certain region of the world;
- f) Other relevant factors.

Consequently, 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 interference³⁶.

The working definition does not use the distinction between tribal and indigenous peoples. For practical purposes, these terms are used as synonyms in the UN system³⁷. It has also to be seen as a flexible tool, to be put in relation with the principles of respect for human rights, equality and non-discrimination, since the following critics can be formulated:

The mention of ‘pre-invasion’ or ‘pre-colonial society’, could limit the concept of Indigenous Peoples drastically, and exclude those oppressed by equally original inhabitants of neighboring lands that have become the dominant group of their society³⁸.

The mention to the necessary determination to preserve ‘ancestral territories’ poses some problems of application when it comes to peoples that have been forcibly or not removed from their land, as it would be the case of the Wayúu now living in the outskirts of Maracaibo, Venezuela, distant from their traditional forests in the border region between Colombia and Venezuela³⁹.

The mention of the criteria ‘non-dominant sectors of society’ could exclude from the protective scope those indigenous groups that have recently achieved preeminence in a Nation-State, as for example the indigenous Fijians⁴⁰.

³⁶ The martinez-Cobo study; paragraphs 379-382.

³⁷ PFII/2004/WS.1/3, United Nations, background paper prepared by the Secretariat of the Permanent Forum on indigenous issues, the concept of indigenous peoples.

³⁸ Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of “indigenous people U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996).

³⁹ Siegfried Wiessner, *Rights and Status of Indigenous peoples: A Global Comparative and International Legal Analysis*, Harvard Human Rights Journal, volume 12, spring 1999 ISSN 1057-5057.

⁴⁰ Under the Constitution of 1990, the President of Fiji is appointed by the Bose Levu Vakaturaga, the Great Council of [Indigenous] Chiefs; the President appoints the Prime Minister, another Fijian; and the Fijians hold the absolute majority of seats in both Houses

2.2.3 Self-Identification and the UNDRIP

Many ontological obstacles stand before the formulation of a definition of Indigenous peoples. If a combination of approaches permit a reasonable grasp on indigenoussness (origin and descent, experience of invasion/colonization, marginalization within a State's jurisdiction, systematic discrimination, distinctiveness...), the most difficult aspect of a possible definition relies on the meaning and implications of the term 'People'. As opposed to the rather descriptive 'population', the idea of people implies homogeneity of will to form a coherent society with values and codes of its own. Whereas no definition of 'people' can be found on the juridical sphere, self-determination is recognized as its main feature. The legitimacy of such an idea, identified as a guarantee for international peace by the UN Charter, is rather moral than legal⁴¹.

No State is culturally, ethnically and linguistically homogenous, admitting in the same move the idea of two or more peoples coinciding within the same State. If the first problem is the one of representation, the second would be the one of the relation amongst peoples and the identification/recognition of a group as a people. Self-identification appeared as the backbone for the existence of peoples, and to some extent an implication of self-determination and the right of all peoples to be different⁴². Indeed a theoretical hetero-identification would be analyzed as a

of Parliament. Eighty-three percent of the land in Fiji is still owned by Fijians, and the Native Lands Trust Act provides for its inalienability. At the time of the indigenous coup, the Fijian population was 46.0% Fijians, 48.7% descendants of immigrants from East India, and the rest others. According to the latest census of August 25, 1996, the Fijians now constitute 51.1%, the Indo-Fijians comprise 43.6%, with Chinese, Solomon Islanders, Rotumans, Europeans, and people of mixed race making up the balance. Nehla Basawaiya, *Status of Indigenous Rights in Fiji*, 10 St. Thomas L. Rev. 197 (1997). Cited by Siegrfried Wiessner, *ibid* 33, footnote 241.

⁴¹ Regarding to the different interpretations behind the meaning of self-determination, and the impact the doctrine has on its evolution. The right is even not defined *per se, stricto sensu*.

⁴² Mentioned in the preamble of the declaration.

breach of a people's dignity: names like 'eskimo' or 'lapp' are not just inaccurate but also pejorative and even politically incorrect⁴³. People can speak for themselves, and it starts with telling who they are. As a result, the indigenous position within the debate of the working group would place self-identification in the centre for further legal constructions⁴⁴. It would be the principle to name the community as to identify its members.

On the matter of Self-identification, art 33 of the UNDRIP reads: *"Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and tradition. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live"*.

By such a wording, art.33 establishes accordingly Self-Identification as a criterion to identify the group and its content, or better, its members. The article gives expression for a collective right: *customs* and *tradition* are mentioned as a framework for self identification to operate. The collective aspect of the right hereby expressed is not exclusive, since individuals keep their right of citizenship of the state in which they live. As a result, and maybe more generally, this article also stands for a will to ensure multiculturalism in the social construction of the Nation-State. However, article 33 contains many grey zones. Whereas it enables indigenous communities to identify themselves without external interference, the article ominously remains silent on the individual right of an indigenous person to access a membership, in accordance with its own subjective identification. The formulation of the article also appears inefficient for proper implementation: self-identification cannot have any effect without recognition, and no mention of the right of being recognized as such is to be found in the declaration, except from its preamble.

⁴³ The proper name is respectively 'Inuit' and 'Same'.

⁴⁴ For example, Mr Dodson, the aboriginal and torres strait Islander Social Justice Commissioner stated: "there must be scope for self-identification as an individual and acceptance as such as a group."

2.3 The Nature of "Indigenous Rights" through the UN Declaration on the Rights of Indigenous Peoples

The adoption of the Declaration on the Rights of the Indigenous Peoples gives new elements for a theory of indigenous rights. The declaration in a corpus of 46 articles sets an ensemble of rights constituting the "*minimum standards for the survival, dignity and well being of indigenous peoples of the world*"⁴⁵. Such wording contains most of the elements necessary to qualify the declaration and grasp the nature of indigenous rights. Accordingly, the declaration is an instrument created to respond to an urgent situation faced by indigenous peoples to secure their survival, their dignity and well-being. This primary analysis could give the declaration the colours of an instrument containing remedial rights. A closer look shows that indigenous rights have deeper roots, and that these rights are presented as inherent.

2.3.1 Indigenousness and Human Rights: Group Rights and Special Measures

The Human Rights philosophy is built upon the inalienable value individual, and consequently, the necessary equality between them. If individuals were not equal, it would be impossible to talk about a 'Humankind'⁴⁶. The Human Rights system, as it is visible through the UN charter, confirms the individualistic incarnation as the source of legitimacy for these rights, and obeys the principles of equality and non-discrimination.

⁴⁵ United Nations Declaration on the Rights of Indigenous Peoples art 43.

⁴⁶ To follow the argumentation of Georges Vedel in its commentaries on the Human rights as enshrined within the French Constitution of 1958: "*L'égalité c'est l'homme même, elle identifie l'homme [...]. Si l'on peut dire que tous les hommes sont égaux, à l'inverse tous les égaux sont des homes, car si un home refuse à un autre la qualité d'égal [...], il lui refuse la qualité d'homme. L'égalité est non un droit naturel mais le fondement meme de tout droit naturel, car il n'y a pas de droit naturel si les hommes ne sont pas égaux entre eux, autrement dits, si les hommes n'existent pas*", personal notes on French Constitutional Law.

Some rights have a collective nature. These include broadly cultural rights, but also “people’s rights” under International Law. Referring to the rights of the peoples is expressing the existence of a third category of rights, distinct from those addressed to States and the Individual. As a result, the insertion of collective rights in the traditional human rights thinking leads to the question of coherence, inside the system, through the absence of legal delimitation: if the term individual seems to be a unity generally accepted, only the notion of State is defined under International Law.

Sieghart identified six classes of group rights, listed in his compilation of general Human Rights texts⁴⁷. Included in the list are, Self-Determination and Equality of Rights, the Rights relating to International Peace and Security, Permanent Sovereignty over Natural Resources, the Rights in relation to Development, in relation to the environment and the Rights of Minorities⁴⁸. If the existence of collective/ group rights is well established in international instruments and legal theory, there are still some states denying their ‘raison d’etre’⁴⁹.

Presumptively the principles of equality and non-discrimination are sufficient in themselves. Nevertheless, depending on the essence of some rights, this *de jure* enjoyment would be nothing else but a formal equality of measures not taken to fulfil their application *de facto*. For that aim, several international instruments encourage the initiative of adopting so-called ‘Special measures’ or even ‘differential treatment’ to redress a *de facto* systematic discrimination towards vulnerable sections of society (identified as such through studies, and state reports)⁵⁰. Theoretically, the acceptance of special measures is setting different regimes creating discrimination in

⁴⁷ P. Sieghart, *The International Laws of Human Rights* (1983), p 367-378.

⁴⁸ List summarized after James Crawford’s reprinted text, *the Rights of Peoples: “peoples” or “governments”?*, in, *the philosophy of Human Rights*, Paragon House, 2001, pp 427-44.

⁴⁹ For example, Japan and France. Japan considers that contemporary international law does not recognize collective human rights. France, according to its principle, could not acknowledge “*the existence of any number of distinct peoples as component within the French people*”, intervention de la France sur la partie II de la declaration sur les droits des peuples autochtones. Statement cited in Russel Lawrence Barsh, *Indigenous Peoples and the UN Commission on Human Rights: A Case of the immovable Object and irresistible Force*, Human Rights Quartley, 18 (4), 1996, p795.

⁵⁰ For example, Art.1(4) and 2 of CERD, Art.2 (1) of ICESCR.

the name of the non-discrimination principles. This paradox, here again, shows the scope of Human Rights: to declare values within an abstract system, and taking steps to protect them.

Through legal Human Rights lenses, ‘indigenusness’ has come forth as a concern of collective and individual discrimination. It is therefore eligible to both collective rights and special measures. There are two different types of special treatments in International Law: those aiming to overcome, as introduced supra, which aim for the equal enjoyment of Human Rights by individual and groups as well; and those to ensure the enjoyment of distinct cultural identities. Art.27 of the ICCPR is for that concern of primal importance, as it is seen as the recognition of group rights as well as Minority rights. The text of the declaration recognizes an array of collective rights, from the right to maintain and develop their distinct political economic social and cultural identities and characteristic, to the guarantee not to be subjected to genocide/ethnocide, passing their right of self-determination. To many extent, the declaration goes further than what article 27 laid down. Yet many questions need attention. Mainly about the legitimacy of the distinction between Indigenous Peoples and other minorities.

2.3.2 The Distinction between "Indigenous Rights" and "Minority Rights"

It is true that an individual belonging to an indigenous group is in a situation similar to a person belonging to a national, linguistic or religious minority. It is also true that the *raison d’etre* of the special measures is derived from a conception of distributive justice⁵¹. Nevertheless, indigenous peoples and minorities remain two distinct sections of vulnerable groups of a State’s society.

⁵¹ *Iusticia est constans et perpetua voluntas ius suum cuique tribunes* (“Justice is a constant and perpetual will to attribute each its due”) Ullpien, digeste, I, I, 10 (*libro primo regularum*)

The discourse of ‘indigenusness’ leads inevitably to a denunciation of injustices suffered in the past. Minorities, in contrast, are, for the eyes of International Human Rights Law, a *de facto* phenomenon. These injustices are to be put in relation with the indigenous ancestors’ historic control over territories later forcefully incorporated into a state, combined with the impact of their ancestors’ culture on present practices and expectations⁵².

More than just a consequence of the adoption of a distributive legal conception, the special measures benefiting to Indigenous Peoples is also a matter of Corrective Justice. As identified by Aristotle⁵³, corrective justice is the legal theory which seeks to restore what was broken by an unjust act that created an undue inequality. It includes the right of restitution, as visible in art.28 of the UNDRIP : “*Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damages without their free, and prior consent*”.

Consequently, the rights of Indigenous Peoples are about restoring and protecting their status and rights as self-governed peoples, through the theory of Corrective justice. The right of self-determination rectifies the loss of self-government suffered by the experience of colonization. Here the right of self-determination is to be understood as a *jus*⁵⁴, and the sign of popular will, free from alien interference. It can therefore be seen as a substantive self-determination right necessary for the group survival.

In 1999, S. James Anaya⁵⁵ rejected the historical argument as a valid justification to the development of indigenous rights as separate, and somewhat stronger than traditional minority rights. He nevertheless

⁵² See article of Andreas Follesdal,, *The special claims of Indigenous minorities to Corrective Justice*. Unpublished paper available at <http://folk.uio.no/andreasf/ms/indigenous.rtf>

⁵³ Aristotle, *Ethique a Nicomaque*, livre V, chapter 5-7.

⁵⁴ As opposed to *potestas*.

⁵⁵ S. James Anaya, *Indigenous Peoples in International Law*, Oxford University Press inc. First issued Oxford university Press Paperback, 2000.

demonstrates that, as far indigenous peoples are concerned, the traditional array of legal protection in the UN system was problematic. To simplify, Article 1 of the UN charter is too strong⁵⁶, and article 27 of the ICCPR is too weak⁵⁷.

The reasons advanced by Anaya to reject the historical line are following. Firstly, because it is unlikely to be accepted by the international community. This argument is easily understandable, even on a theoretical plan. Granting the world's indigenous peoples the right of self determination according to their historical sovereignty wrongfully violated and taken away by the 'West' would easily be felt as opening Pandora's box or calling upon Nemesis' retribution. Much of the reluctances met against indigenous rights can be explained that way. Secondly, Anaya states that such justification "*ignores the multiple, overlapping sphere of community, authority and interdependency that actually exist in the Human Experience*"⁵⁸. It is indeed questionable whether pre-contact indigenous communities had/desired the sort of sovereignty experienced and enjoyed by western States. The remark is valid, even though it is impossible to verify.

If sovereignty is a legal western construction, its mark is the presence of peoples organized socially/politically on a territory; and Indigenous peoples are by definition connected to a territory, or better a land. The type of social organization or the society's wish to lead their life, may it be diametrically different from the western norms, is irrelevant for sovereignty to exist and to be exercised. Inversely, the absence of sovereignty qualifies the Land as *terra nullius*. To support this idea, the ICJ, in its advisory opinion of 16 October 1975 reasoned on the question whether Western Sahara at the time of colonization by Spain was a *terra nullius* territory that: "*According to the*

⁵⁶ Article 1 of the UN charter contains the right of self determination. However, the disposition is too strong as it is normally interpreted to include the right to form one's state. For that reason, its scope has been drastically restricted in International law, mainly with GA resolution 1541 (XV). The resolution, embodying the so-called 'salt water thesis' or even the 'blue water theory' excluded the legitimacy for indigenous peoples to use that article.

⁵⁷ Article 27 of the ICCPR, while recognizing the right to enjoy one's culture has been traditionally been understood to include negative rights of non-interference, rather than positive rights of autonomy, recognition and protection.

⁵⁸ Quoted in Will Kymlicka's review of S. James Anaya work, *Indigenous Peoples in International Law*. Ibid 26, p.286.

State practice [of the time of colonization], territories inhabited by tribes or peoples having a social and political organization were not regarded as terra nullius. The information furnished to the court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially organized in tribes and under the chiefs competent to represent them”⁵⁹.

However, the declaration does not expressly legitimate the rights of Indigenous Peoples on the ground of their ‘historical sovereignty’. The preamble instead affirms the equality of Indigenous Peoples to all other peoples, and expresses its concern “*that Indigenous Peoples have suffered from historic injustices as a result of, inter alia, their colonization and disposition of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests*”. The conclusion one can draw from the declaration’s preamble is that indigenous rights are hybrid in nature. This hybridism is visible through the establishment of a legal system containing legal remedies for a specific section of a State’s demos motivated by an inherent Human Right, namely, the Right to Development⁶⁰. It makes however difficult to clearly state what rights contained in the declaration are drawn from the qualification of Indigenous Peoples as being ‘peoples’ or as being ‘indigenous’. The last remark can potentially be of greater importance regarding to the declaration’s status after its adoption, and permits to introduce the reasoning behind the question whether or not the declaration gives expression for customary law.

⁵⁹ ICJ advisory opinion on the Western Sahara case, paras 75-83.

⁶⁰ Art.1 of the Declaration on the Right to Development states that: “*The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized*”. General Assembly, Resolution 41/128 of December 4, 1986.

2.3.3 An Overview of the UN Declarations on the Rights of Indigenous Peoples

The declaration was adopted the 13 September 2007 by an affirmative vote of 144 States in the UN General Assembly⁶¹. Four States voted against: US, Canada, Australia⁶², New Zealand. Eleven States abstained: Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, Ukraine. The Secretary-General Ban Ki-Moon described the declaration's adoption as a "*historic moment when the UN Member States and Indigenous Peoples have reconciled with their painful histories and are resolved to move forward together on the path of Human Rights, justice and development for all*"⁶³. Bolivia was the first implementing the declaration within its system⁶⁴, while The Canadian ambassador, John McNee expressed its Country's disappointment to have to vote against it. He shared its Country's "*significant concerns*" about the language of the document. The provisions on lands, territories and resources "*are overly broad, unclear, and capable of a wide variety of interpretations*" and could put in question matters that have been settled by treaty. Mr. McNee said the provisions on the need for States to obtain free, prior and informed consent before it can act on matters affecting Indigenous Peoples were unduly restrictive; he also expressed concern that the declaration negotiation process over the past year had not been "*open, inclusive or transparent*". The US, argued that the document is not nor can become Customary International Law. It does not constitute "*any evidence of Customary International Law*, lacking practice, and cannot provide a "*proper basis for*

⁶¹ General Assembly Resolution 61/295, 13 September 2007.

⁶² Australia has endorsed the UNDRIP april 3rd 2009. United Nation News center, <www.un.org/apps/news/story.asp?NewsID=30382&Cr=indigenous&Cr1=>

⁶³ UN News Centre 13 September 2007, *United Nations adopts Declaration on Rights of Indigenous Peoples*, <http://www.un.org/apps/news/story.asp?NewsID=23794&Cr=indigenous&Cr1.>

⁶⁴ On Nov. 7, in the Government Palace of Bolivia and surrounded by cheering Native leaders and other representatives, President Evo Morales announced the passage of National Law 3760 or the Rights of Indigenous Peoples, legislation that is an exact copy of the United Nation's recently passed Declaration on the Rights of Indigenous Peoples. Information retrieved from the webpage of Indian Country today, December 10, 2007.

legal actions, complaints, or other claims in any international, domestic, or other proceedings”⁶⁵.

There is, in those comments, a common pattern of logic meant to annihilate the declaration’s scope and/or legitimacy. A declaration is *per se* not binding, as long as it is not regarded as expressing Customary Law. It is therefore indispensable to analyse both the comments and the declaration according to the elements behind the legal theory of Customary Law in Public International Law.

Taken as a social phenomenon, Customary Law can be regarded as “*any recurring mode of interaction among individuals and groups, together with the more or less explicit acknowledgement by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied*”⁶⁶. It is thus a valid source of Law, as long as constitutes “*evidence of a general practice accepted as law*”⁶⁷. Customary Law is therefore constituted by two elements, in order to be differentiated from mere social usage. The first element is a general practice; the second is the *opinio juris sive necessitatis* (*opinio juris*)⁶⁸.

Through its reports, the ICJ gives a clearer picture of the nature of Customary Law. Identified as the judicial *Locus Classicus*, the North Continental Shelf case⁶⁹ confirms the bi-polarity of Customary Law, as it declares “*not only must the acts concerned amount to a settled practice, but they must be such, or be carried out in such a way, as to evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis*”.

⁶⁵ Statement retrieved from the article by S. James Anaya and Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Toward Re-empowerment*, published in Jurist legal news & research, university of Pittsburg. Article to be found at the webpage <http://jurist.law.pitt.edu/forum/2007/10/un-declaration-on-rights-of-indigenous-php>.

⁶⁶ R.Unger, *Law in Modern Society*, London, 1976, p49. Cited in Taken from Shaw, *International Law*, fifth edition, Cambridge university press, 2003, p 67.

⁶⁷ Art.38, Statute of the International Court of Justice.

⁶⁸ *Opinio Juris Sive Necessitatis*, is the legal terminology formulated by Francois Geny as an attempt to differentiate legal custom from mere social usage. *Méthode d'Interpretation et Sources en Droit Privé Positif*, 1899, para.110.

⁶⁹ ICJ reports 1969, p 3, para 77

In brief, the substance of customary law must be “*looked for primarily in the actual practice and opinio juris of States*”⁷⁰.

However, much has been written about the dynamics of Customary Law. Still today, the question whether the two requirements are part of a balanced equation remains difficult to answer. Following the launching of the Russian *sputnik*, a milestone for space law, the idea of ‘instant custom’ has been suggested⁷¹. According to this view, Custom may be deduced from evidence of *opinio juris*, despite the lack of practice. Consequently, General Assembly resolution, constituting at once elements of State practice and evidence of *opinio juris*, could give expression for customary law. The ICJ implicitly rejected the theory, mainly in cases as the *Military and Paramilitary Activities in and against Nicaragua*, and *Legality of the Threat or Use of Threat of Nuclear Weapons*. GA resolutions were treated as expression of *opinio juris*, but not act as State practice. As expressed by Hugh Thirlway, “*the position appears to be that in a field of activity in which there has not been any opportunity for state practice, there is no Customary Law in existence*”⁷².

Customary Law is thus a moral consciousness between groups of persons/officials/peoples, consistent with a reciprocal behaviour, acquiring a legal denomination through judicial bodies. It is revealed by virtue of a pattern of claims, acquiescence and absence of protests by States in official foras. The chamber of the International Court in the Gulf of Maine case defined acquiescence as “*equivalent to tacit recognition manifested by unilateral conduct with the other party may interpret as consent and as founded on the principles of good faith and equity*”⁷³. The silence of other states can be used as an expression of *opinion juris*.

The negative votes, all from countries having a large population of Indigenous Peoples under their jurisdiction, as the comments of Mr.McNee,

⁷⁰ ICJ, Lybia/Malta case, ICJ reports, 1985, pp.13, 29; 81 ILR, p 239

⁷¹ This terminology is recent. It is traditionally accepted that it has first been formulated in 1965 by Cheng.

⁷² Hugh Thirlay, *The Sources of International Law*, in *International Law*, edited by Malcolm D.Evans, Oxford University Press, second edition, 2006, p124.

⁷³ ICJ reports, 1984, pp. 246, 305; 71ILR, p.74.

could be interpreted as a strategy to break the legitimizing process of the declaration as expressing evidence of *opinio juris* by tacit recognition. *A contrario*, this proves the declaration's potential to become binding. Taken broadly, the declaration sets a system deduced from the qualification of indigenous populations as being 'peoples'. In other words, it expresses the guidelines and standards in accordance to the indigenous' right of self-determination. The consequent scope of indigenous sovereignty is designed as the reaffirmation of their social, cultural and economic rights, in respect with the territorial integrity and political unity of States. It may not have the 'external' attributes of self-determination enshrined in the UN Charter⁷⁴, but still is consistent with the idea that 'peoples' have the right of self-determination.

This relation is almost ubiquitous in International Law and relations. It legitimizes the basic prohibitions of conduct enshrined in the Charter, and one could legitimately suggest that peace-loving States are, in substance, governments respecting the/other peoples' right of self-determination. It is Customary Law, and since it gives *erga omnes* obligation becomes eligible for the qualification of peremptory rule of international law, a *Jus Cogens* rule. But the contention seems to lay somewhere else, namely in the very qualification of indigenous peoples as being peoples.

This recognition on the international level may lack practice. It however follows an *opinio juris* that has been consistent in more than 25 years⁷⁵. Moreover, the negative voting States shows proofs of practice going in the same spirit in their domestic relations with indigenous peoples.

The U.S mission to the United nations, in the explanation of its negative vote stressed out that the "*U.S government recognizes Indian Tribes as political entities with inherent powers of self-government as first peoples. In [its] legal system, the federal government has a governmental-to-government relationship with Indian Tribes*"⁷⁶. As For Canada, the 1982

⁷⁴ To be understood as the right to form a new state.

⁷⁵ See annex I including a list of international instruments concerning indigenous peoples.

⁷⁶ Statement retrieved from the article by S. James Anaya and Siegfried Wiessner, *The UN Declaration on the right of indigenous peoples: Towards Re-empowerment*, published in Jurist legal news & research, university of Pittsburg. Article to be found at the webpage <http://jurist.law.pitt.edu/forum/2007/10/un-declaration-on-rights-of-indigenous-php>.

Canadian Charter of Rights and Freedoms grants the aboriginal a widespread autonomy, recognising therefore a specific political status. The Maori retained the so-called 'rangatiratanga', that is to say their chiefs' authority, including their power to own, use and manage Maori lands and other resources according to Maori ways⁷⁷.

In definitive, the only valid argument against the declaration efficiency and legitimacy is the absence of definition of 'indigenous peoples'. Even through their comments and negative votes, those States implicitly recognize that indigenous peoples have a status, translated in the language of law.

For the most, those oppositions are merely a sign of political reluctances or diplomatic hesitation⁷⁸. As far as International Law is concerned, this makes it clear that indigenusness needs further promotion on the international level. The absence of the Working Group on Indigenous Populations, the declaration's biggest contributor, is regrettable ...

⁷⁷ Treaty of Waitangi, 1840.

⁷⁸ As for example, Anaya and Wiessner rightfully note that Canada, under its previous government, has been a fervent proponent of the declaration. It is now an opponent.

3 The Contribution of the Working Group on Indigenous Populations

Until the establishment of the special rapporteur in 2001, the only forum at the UN for indigenous issues was the Working group on Indigenous Populations. This working group, formally created by the ECOSOC resolution 1982/34 was abolished in June 2007 as a result of the reform of the Sub-commission. During the years of work, NGOs and indigenous representatives were more than welcome in Geneva for its annual sessions. The Working Group presented annual reports to the Sub-commission summarizing its discussions, and including recommendations. It prepared thematic studies on Indigenous Peoples' rights, discussed issues, elaborated guidelines and standards, as for example the original draft declaration on the rights of indigenous peoples. The contribution of the WGIP for the recognition and respect of indigenes in the international order is incommensurable, and its history contains many lessons to be remembered. The aim of this chapter, consequently, is to present an analysis of the WGIP's contribution in the evolution of indigenes as presented in the first chapter, assessing its achievements. However, since the chapter will not present itself as a sole summary of activity, some preliminary remarks are needed.

To a certain extent the fate of Indigenous Peoples illustrate in a cruel way the critics Michel Villey⁷⁹ directed to the systematization of Human

⁷⁹ Villey, Michel (1914-88) was France's leading post-war philosopher of law in the 'natural law' mode. He aimed to rediscover a distinctively philosophical approach to law rooted in the history both of legal ideas and of legal institutions. Legal institutions he considered to have been uniquely a gift of Greco-Roman civilization to the world. They represent a distinctive domain of human activity, concerned with an objectively just ordering of human relationships as these affect external conduct and the possession and use of things. Villey has in common with legal positivism a belief in the differentiation of the legal, concerned with objective interpersonal relations in their 'external' concern with a distribution of things, from morality and from religion with their distinctively 'internal' and 'spiritual' concerns. In opposition to legal positivism, however, he holds that justice is a concept implicit in the legal, and discountenances positivists' tendency to reduce law to a simple aggregation of enacted statutes. Routledge Encyclopedia of Philosophy, Version 1.0,

Rights. Starting from a historical analysis of individualism, Villey demonstrated that globalization is extending a fundamental void within the philosophical understanding of Human Rights, namely its incapacity to ‘think’ the relation. According to Villey, the Human Rights are the western symptom of an omission yet fundamental for the enunciation of Justice. The attribution of subjective Rights to an abstract conception of the individual, made the dialogue ‘a soi et a l’autre’ impossible. Justice as a goal only appears when the relation drawn between different components of a legal system is balanced. Indigenousness tells the story of the forced incapacity of Indigenous Peoples to negotiate themselves the terms and condition of their future and their own survival. In 1990 Robert A. Williams Jr saw in the Working Group the benefits of the rights discourse and story-telling in institutionalized law-making organs⁸⁰. The contribution of the WGIP reside essentially in its innovative way to perform its mandate, and its history shows that it managed to break with the traditional view behind the enunciation of legal standards, through establishing a dialogue. Consequently, the reasoning will start from the establishment of the Working Group to lead an analysis of its achievements enlightened with the remark above. To conclude, the chapter will propose a brief assessment of the draft declaration of 1994.

3.1 The Establishment of the Working Group on Indigenous Populations

The creation of the Working Group followed the identification by the UN of indigenous populations as a distinct category. It also coincided in a period of

London: Routledge. His critics of the Human Rights is developed in *Le droit et les droits de l’homme*, PUF, 1983.

⁸⁰ In his article entitled *Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples’ survival in the world*, Robert A. Williams Jr, describes the central role of indigenous peoples’ own stories in the Working Group’s effort toward development of an internationally recognized legal instrument declaring the Human Rights of the Indigenous Peoples. The article is to be found in the *Duke Law Journal*, vol.1990, No 4, *Frontiers of Legal Thought III*, September 1990, pp 660-704.

international lobbying for the indigenous cause.

3.1.1 Context of Creation

It was a lawyer from Guatemala and a member-staff of the UN Human rights Centre in Geneva, Augusto Willemsen Diaz, who would initiate the consideration of indigenusness as a distinct issue for the UN agenda. Most of the literature to be found on his account relates the role he played in the initiative and the conducting of the specific study on the problem of discrimination against indigenous populations. A(u)gusto Willemsen Diaz's concern for indigenous issues is also visible through his position under the initiative on racial discrimination in the mid-1960s. Recollected from different sources⁸¹, his argument was that racism could not effectively address the problems faced by the Indigenous Peoples⁸². Indeed, the struggle against racism is a matter of equality whereas indigenous discrimination stakes the survival of a group. During the decade to combat racism, racial discrimination and apartheid⁸³, special attention was also brought up for people living under military occupation and migrant workers. His goal was to build a case of documentation upon which Indigenous Peoples could construct infrastructure within the UN. He also wanted to dissociate indigenous questions from Minority Rights⁸⁴. Preoccupied with

⁸¹ Mostly different articles by Douglas Sanders. *Developing a Modern International Law on the Rights of Indigenous Peoples*, University of British Columbia, December 1994; and *the UN Working Group on Indigenous Populations*, Human Rights Quarterly, 1989, vol 11, number 3. The first article contains statement based on personal discussions between Sanders and Willemsen Diaz.

⁸² Such statement follows the conclusions of the Special Rapporteur Hernan Santa Cruz regarding Indigenous peoples, in his study on racial discrimination (submitted in 1969 to the Sub-Commission). He concluded that he had not been in a position to deal exhaustively with the subject as the available information had not enable him to determine precisely what kind of policies were being pursued in the various countries. He recommended a thorough analysis, and measures to be undertaken by the competent organ of the UN. Special study on Racial Discrimination in the political, Economic, Social and Cultural Spheres, United Nations Publications, sales number E.71.XIV.2, Chapter XIII, para. 1102. Information retrieved from Gudmundur Alfredsson, *Fourth Session of the Working Group on Indigenous Populations*, Nordic Journal of International law, Vol 55, 1986, n# 1-2, p 22.

⁸³ Which began in 1973, GA res 3057 (XXVII).

⁸⁴ "The treatment of indigenous issues as separate from consideration of other minorities is consistent with State practice in Canada and other Western States. The only traditions that grouped indigenous minorities with other minorities were the nationalities policies of the Soviet Union and China. The Russian federation has moved away from this linkage. China has not, a fact that separates Chinese policies from the international debates on Indigenous

the situation of the Mayan people in Guatemala, situation that could turn into a state genocide, he convinced Martinez-Cobo to propose the Sub-commission a study of Indigenous Peoples⁸⁵.

As mentioned in the first chapter, a study on the problem of discrimination against indigenous populations was authorized in 1971. Douglas Sanders notes, that even if Jose R Martinez Cobo was named as special rapporteur to conduct the study, “*inadequate staffing and funding at the human rights centre meant that the work fell almost exclusively to Augusto Willemssen Diaz. Martinez Cobo took a couple of trips as part of the work but never did any of the drafting*”⁸⁶. The study was finally completed in 1983⁸⁷.

It is quite surprising that the working group was established before the completion of the study. In fact, a coalition of actors, decided to take the lead, instead of waiting to have the confirmation of what they knew would be a major recommendation of the study, that is, the establishment of a Working Group.

Indigenous issues reached the UN Human Rights agenda through the leadership of the Netherlands and the Nordic States and support from “*loose like-minded group*” that included Canada⁸⁸. The government of Norway played a key role in the establishment of the WGIP and the Norwegian member of the Sub-commission, Asbjörn Eide, became its first chairperson. The Dutch parliament passed a resolution on indigenous rights after the Russell tribunal hearings in Rotterdam⁸⁹ (1980), and with Theo Van Boven, the Dutch head of the United Nations Human Rights Centre, the decision

peoples”, Douglas Sanders, *Developing a Modern International Law on the Rights of Indigenous Peoples*, University of British Columbia, December 1994.

⁸⁵ Information retrieved from *First Nations strategic Bulletin*, volume 4, issue 2, February 2006, p 19.

⁸⁶ Douglas Sanders, *Developing a Modern International Law on the Rights of Indigenous Peoples*, University of British Columbia, December 1994.

⁸⁷ UN Doc.E/CN.4/Sub.2/1986/7 and add 1-4.

⁸⁸ Douglas Sanders, *Developing a Modern International Law on the Rights of Indigenous Peoples*, University of British Columbia, December 1994.

⁸⁹ The Fourth Russell tribunal took place in Rotterdam, between November 24 and 30 November 1980. The tribunal was under the direction of the Russell foundation, which is a private organization. It is not a formal court of Law, but does operate like one. The tribunal heard 14 cases, addressing the rights of the Indians of the Americas. Information retrieved from Clem Chartier, Saskatchewan Indian federated College, January/February 1981, Vol 11, n 01-02, p 7. available on the webpage <http://www.Sicc.sk.ca/saskindian/a81jan07.htm>.

was taken in 1982 to establish a Working Group as a pre-sessional working group of the Sub-commission.⁹⁰

In a standard fashion, the WGIP would be composed of 5 individuals, drawn from the membership of the Sub-commission representing the 5 regions recognized by the UN⁹¹. It would meet annually before the session of the Sub-commission. The WGIP would review current development affecting the rights of Indigenous Peoples, but its basic mandate was to draft Standards. It was to produce a declaration on the rights of Indigenous Peoples for consideration of the General Assembly⁹².

The creation of the WGIP followed a growing internationalisation of activities by Indigenous Peoples as two non-governmental conferences bringing together indigenous from the western hemisphere took place in the 1977 and 1981.

In 1977, the non-governmental organisations' Indigenous Peoples conference in Geneva gathered over 100 representatives. They testified about the effects of natural resources exploitation, 'developments' projects, repression and genocide on their peoples. Alison Field witnesses, "*this was the first time that the UN had allowed Indigenous People to testify on their own behalf, although it was not their first attempt to do so*"⁹³. The opening statement of 1981 United Nations NGO conference on Land and Indigenous Peoples could be seen as a sign of an international legal awareness of Indigenous Peoples⁹⁴:

⁹⁰ The creation of the WGIP was proposed by the Sub-commission in its resolution 2 (XXXIV) of 8 September 1981, endorsed by the commission on human rights in resolution 1982/19 of 10 March 1982, and authorized by the ECOSOC resolution 1982/34 of 7 May 1982.

⁹¹ 5 regions of the world as recognized by the UN: Africa, Asia, Eastern Europe, Latin America, Western Europe and others (WEO, including: US, Canada, Australia and New Zealand)

⁹² Douglas Sanders, *the United Nations Working Group on Indigenous Populations*, Human Rights Quarterly 1989

⁹³ Alison Field, *Indigenous Peoples Network*, Aboriginal Law Bulletin, 1986. To be found at the webpage <http://www.austlii.edu.au/au/journals/aboriginalLB/1986/6.html>.

⁹⁴ Some Indian leaders already tried to petition the League of Nation after its formation in 1919, and, the Iroquois Deskaheh went to Geneva in 1923 and 1924 to claim that Canada

“The world changed. The Indigenous Peoples became stronger, and in 1977 they marched in through the doors of the United Nations.

But at the End of the Conference in 1977 we said: we shall come again and again, till victory is ours! Here we are again, Brothers and Sisters, marching into the United Nations in Geneva.

Do the governments of the world understand our cause today? Yes. But above all we are here because the struggles of the indigenous nations have grown and become stronger and more united.

We spoke then... of four words which we had learned at that conference.

*The first word is **Genocide**. Do not talk of this ‘right’ or that ‘rights’. We are nations which demand the right to live and be part of our land. Learn the word **nation**: stand by the indigenous nations and their rights as nations.*

*Another key word we learned ...is **Land**... Land is connected with all the other questions. You cannot talk about land without talking about genocide... about the nations... about the fourth word we learned which is **self-determination**.”⁹⁵*

(For further reading on the political aspects of the indigenous lobbying in the 1970’s, the author recommends the *First Nations Strategic Bulletin*, volume 4, issue 2 of February 2006.)

In 1977, the International Indian Treaty Council requested and gained consultative status with the ECOSOC thereby making it the first indigenous organization to have right of participation in the UN meetings⁹⁶. Several other Indigenous People’s organization also received similar credentials⁹⁷.

was planning to invade the lands of the Six Nations. Information taken from Douglas Sanders, chapter 5, *The legacy of Deskaheh: Indigenous Peoples as International Actors*, in *Human Rights of Indigenous Peoples*, edited by Cynthia Price Cohen, Transnational Publishers, 1998, p73.

⁹⁵ Opening statement, *ibid* 9 , quoted from *the Australian National Aboriginal Conference Newsletter*, 3/84.

⁹⁶ Julian Burger, the United Nations Working Group on Indigenous Populations, in *Indigenous peoples and international organisations*, compiled and edited by Lydia van de Fliert, Russel Press Ltd, 1994, p 91

⁹⁷ In March 1997, 15 organisations of indigenous peoples would have consultative Status with the ECOSOC. Source: the Fact sheet no 9 (rev.1), the Rights of Indigenous peoples,

3.1.2 Presentation of the Working Groups on Indigenous Populations

In addition to facilitating and encouraging dialogue between governments and fundamental freedoms of Indigenous Peoples, the Working Group had two main tasks

a) Review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually from Governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status, particularly those of indigenous peoples, to analyse such materials, and to submit its conclusions and recommendations to the Sub-Commission, bearing in mind in particular the conclusions and recommendations contained in the report of the Special-Rapporteur of the Sub-Commission, Mr. José R. Martínez Cobo, entitled “Study of the problem of discrimination against indigenous populations” (E/CN.4/Sub.2/1986/7 and Add.1-4);

(b) Give special attention to the evolution of standards concerning and recommendations to the Sub-Commission, bearing in mind in particular the conclusions and recommendations contained in the report of the Special-Rapporteur of the Sub-Commission, Mr. José R. Martínez Cobo, entitled “Study of the problem of discrimination against indigenous populations” (E/CN.4/Sub.2/1986/7 and Add.1-4); the rights of indigenous populations, taking into account both the similarities and the differences in the situations and aspirations of indigenous populations throughout the world⁹⁸.

office of the High Commissioner for Human Rights, available at <http://www.unhchr.ch/html/menu6/2/fs9.htm>.

⁹⁸ Formulation of the WGIP’s mandate retrieved from the annual reports of the WGIP

Accordingly, there have been two main issues on the Working Group's agenda. The first was the 'Review of Developments', which provided an opportunity for Indigenous Peoples and their representatives to draw attention to issues of concern and for governments to present their views of developments. The Working Group received and analyzed written information submitted by governments, specialized agencies and other organs of the UN, other international and regional intergovernmental organizations, non-governmental bodies and Indigenous Peoples themselves⁹⁹. The chairperson-Rapporteur was allowed to conduct States visits in order to gather 'first-hand' information and to provide information on the UN activities in the field of Indigenous Rights and to identify issues to be taken up in the 'standard setting' activities¹⁰⁰. Since 1996, the Working Group has tried to focus discussion in the 'Review of Developments' session by addressing a specific theme each year. A compilation of those themes is proposed infra:

Principal theme in 1996	Indigenous Peoples and Health. ¹⁰¹
Principal theme in 1997	Environment, Land and Sustainable development. ¹⁰²
Principal theme in 1998	Education and language. ¹⁰³
Principal theme in 1999	Indigenous Peoples and their relationship to the land. ¹⁰⁴
Principal theme in 2000	Indigenous children and youth. ¹⁰⁵
Principal theme in 2001	Decade, land ¹⁰⁶

⁹⁹ See infra, the working principles of the Working Group on Indigenous Populations.

¹⁰⁰ Information retrieved from the Fact sheet no 9 (rev.1), the Rights of Indigenous peoples, office of the High Commissioner for Human Rights, available at <http://www.unhchr.ch/html/menu6/2/fs9.htm>.

¹⁰¹ UN Doc E/CN.4/Sub.2/1996/21, 16 August 1996

¹⁰² UN Doc E/CN.4/Sub.2/1997/14, 13 August 1997

¹⁰³ UN Doc E/CN.4/Sub.2/1998/16, 19 August 1998

¹⁰⁴ UN Doc E/CN.4/Sub.2/1999/19, 12 August 1999

¹⁰⁵ UN Doc E/CN.4/Sub.2/2000/24, 17 August 2000

Principal themes in 2002	The Working Group on Indigenous populations: achievements in the UN system and vision for the future, Indigenous peoples and their right to development including participation in development affecting them, the future working relationship between the Permanent Forum on Indigenous Issues, the Special-rapporteur and the WGIP. ¹⁰⁷
Principal theme in 2003	Indigenous Peoples and globalisation. ¹⁰⁸
Principal theme in 2004	Indigenous Peoples and conflict resolutions. ¹⁰⁹
Principal theme in 2005	Indigenous Peoples and the international and domestic protection of traditional knowledge. ¹¹⁰
Principal theme in 2006	Utilization of Indigenous Peoples' lands by non-indigenous authorities, groups or individuals for military purposes. ¹¹¹

¹⁰⁶ UN Doc E/CN.4/Sub.2/2001/17, 9 August 2001

¹⁰⁷ UN Doc E/CN.4/Sub.2/2002/24, 8 August 2002

¹⁰⁸ UN Doc E/CN.4/Sub.2/2003/22, 11 August 2003

¹⁰⁹ UN Doc E/CN.4/Sub.2/2004/28, 3 August 2004

¹¹⁰ UN Doc E/CN.4/Sub.2/2005/26, 12 August 2005

¹¹¹ A/HRC/Sub.1/58/22

The second was "Standard Setting", which focused on the draft Declaration on the Rights of Indigenous Peoples. This mandate has been particularly emphasised during the years of activity of the WGIP. The actual work began in 1985 with the preparation of a draft Declaration on the Rights of Indigenous Peoples. In 1993, the working group would agree on a draft, which was adopted by the sub-commission by its resolution 1994/45 of 26 august 1994. For further information of the WGIP' activity in that field please see below.

The Working Group met annually until its abolishment except for the year 1986, where due to the financial crisis, the session of the sub-commission and the WGIP was cancelled. Thanks to the initiative of some NGOs¹¹², an informal seminar would be organized the 6th and 7th September 1986. Erica-Irene Daes and Miguel Alfonso Martinez, as members of the WGIP would participate. The rapport of the seminar is collected as an annex to the document E/CN.4/Sub.2/1987/22, annexe II...

3.1.3 Policies of the Working Groups on Indigenous Populations

Under Eide's chairmanship the Working Group decided on rules of procedure which allowed any indigenous person or representative to speak. The WGIP became the most open body in the UN system: in almost all other United Nations forums, participations is limited to States, intergovernmental organisations and special observers such as the Holy see or recognized liberation movement. Since the innovation in the Working Group, two other bodies have adopted a similar approach: the Working Group on Contemporary Forms of Slavery and the new Commission on Sustainable Development, which grew out of the earth summit in Rio de

¹¹² Specially the Anti-slavery Society for the Protection of Human Rights and the World Council of Indigenous Peoples. Information retrieved from the Fact sheet no 9 (rev.1), the Rights of Indigenous peoples, office of the High Commissioner for Human Rights, available at <http://www.unhchr.ch/html/menu6/2/fs9.htm>.

Janeiro which itself, like other recent UN conferences, allowed otherwise unaccredited NGO's to participate in its work¹¹³.

This working principle, is not only consistent with the pragmatic consideration of indigenous peoples' self identification capacity (see above, self identification and the UNDRIP), but allowed the WG to constitute an information database through a "story telling" procedure. This can explain the rapidly growing popularity of the working group that became one of the UN system biggest fora. Legally speaking, the impact of this policy could be seen as a major recognition of indigenous peoples as international participants.

The denomination 'international participants' needs to be replaced in a context in order to reveal all its legal implications. International Law has been traditionally constructed with a dominant positivist approach, which paradigm was that "[s]ince the law of Nations is a Law between States only and exclusively, States only and exclusively are subjects of the law of Nations"¹¹⁴. A subject of International Law is to be seen as an entity having direct rights and responsibilities, under that system. It can therefore bring international claims, and, to Robert McCorquodale's opinion¹¹⁵, is able to participate in the creation, the development and the enforcement of International Law. From such a perspective, the cosmos of International Law is marked with the dichotomy between 'subject' and 'object' and consequently generates a unilateral relation from the subject, as an actor, to the object, as a media. The binary opposition subject/object became a part of the definition of international personality, as the reasoning of the ICJ shows in the *Reparation for injuries* case¹¹⁶.

¹¹³ Douglas Sanders, *Developing a Modern International Law on the Rights of Indigenous Peoples*, University of British Columbia, December 1994.

¹¹⁴ Oppenheim, *International Law*, vol 1, London: Longman, 1905, p 341, quoted by Robert McCorquodale in *International Law*, edited by Malcolm D. Evans, Oxford University Press, second edition 2006, p 308.

¹¹⁵ Ibid 33.

¹¹⁶ *Reparation for injuries*, ICJ report 1949. The Advisory opinion (p 174 at pp 178-179) while recognizing the contents of the legal personality as introduced above, extends it to the case of the UN organisation which is not a State. This evolution has become a jurisprudence, since the ICJ applied the same principles to other international intergovernmental organization in the case *Legality of the Use of Nuclear Weapons in Armed Conflict*, advisory Opinion, ICJ reports 1996, p 66.

Taking into account the evolution of International Law, the dichotomy subject/object began to be criticized by a scholars and professionals of Law. As an example, Rosalyn Higgins, now President of the ICJ argues: “*the whole notion of ‘subjects’ and ‘objects’ has no credible reality, and, in my own view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint*”¹¹⁷ . International Law is merely a particular decision-making process, made of claims meeting values in different foras, to be determined by authoritative decision-makers. In such perspective, “*there are no ‘subjects’ and ‘objects’, but only participants*”¹¹⁸ . In definitive, the working principle of the WG appears not only to be innovative procedurally but also illustrate the view of a dynamic process of decision making in which the Indigenous Peoples were allowed to speak for themselves, bring claims, participate in the creation and the development of its standard-setting activities. As a big contribution for the WG’s first years of existence, observers pointed out that this ability given to Indigenous Peoples to participate was the key-factor that did not turn the WG to become politicized within the political context of the Cold War¹¹⁹ .

This policy allowed the Working Group to focus its energy extensively. The list of actions undertaken by the Working Group in its 24 years of existence is impressive. The Commission on Human Rights document, *information on the achievements of the Working group*, E/CN.4/Sub.2/AC.4/2006/CRP.1, lists in its annexes the most significant initiatives of the WGIP. A reproduction of the annex I of the document is attached in the annex of the present work.

¹¹⁷ Rosalyn Higgins, *Problems and Process: International Law and How we use it*, Oxford University Press, 1994. quote found in *ibid* 33

¹¹⁸ *Ibid* 36, p 49. Expression quoted in Anna Mejknecht, *Towards International Personality: The position of Minorities and Indigenous Peoples in International Law*, Intersentia- Hart, 2001, p 52.

¹¹⁹ Statement retrieved from *First Nations strategic Bulletin*, volume 4, issue 2, February 2006, p 24.

3.2 Achievements of the Working Group on Indigenous Populations

The achievements of the Working Group go beyond the listing of its activities as presented in the UN document above mentioned¹²⁰. The numerous studies, events and, of course the draft declaration, are to be seen as proves of a greater achievement. Throughout its 25 years of existence, the Working Group built a solid reputation within Indigenous Peoples. The WGIP proved it self to become a true opportunity for Indigenous Peoples to break through, and not to be a mere symbolic gesture of a post colonial system trapped by its own universalism¹²¹. The Working Group managed to win the trust of the Indigenous Peoples. This allowed the Working Group to bridge the *Jus Fori* and the *Jus Poli*, in the aim to produce a Declaration on the Rights of the Indigenous Peoples.

3.2.1 Winning the Trust of the World's Indigenous Peoples

The Working Group could not have won the trust of the Indigenous Peoples without a strong an inspired leadership. During its years of existence, the Chairpersons notably dedicated themselves for their task despite the bureaucracy and the opposition met. As a consequence, the Working Group became the largest forum within the UN System.

3.2.1.1 The Leadership of the Working Group on Indigenous Populations

¹²⁰ The Commission on Human Rights document, *information on the achievements of the Working group*, E/CN.4/Sub.2/AC.4/2006/CRP.1

¹²¹ As, J M Roberts notices: “(...) *the deepest irony of post-Western history [is that] it is often in the name of western values that the West is rejected and it is always with its skills and tools that its grasps is shaken off. Western values and assumptions have been internationalized to a remarkable degree in almost every other major culture*”, in, *The Triumph of the West*, Boston: Little Brown and co, 1985, p. 278. Cited in *Are Human Rights Western? a contribution to the dialogue of Civilization*, Arvind Sharma

Asbjörn Eide, the first chairman of the WGIP was an academic, working at the peace Research Institute in Oslo. In 1978, the United Nations conference on racism held in Geneva considered the question of Indigenous Peoples, primarily at the initiative of the Norwegian delegation which included Asbjörn Eide and the Sami leader Aslak Nils Sara¹²². In 1981, a sami challenged the decision of the Norwegian government to proceed with a major hydro-electric project in a area traditionally used for reindeer herding. At the trial, Eide testified in that the Samis had certain Rights under international law flowing from article 27 of the ICCPR. He reasoned that the protection of the cultural rights of members of minorities, provided for in art.27, presupposed the protection of the minority. He saw the threat of a hydro-electric project to reindeer herding lands as a threat to the cultural survival of the Sami people¹²³. Eide's chairmanship dramatically ended, as a consequence of an attack directed to the working group in general, and Eide in particular. The details of that event are presented by Douglas Sanders as following.

In 1983, Niall MacDermot, secretary general of the international commission of jurist, told the working group that a representative of the government of India had threatened reprisals against Swani Agnivesh on his return to India. The Swani was chairman of the bounded liberation front, an organization fighting bounded labour in India. Many bounded labourers are tribal. Eide, was under the impression that MacDermot had already verified the accusation and expressed his concern with the threat. This apparent acceptance of the accuracy of the accusation angered the representative of India, who organized in return third world votes in the 1984 election of the Sub-Commission. Four of the fives members of the WGIP lost their seats, including Eide. On September 1985, Swani Agnivesh returned to India and saw his passport seized by the government. The event seemed to confirm the theory of the threat. The Indian representative in Geneva lost her seat before the 1985 session of the Working Group. Observers saw her attack as a

¹²² The final statement of the conference includes a passage urging states to recognize [(the following)] rights of indigenous peoples: Self-identification, recognition and political action, and basic cultural rights.A/Conf.92/40, 1979.

¹²³ Information taken from Douglas Sanders, *the United Nations Working Group on Indigenous Populations*, Human Rights Quartley, 1989.

personal initiative, not as a continuing policy of the government of India. His chairmanship in the WGIP might have been short, but it is still remembered as an “*excellent leadership*”¹²⁴, that would inspire the WGIP in all its years of existence.

Erica-Irene Daes took over Eide’s chairmanship in 1984 and served in that capacity until 2000. She undertook UN Studies, such as on the protection of the Human Rights and freedoms of individuals, indigenous land rights, intellectual and cultural rights and indigenous heritage. She also played a key role in bringing the international year (1993) and a decade (1995-2004) for the promotion of indigenous rights and the establishment of the two voluntary funds (voluntary fund for indigenous populations, and for the international decade of the World’s indigenous peoples). She carried out a number of fact finding missions relating to indigenous peoples’ rights, including visits to Australia, Brazil, Canada, Fiji Islands, Finland, Greenland, Guatemala, Japan, Mexico, Micronesia, New Zealand, Norway, Panama, Russia, Sweden and the United States. Report always followed the visits and, as she was “*never afraid to speak frankly*”¹²⁵, many were condemning. Her dedication is also visible through her participation in seminars and conferences of the United Nations and other organizations and institutions, and trips she made in her own personal competence. Her most significant achievement is of course the redaction of the Declaration on the Rights of Indigenous Peoples, which is also widely known as the ‘Daes Declaration’. Her dedication and success in her initiatives brought Les Swepston and Gudmundur Alfredsson to the conclusion that “*many of the steps [for indigenous rights] have come about since Mme Daes began her work in this field, and many of them clearly bear her personal imprint. In contributing to the progressive development of international law, she also has pulled international perceptions and general awareness along with her.*

¹²⁴ Expression taken from *First Nations strategic Bulletin*, volume 4, issue 2, February 2006, p 24.

¹²⁵ Expression of the judge Rosalyn Higgins, in *Words of personal appreciation to Erica-Irene Daes, Justice Pending: Indigenous Peoples and other Good Causes, essays in Honour of Erica-Irene Daes*, The Raoul Wallenberg Institute Human Rights Library, Martinus Nijhoff Publishers, 2002, p2.

She has actively presented ideas of Justice and fairness to the modern world while many of the governments and indeed some of the international bureaucracies are stubbornly refusing to move forward".¹²⁶

Miguel Alfonso Martinez of Cuba was the second senior member of the Working Group, and has been active in the United Nations system for more than three decades. He carried out the Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples.

The questions about the value and the validity of treaties between Indigenous Peoples and colonizing powers always were of central concerns. The international India treaty Council made the issue a central goal of its work. When the WG endorsed in 1988 a treaty study, it faced strong States' opposition. The study was another recommendation included in the Martinez-Cobo Study. He recommended the study to be undertaken "*in the light of existing principles and norms in the field, as the opinion submitted by all interested parties, primarily the Governments and Indigenous nations and peoples*"¹²⁷. Of Course the idea of such a study awakened fear and suspicion from governments. Canada lobbied hard to block the initiative. It argued that any study should be 'universal', in order to include the Soviet Union on the issue of Indigenous Peoples and, to a certain extent, to protect itself. If it didn't manage to block the project entirely, it nevertheless changed the terms through its 'universal' position: in adopting resolution 1988/56, the commission on Human Rights broadened to a considerable extent the scope of the study, as envisaged by the sub-commission in its resolution 1987/17. The Commission recommended Alfonso Martinez as Special Rapporteur with the mandate of preparing "*an outline on the possible purposes, scopes and sources of a study to be concluded on the potential utility of treaties agreements and other constructive arrangement between Indigenous populations and government for the promotion and*

¹²⁶ Les Sweptson and Gudmundur Alfredsson in the Rights of Indigenous Peoples and the contribution by Erica Daes, , *Justice Pending: Indigenous Peoples and other Good Causes, essays in Honour of Erica-Irene Daes*, The Raoul Wallenberg Institute Human Rights Library, Martinus Nijhoff Publishers, 2002, p 77.

¹²⁷ ECOSOC document E/CN.4/Sub.2/1999/20, Human right of Indigenous peoples, study on treaty, agreement and other constructive arrangement between States and indigenous populations, final report by Miguel Alfonso Martinez, Special Rapporteur, p2 para 4.

protection of the human rights and fundamental freedoms of indigenous populations”¹²⁸. Canada was concerned about the appointment of Alfonso Martinez as special rapporteur: in a context of west-east tension, Canada suspected attack from the Cuban representative. In a try to stop Alfonso Martinez’s lobbying to get the attendance, the member of the sub-commission from the United States offered at one point to be the special rapporteur if there appeared to be problems about the suitability of Alfonso Martinez. This is in that sense that Alfonso Martinez appeared as a more political figure than Erica Daes.

3.2.1.2 Participation in the Working Group’s Sessions

Participation in the working group¹²⁹:

Year	Number of NGO	Participants
1982	31	-
1983	43	-
1984	63	-
1985	95	250
1986	NO OFFICIAL SESSION	NO OFFICIAL SESSION
1987	115	370
1988	142	380
1989	130	-
1990	132	-
1991	150	-
1992	275	615
1993	226	600
1994	267	790
1995	279	700
1996	297	721

¹²⁸ Resolution 1988/56, 54th meeting 9 march 1988, first recommendation.

¹²⁹ E/CN.4/Sub.2/AC.4/2006/CRP.1, annex II

1997	236	887
1998	306	950
1999	251	971
2000	248	1027
2001	271	1033
2002	270	1076
2003	304	871
2004	226	651
2005	146	427

The Statistics speak for them selves: until the year 2002, year of the permanent forum's first session, the number of participants was increasing. For purpose of comment and recapitulation, the indigenous participation was supported by one major innovation, and two 'procedural' adjustments:

Such a broadened attendance was allowed by the decision to open the access to the WG to any Indigenous representatives, indigenous persons, scholar etc... As for example, the WG heard in 1985 about 30 hours of oral statements without having emptied the speaker's list¹³⁰. A short analysis of the impact of such policy is proposed above. The WGIP was probably one of the UN bodies with the highest level of NGO attendance.

Comes then the establishment of the voluntary fund for indigenous peoples, that made possible to support economically indigenous NGO and persons to attend the annual session of the WG.

It is also relevant to mention the relaxing of the rules of the ECOSOC for the formal accreditation of indigenous organizations as non-governmental organisations with 'Consultative Status' with the ECOSOC. The modern basis for the consultative relationship was established in 1968 with resolution 1296, and resolution 1996/31 of 25 July 1996¹³¹. Accordingly, there are three different categories of consultative relationship: the *General*

¹³⁰ The WG does not have any verbatim or summary records, but the statements are collected and duly reflected in the WG's reports.

¹³¹ E/RES/1296 (XLIV), *Arrangements for consultation with Non-Governmental Organisations*, 3 May 1968 and 1996/31, *Consultative Relationship between the United Nations and Non-Governmental Organizations*, 25 July 1996.

Consultative Status, accorded to NGO's concerned with most activities of the Council, the *Special Consultative Status*, accorded to NGO's with a specific concern within the Council's activities, and the *Roster Status* accorded to NGO's which competences are seen as useful by the Council or the UN Secretary-General for the Council or its subsidiary bodies.

As for 2006, most of the Indigenous NGOs were listed under the special consultative status.¹³²

3.2.2 Bridging the *Jus Fori* to the *Jus Poli*

International Law exists everywhere competitive interests enter in action. As a result, International Law gets through all of the old-fashioned abstract limits the 19th century was proud to lay down, specially the State's border, to concern even the individual in its own substance, giving him if not a status at least an existence. These interests qualified as competitive can be found behind the voluntarism at the source of every Treaty, as the arising of peremptory rules reflecting an almost metapositif *opinio juris*, reflecting the common and highest interests of the international community (*jus cogens* rule). This duality in the dynamics of international law, often recalled by the International Court of Justice, allows adopting the conception of William of Ockham¹³³ of two different kinds of law: a *Jus Fori* of a delibatory nature, along a *Jus Poli*, of a religious nature in Ockham's view, which was the ground for the Human Rights to be developed..

The problems of respect and protection of Indigenous rights succeeded to reach the international level, with the establishment of and through the Working Group. Through lobbying, indigenous representative and

¹³² ECOSOC document E/2006/INF.5, *List of Non-Governmental Organizations in Consultative Status with the Economic and Social Council as at 31 August 2006*.

¹³³ 1285-1347(?). William of Ockham is a major figure in late medieval thought. Many of his ideas were actively – sometimes passionately - discussed in universities all across Europe from the 1320s up to the sixteenth century and even later. Against the background of the extraordinarily creative English intellectual milieu of the early fourteenth century, in which new varieties of logical, mathematical and physical speculation were being explored, Ockham stands out as the main initiator of late scholastic nominalism, a current of thought further exemplified - with important variants - by a host of authors after him, from Adam Wodeham, John Buridan and Albert of Saxony to the school of John Mair far into the sixteenth century. Routledge *Encyclopedia of Philosophy*, Version 1.0, London: Routledge

sympathisers managed to insert indigenoussness into the discourse of Human Rights. This insertion gave birth to the declaration that stands not only as an achievement for minority rights, but also as a important step outside the post-colonial positivism in international law. As far as the Working Group is concerned, it managed to balance the claims with the formal frames of the law, by handling a great amount of document and different sources, to constitute a draft declaration. In this way, the WGIP succeeded in bridging the convened issues and principles from the debate – the *Jus Fori*- to actually draft legal standards -the *Jus Poli*-. Consequently, after analysing the declaration as the choice made by the WGIP to fulfil its mandate, the focus will be held on the constitution of the drafting principle, formulated in close relation with the indigenous participants.

3.2.2.1 The Project of a Declaration

Following the Sub-commission’s request to consider “the drafting of a body of principles on indigenous rights”¹³⁴ , the WGIP found itself confronted with a choice, between a Declaration and a Convention. The WGIP opted for a Declaration¹³⁵. The Sub-commission expressly endorsed this approach by resolution 1985/22 of 29 august 1985¹³⁶.

The decision of the WGIP to “aim at producing in due course, and as a first formal step, a draft declaration on indigenous rights which may be proclaimed by the General Assembly”¹³⁷ can be interpreted in many ways. Firstly, such a decision constitutes a diplomatic compromise within the divided interested parties. Secondly, the wording “as a first formal step”, could stand as a try for the WGIP to proclaim its independence as a working group. It expresses the possibility to draft several instruments, and, in the

¹³⁴ Resolution 1984/35B of 30 august 1984.

¹³⁵ The option of a Declaration was expressively wished by indigenous organisations and participants. The WG’s 1984 report contains as an annexe their view on the topic. E/CN.4/SUB.2/1984/20 annexe III.

¹³⁶ Gudmundur Alfredsson notes that the adoption process of this resolution was a good demonstration of the lobbying skills of indigenous observers. The draft was originally sponsored by four of the working group members, subsequently co-sponsored by the independent experts from Bangladesh and the United States and adopted by the sub-commission without a vote, a result which by no means was a foregone conclusion to the debate leading to it.

¹³⁷ E/CN.4/Sub.2/1985/22 annex II, see also paragraph 85 same document.

same time, assure its longevity. Established as an urgent recommendation of the Martinez-Cobo Study, the WGIP addressed disturbing questions of international law, and could legitimately fear of being abolished once the production of the agreed declaration. Even though presented as a formal step, the choice of a declaration is not innocent. In fact, a declaration offers more advantages than a convention.

As a binding instrument, a convention would have been difficult to draft: it would have met strong State-opposition on a certain amount of concepts and has the weakness of being subjected to state voluntarism. In that case, the main source of problems would consequently result from the nature of the legal prescription and the incompatible claims from indigenous parties and State representatives.

The choice of a declaration corresponds therefore to a will to maintain the flexibility in conciliation to the needs of indigenous peoples worldwide. Moreover, the problems related to Universalism, as the identification of beneficiaries for instance, do not jeopardize in the same way the adoption of such an enterprise. As would the practice of the UN show, a declaration sets standards and guidelines and is normally followed by a treaty/convention/covenant¹³⁸, containing binding and more specified dispositions. A declaration sets out the frames; a treaty fills the void within the frames. Having a more solemn ring than a treaty, a declaration stands for a powerful recognition of the existence, the situation and the rights of indigenous peoples. Even though not binding, these provisions give a strong expression for a UN accepted *Opinio Juris*, and therefore has a potential of becoming customary law.

The first revised text of the draft declaration on the rights of indigenous peoples has been described by Ms. Erica-Irene Daes as “*a realistic approach to the issues, constituting a fair balance between the aspirations of indigenous peoples and the legitimate concerns of States*”¹³⁹. The (rather long) history of the draft declaration is marked with the sign of the dialogue.

¹³⁸ As for example, the Universal declaration on human rights in relation the international bill of human rights. The treaties on torture and on the rights of children were also preceded by declarations.

¹³⁹ WG Draft UN Doc. E/CN.4/Sub.2/1989/33

This dialogue is visible through the constitution of agreed draft principles for the declaration to be produced.

3.2.2.2 The Constitution of Draft Principles

Once the preliminary choice of the instrument was made, the WGIP found itself confronted to another difficulty. As being a legal innovation to many different aspects, the WGIP had to make choices empirically in order to handle the great amount of documents it had at its disposition for the enterprise¹⁴⁰. Needless to say that indigenous representative also looked very carefully at the standard setting activities of the WGIP, and tried to insert their own principles in the project. Solicitated from every part, the WGIP convened to focus on drafting principles with the indigenous representatives to give a reasonable orientation to the Declaration to come.

Identified as a preliminary necessity, the draft principles reflect the ability of the Working Group to establish a dialogue with the Indigenous Peoples present at the sessions. It received many different drafts from indigenous representatives, and made adjustment through the years until the final draft declaration was completed in 1994. Unfortunately, the reports of these drafts, often added as an annex, are hard to find¹⁴¹. Consequently, most of the information used by the author derives from secondary legal sources, such as scholarly and NGO's articles¹⁴².

Between 1982 and 1987, indigenous delegates met in Geneva to formulate the principles relying in part on the guidance of indigenous nations meeting in international conferences during the period 1977-1987. The 1977

¹⁴⁰ Gudmundur Alfredsson summarize these in his article , *Fourth Session of the Working Group on Indigenous Populations*, Nordic Journal of International law, Vol 55, 1986, n# 1-2, p 22. to mention some of them, the Martinez-Cobo Study (in particular the final chapter), written comments and suggestion received from governments, non-governmental organisations and indigenous organizations, a series of working papers (E/CN.4/Sub.2/AC.4/1985/WP.1 and Add.1-3, WP.2 and Add.1, WP.3, and WP.4 and Corr.1 and Add.1-4)...

¹⁴¹ The webpage of the now defunct Working Group do not contains all the session's report.

¹⁴² Most of the informations are retrieved from *First Nations strategic Bulletin*, volume 4, issue 2, February 2006; , Gudmundur Alfredsson in the article *Fourth Session of the Working Group on Indigenous Populations*, Nordic Journal of International law, Vol 55, 1986, n# 1-2 and the article by Rudolph C. Ryser, *Indian Nations and the United States debate Self-Determination and Self-Government at the UN*, Center for World indigenous Studies, 1993, document UNWGIP93.TXT.

Conference appears as a milestone for the indigenous drafts, as indigenous representatives submitted collectively a document entitled “*Draft Declarations of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere*”¹⁴³. The declaration contains 13 statements on indigenous rights, such as:

- Recognition as Nations and/or subjects of international Law,
- Equality in Rights and Status,
- Accordance of independence, consistent with the nation/group’s desire.
- Recognition and application of treaties and agreements entered by indigenous nations or groups with other states in respect with international law and principles. These agreements shall be subject to unilateral abrogation.
- Recognition and respect of indigenous jurisdiction over themselves. No State shall assert or claim to exercise any right of jurisdiction over any indigenous nations or group unless pursuant to a valid treaty or other agreement freely made with the lawful representatives of the nation or group concerned;
- Recognition of indigenous territories. No states shall claim or retain, by right of discovery or otherwise, the territories of an indigenous nation or group, except such lands as may have been lawfully acquired by a valid treaty or other cessation freely made.
- Establishment of peaceful and equally fair procedures for the settlement of disputes related to indigenous matters. These procedures shall be binding and consistent with international law;
- Respect of National and cultural integrity of the indigenous nations and groups. Prohibition of ethnocide.
- Environmental protection of the territories of indigenous nations or groups. Destruction Deterioration and pollution of indigenous lands and natural resources;
- Respect of indigenous membership. Recognition and respect of indigenous self-identification right.

¹⁴³ UN doc E/CN.4/Sub.2/L.684 Annex IV, p.3. July 21, 1978.

- All of the rights and obligation declared herein shall be in addition to all rights and obligations existing under international law.

The above-summarized declaration is seen as the fundamental political document of the international indigenous movement, and provided the basis for the formulation of the draft principles of the working group. As for its fourth session, the Working Group included a list of seven principles for inclusion in the draft declaration on indigenous rights¹⁴⁴. They read as follow:

1. The right to full en effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments, particularly in the charter of the United Nations and the international bill of human rights.
2. The right to be free and equal to all other beings in dignity and rights, and to be free from discrimination of any kind.
3. The collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty and security of person.
4. The right to manifest, teach, practice and observe their own religious traditions and ceremonies, and to maintain, protect and have access to sites for this purposes.
5. The right to all forms of education, including the right to have access to education in their own languages, and to establish their own educational institutions.
6. The right to preserve their cultural identity and traditions, and to pursue their own cultural development
7. The right to promote intercultural information and education, recognizing the dignity of their cultures

The formulation of the WGIP principles differ slightly from the declaration submitted during the 1977 conference, even though one finds a clear similarity between the topics covered. The declaration adopted during the

¹⁴⁴ E/CN.4/Sub.2/1985/22 annex II

1977 conference is somewhat narrower than the 1985 draft principles of the WG. The dispositions contained in the 1977 document are directed to “*the Defence of the Indigenous Nations and Peoples of the Western Hemisphere*”, whereas the draft principles are aiming a universal declaration on the rights of Indigenous Peoples¹⁴⁵. This major difference maybe explains the strong wording of the 1977 declaration about recognition, independence and self-determination. The principles of the WGIP are in comparison, and from today’s perspective, more predictable and convened. The first articles are reminding the universality of former Human Rights instruments, such as the universal declaration of 1948 and the international bill of Human Rights, to progressively address some aspects of ‘indigenous’ Collective Rights. Taken as a framework, these principles are consistent with the general theory of minority rights, and do not contain any more specificity. As Gudmundur Alfredsson reported in 1986, “*the importance of these draft principles relates perhaps mainly to the fact that they were drafted in the first place. It was a difficult birth, with publicly stated opposition (see the statement of one of the five members of the WG as summarized in the group’s report, E/CN.4/Sub.2/1985/22, para 63) but it meant that the beginning of the group’s standards setting activities as laid down by the ECOSOC mandate*”¹⁴⁶.

3.3 The Draft Declaration on the Rights of Indigenous Peoples

Year after year, the Working Group developed the suggestions and comments of indigenous participants into principles to finally produce a comprehensive text with detailed provisions. The seven principles above mentioned got sharper and numerous¹⁴⁷ and allowed the WGIP to present a

¹⁴⁵ As it was the UNDRIP former name.

¹⁴⁶ Gudmundur Alfredsson, *Fourth Session of the Working Group on Indigenous Populations*, Nordic Journal of International law, Vol 55, 1986, n# 1-2.

¹⁴⁷ No session took place in 1986 due to UN’s financial difficulties. From the informal seminar organized to compensate the absence of annual meeting of the WGIP in 1986, three new principles are added to the 7 adopted by the WGIP. In 1987, the indigenous

first version of a draft in 1988¹⁴⁸. Until the adoption of a final draft in 1994, the text was reviewed, taking into account the comments and critics of the indigenous participants. Within these 6 years of debate, the WGIP proved its competence to maintain a dialogue between indigenous and legal experts. Some of the substantive developments are the incorporation of the right of self-determination in the draft declaration and the use of the term ‘peoples’ instead of ‘populations’. Under the lead of Erica Daes, the Working Group managed to keep its non-political position in its standard setting activities by focusing its work thematically, through, for example, the establishment of cluster groups¹⁴⁹. Nevertheless, and especially in the context of the international year of the world’s Indigenous Peoples¹⁵⁰, the incessant process of comments and consideration was threatening the credibility of the WGIP to fulfil its mandate of standard setting. At the 1993 session of the Working Group, the chair announced that the session would be the last in which the text was debated. The majority of the WGIP did not want to delay the production of the draft for yet another year concluded their private discussions on the draft and released the report of its 11th session on August 23¹⁵¹. The text was then adopted by the Sub-commission in 1994 with resolution 1994/45. After considering the Text submitted in 1994, this part will address the contemporary reflections about the true value of the final United Nation Declaration on the Rights of the Indigenous Peoples.

representatives reviewed the principles they drafted in 1985, and add 2 new principles. The report of the WGIP in its 5th session contains the compilation of all different lists as annex V and II of the report E/CN.4/Sub.2/1987/22.

¹⁴⁸ This first draft is reviewed in 1988, first as a working paper: E/CN.4/Sub.2/1988/25, then included in the annual report of 1988, in annex II: E/CN.4/Sub.2/1988/24.

¹⁴⁹ In 1989, three groups are formed to discuss the draft. The groups are divided in themes: ‘Land and resources’, ‘political rights and economy’, ‘other matters’. The Reports are found as an annex of document E/CN.4/Sub.2/1990/42

¹⁵⁰ In resolution 47/75 proclaiming the international year of the world’s indigenous peoples, the General Assembly asked the working group to complete the drafting in 1993 and submit its report through the sub-commission to the Commission on Human Rights. The final statement of the World Conference on Human Rights also called upon the Working Group to complete the draft in 1993 (Vienna declaration and programme of action, A/conf.157/23).

¹⁵¹ Catherine J Iorns reports that the feeling was not unanimous. “*various indigenous participants in particular wanted to be able to take back to their peoples the revisions that had been produced in order to review and respond to them*”, *The draft Declaration on the Rights of Indigenous Peoples*, Murdoch University Electronic Journal of Law, 1993, vol 1, number 1.

3.3.1 The Draft of 1994 and Its History

The WGIP's draft stand as a historical document for the recognition and respect of the rights of the Indigenous Peoples. As submitted to the Sub-commission, the text was composed of a preamble of 18 articles, and a corpus of 45 articles divided in 9 thematic parts. These parts address respectively the general and fundamental rights of Indigenous Peoples, their right to existence (physically and culturally speaking), their cultural rights, provisions related to education and public information, their economic and social concerns in relation with the state they live in, their concerns on land and other property rights, their rights to self-government. Part VIII contains general monitoring and implementation provisions, and part IX general statements about Indigenous Peoples' rights and situating them within the international Human Rights framework.

As being drafted in close collaboration with indigenous participants, the draft satisfies most of the indigenous concerns. Contemporary critics had it that the draft as submitted was not "*as good as it needs to be for the best protection of indigenous Rights and needs*"¹⁵². The arguments set forth to support such critics are both well structured and documented. It is however the opinion of the author that those critics only have an academic interest. Indigenous matters have reached the UN as a challenge to the internationalised struggle of discrimination. It otherwise addresses a problem of sovereignty and governmental representation within the borders of recognized States. Consequently, indigenusness can not solely be addressed by general instruments such as a declaration. It is moreover not assumed that all states have indigenous group according to the Martinez Cobo working definition. A declaration in fact is a text declaring/(re)affirming/acknowledging the inherent value of specific standards, and do not aim the establishment of a system of protection *per se*.

¹⁵² As for example, Catherine J Iorns, in the conclusion of her article *The draft Declaration on the Rights of Indigenous Peoples*, Murdoch University Electronic Journal of Law, 1993, vol 1, number 1.

The draft declaration remedied the weakness of former legal instrument such as the ILO convention 107 and 169, notably by translating into the international Human Rights language the indigenous views on self-determination, self government etc...Formally, the declaration succeeded to become what it is. To quote Erica Daes: *“The draft declaration of the rights of indigenous peoples was not intended to be a synthesis of current practice, but a beacon of hope- a beacon of hope for the justice indigenous peoples seek, as they shed the fears, humiliation, and despair of centuries of oppression. Shall the United Nations offer them a declaration of rights to inspire them, or one that deepens their sense of rejection by the rest of humanity?”*¹⁵³.

The establishment by the Commission on Human rights of its own Working Group (the Working Group on the Draft Declaration, WGDD) to review the text submitted by the Sub-Commission prolonged the debates around the declaration for another 12 years. If under the authority of the Sub-commission, the focus was on the legal formulation of standards reflecting the frames of International Law and indigenous views on key notions, the review by the WGDD recalled how politicized the enterprise of a declaration in fact was. The members of the WGDD were representatives of member states of the Commission on Human Rights, and throughout the debates, some States began to take different approaches regarding the text proposed by the Sub-commission¹⁵⁴.

¹⁵³ Statement made to the Sub-Commission on the occasion of the first International Day of the World’s Indigenous People, 9 august 1995. Recollected by Russel Lawrence Barsh for his article, *Indigenous Peoples and the UN Commission on Human Rights: a case of the Immovable Object and the Irresistible Force*, Human Rights Quartley, 18.4, 1996, pp 782-813, p 808.

¹⁵⁴ Jeremie Gilbert, in the article, *Indigenous Rights in the making: the UNDRIP*, in International Journal on Minority and group rights, volume 14 2007, no 2-3, sums up three categories reflecting State reluctances: *“In the first group were a limited number of States willing o support the text of the draft as adopted by the SC (or with very minor amendments : Usually included members of the Latin America and the Caribbean countries such as Chile and Mexico.(UN Doc.E/CN.4/2002/WG.15/CPR.6 and UN Doc.E/CN.4/2003/92) In the second group, were the States supporting in principle the adoption of a declaration, while opposing the draft declaration, notably on the issue on Self determination and Land rights. Finally, in the third group, were the States more generally opposed to the recognition of the specificity of indigenous peoples’ claims and rejecting core issues such as Collective Rights”*.

In its first substantive decision, the council on June 29, 2006¹⁵⁵ , by a vote of 30 in favour, two against and 12 abstentions adopted a revised text of the declaration and passed it to the general assembly for its final approval. At that time, it was expected that the draft would be formally adopted by the GA at the start of its 61th session in November. Nevertheless a number of States in the UN's African Group withdrew their support, and eventually agreed to act as a voting bloc in deferring the vote on the draft. In December 2006, Namibia proposed a successful resolution deferring the vote on the draft. Between late December 2006 and September 2007, Indigenous Peoples and states supporting the draft engaged intense dialogue

¹⁵⁵ Resolution 2006/2.

4 The Legacy of the Working Group on Indigenous Populations

The UN held the 6th and the 7th December an informal meeting in Geneva to discuss the most appropriate mechanism to continue the work of the Working Group on Indigenous Populations¹⁵⁶. On December 13th 2007, in the closing hours of its 6th session, the United Nations Human Rights Council adopted by consensus a resolution to establish a new subsidiary body, the 'Expert Mechanism on the Rights of Indigenous Peoples'. This part will consequently tackle the main aspects prior to this establishment, such as the reactions following the abolishment of the WGIP, the content of the informal meeting and the design of the new organ.

4.1 A Forseeable Abolishment?

The Working Group has been contextually established by the sub-commission to answer to a predictable recommendation of the Martinez-Cobo Study. Its establishment, as well as the formulation of its mandate, was meant to fill the lack of pragmatic information about the situation of indigenous peoples worldwide, and to draft a document, to secure their rights.

As above mentioned, the Working Group submitted a final draft to the Sub-commission in 1994, after long years of discussion and debate amongst members and participants. Had the Working group already fulfilled its mandate? If not, several aspects could have spoken for a foreseeable abolishment of the WGIP. Some of them depend from institutional weaknesses, whereas others are mostly due to the evolution of the way to perceive Indigenoussness in the UN (an evolution supported by international

¹⁵⁶ Human rights council Resolution 6/16, 28 september 2007.

indigenous lobbying, through the WGIP itself). Despite all its achievements, this mature Working Group had its flaws.

4.1.1 Institutional Weaknesses of the Working Group on Indigenous Populations

Technically, the Working Group was called a working group. It was located as the lowest level of hierarchy of the United Nation system, and met annually in Geneva. The distance, geographically and administratively speaking, could either reflect the lack of consideration to this, in fact, committee of expert and its topic, or the mistrust of the assembly of governments toward a sensible field of Law. As a result, every production had to laboriously climb every level to finally have some practical effects. The History of the draft declaration and the establishment of a further Working Group (namely, the Working Group on the Draft Declaration) illustrate at best the implications of this institutional weakness of the Working Group.

If the number of participants of the WGIP's sessions clearly stands as a success, it can also be used to reveal another inadaptability of the WGIP to perform its mandate effectively. The UN leaflet Number 3¹⁵⁷, while explaining pedagogically how to attend the WGIP's session, also tells the story, maybe between the lines, of frustration and confusion. The Working Group's meetings were a long succession of formal, individual speeches, given mostly by indigenous representatives, but also by Sub-commission experts and government representatives. The speeches were made in the order in which people ask to speak, and consequently, no continuity to the debate was assured. As already mentioned above, and as for example yet again, the WGIP heard in 1985 about 30 hours of oral statements without having emptied the speaker's list. One can imagine the difficulty to remain focused during these speeches! The WGIP was designed as a study group to

¹⁵⁷ Leaflet entitled "UN Charter-based Bodies and Indigenous Peoples".

codify and review international standards. It developed to become the UN biggest Fora. To some extent, the WGIP suffered its own success.

Another point to mention was the absence of indigenous representative within the WGIP's members. The history of the WGIP does not suggest that it has been a problem, nevertheless this absence regarding to the will to enhance indigenous participation in official foras was pointed out. In brief, the WGIP's original design reflected the past; a past where Indigenous Peoples were just 'populations', a past where indigenous issues were seen solely as a matter of discrimination, a past before the Working Group on Indigenous Populations. An update was needed.

4.1.2 The Working Group's Last Years of Existence

In fact the Working Group was seriously threatened since 2002, with the establishment of the Permanent Forum on Indigenous Issues, at a higher level, that is, as a subsidiary body of the ECOSOC. In its 20th report, the WGIP considers: *"Although the members of the WGIP had been aware that certain Government were suggesting in other forums that the Permanent Forum on indigenous Issues replace the WGIP as soon as possible, that proposal did not explicitly surface during the debate this year. In fact, not a single government speaker advocated the abolition of the Working Group."* (...) *"In this context, it was very important to the members of the Working Group that the 20th session should provide an opportunity to canvass views and listen to comments on its future."*¹⁵⁸

The arguments for the abolishment of the Working group were Two-folded. Some presented the redundancy of the mandates, and that the UN does not have the resources to sustain more than two mechanisms dealing with indigenous peoples...Nevertheless, the attendance of the WGIP's sessions decreased drastically after 2002, and some considered that it became *"increasingly directionless because of the lack of specific mandate"*¹⁵⁹.

¹⁵⁸ Report of the WGIP on its 20th session. UN Doc.E/CN.4/Sub.2/2002/24 para 64.

¹⁵⁹ Expression taken from the document IMWGIP/2007/CRP.9

Eventually, the Working Group vanished, as a consequence of the ongoing UN reform: the Sub-commission had held its last session in August 2005. Scholars expressed both their concerns and hopes for the future¹⁶⁰ of the protection of minorities and Indigenous Peoples. The Commission on Human rights was terminated and replaced by the new Human Rights Council in April 2006 with GA res 60/251 of 3 April 2006. Throughout the first cycle of the Council, the future of the various Working Groups established by the Sub-commission was unclear and disputed. Though, for the period of its first year (2006-2007), the Human Rights Council prolonged all the mechanism under the commission, including the Sub-commission. It was decided in June 2007 that the Council would discuss at its 6th session the most appropriate mechanisms to continue the work of the Sub-commission's Working Groups. Regarding the Working Group on Indigenous Populations, the council decided to request the OHCHR to convene an informal meeting to discuss the issue on the 6th and 7th December 2007.

4.2 Feeling the Void within the UN Machinery

The termination of the WGIP made only little noise in comparison with the adoption of the declaration. No need to start wondering why, the result of such questionings would be nothing more than suppositions. On the other hand, this silence is in no case the sign that the WGIP's abolishment had gone unnoticed. In fact, many were those who lobbied for the establishment of a successor, to continue its work. After demonstrating the Working Group's uniqueness in the UN machinery, this part will present the main features of the lobbying and its position that lead to the informal meeting of the 6th and 7th December.

¹⁶⁰ As an example, the article of Asbjörn Eide and Rianne Letschert, *Institutional Developments in the UN and at the Regional Level*, International Journal on minority and group rights, vol 14, 2007.

4.2.1 Comparative Mandate Analysis of the Indigenous-Related Organs of the UN

The WGIP's abolishment is leaving a void in the UN system. One could point out its experience and past achievements, as listed in the 2nd chapter, in order to demonstrate the uniqueness of this group for the indigenous cause. It is however not sufficient for the jurist to justify the value of the WGIP solely based on these elements. Things have changed since the WGIP's establishment; indigenous concerns are reflected in the UN system through the Permanent Forum and the special rapporteur. Consequently, the best way to grasp and demonstrate the void left by the WGIP's abolishment is a comparative mandate analysis between these organs.

The result of such an analysis shows that only the Working Group was designed to set up international standards and to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations.

The Permanent Forum is a place to discuss indigenous issues related to economic and social development, the environment, education health and human rights. In its annual reports to the ECOSOC, it includes recommendations and matters for consideration by the UN system. The Permanent Forum stands as the adviser of the ECOSOC: It has the mandate is to give expert advice and recommendations on indigenous issues, to raise awareness and promote integration and coordination of activities relating to indigenous issues within the United Nations system and to prepare information on indigenous issues.

The Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, is an independent expert whose mandate enables him to conduct official missions to countries. The Rapporteur gathers information for its annual thematic reports on issues regarding the rights of indigenous peoples to the human rights council. He is the agent who looks for the proper enforcement of international standards: in case of imminent danger of violations he is mandated to send urgent appeals to

governments. In case of lesser urgent violations or those that have already occurred, the Special Rapporteur sends allegation letters.

Consequently, the argument in favor for the WG's termination claiming the redundancy of the mandates within the UN system had a very limited relevancy. The Working group was the only forum for legal experts to formulate/review international standards. It was a necessary link between the advisor, the Permanent Forum, and the supervisor, the Special Rapporteur. In our context of the declaration and its opponents, this kind of *Summa Divisio* formed by these three organs is more than ever required.

4.2.2 Lobbying for a Succession

As a result of an extensive lobbying carried out throughout the first year of the council on the part of indigenous delegations¹⁶¹, the question of the WGIP's legacy has been kept on the agenda. This lobbying led the tenure of the informal meeting of the 6th and 7th December 2007.

The WGIP was the only Working Group of the former Sub-Commission left without successor¹⁶² despite the unanimous will of the Indigenous Caucus to, at least, create a new expert body. This will already been expressed during the WGIP's 24th session, august 2006. During the session's discussion on the future of its mandate in the framework of the reform of the Human Rights system, the Indigenous Caucus formulated different proposals for future mechanism in the field of the rights of Indigenous

¹⁶¹ Delegation mainly composed of the International Indian Treaty Council, the International Organization of Indigenous Resource Development (IOIRD), the Legal Commission for the development of Native Andean Peoples (CAPAJ), Eastern Door, The Foundation for Aboriginal and Islander Research Action (FAIRA), The Indigenous Regional Council of Cauca (CRIC), and the Ngobe-Bugle Center for Education (CEDHUNG). Information retrieved from the document of the Indigenous Peoples' Center for Documentation, Research and Information Docip (<http://old.docip.org/Human%20Rights%20Council/ReunionsAvenirGTPAen.pdf>).

¹⁶² Accordingly, the general attention was focused on the adoption of the declaration. It also notes that the groundless rumor, according to which the creation of an expert group on the rights of indigenous peoples could have threatened the mandate of the Special Rapporteur also played a negative role. Docip, *Update* 76, July/September 2007, p6.

Peoples. The Working Group itself submitted some recommendations to this end¹⁶³.

Let us be reminded that the opportunity of a reform is to reconsider a system with the aim of creating a new, more adapted and efficient system. The main concerns of the HRC were the innovation within the formulation of the new bodies' mandate, which would annihilate any form of duplication (even imaginary)¹⁶⁴. The Working Group had its flaws; the most significant have been listed above. Consequently, neither the Indigenous Caucus nor the WGIP could advocate the continuation of the WGIP's mandate as it was. The recommendations consequently had to take into account these constraints in their design, and at the same time enable the continuation of the WGIP's undertaken and unfinished work¹⁶⁵.

The Indigenous Caucus was well prepared. It organized a meeting on the 4th and 5th to draft together a convened mandate of the WGIP's successor to be debated on the day of the informal meeting. It also produced a three-point guideline to make the meeting as efficient as possible. The guideline¹⁶⁶ firstly reminded that the creation of a new expert group subsidiary to the HRC was not yet obtained. It consistently invited and urged all Indigenous Delegations to stay for the full week of the Human Rights Council' session¹⁶⁷.

The second point to be tackled concerned the level of the new expert group in the hierarchy. The indigenous caucus stressed out that the WGIP's successor must not depend on the Expert advice body of the HRC, the Sub-commission's successor. The new expert group has to be subsidiary to the council in order to remedy one of the WGIP's weaknesses. It is also relevant to add that the expert advice body lost important competencies regarding the

¹⁶³ The working group's recommendations are attached in the annex III, whereas the Indigenous Caucus' statements are reported in annex IV of the UN Doc A/HRC/Sub.1/58/22.

¹⁶⁴ Under the General Assembly resolution Res/60/251, para 6, the HRC is required to review all mandates mechanisms, functions and responsibilities of the commission. On the basis on that review, the HRC may improve and rationalize these.

¹⁶⁵ To have a reasonable grasp of what it might be, the WGIP identified issues requiring in depth-studies in the document E/CN.4/Sub.2/AC.4/2003/4.

¹⁶⁶ A reproduction of the document can be found at the webpage:
<http://old.docip.org/Human%20Rights%20Council/ReunionsAvenirGTPAen.pdf>

¹⁶⁷ 10-14 December 2007.

former Sub-Commission, mainly the power to decide the subjects to be addressed.

At last, the document concluded that the new expert group would not be approved by the Indigenous Caucus unless it is innovative with respect to the WGIP of the former sub-commission; it avoids all forms of duplication with other existing mechanisms¹⁶⁸, it finds States to present and sponsor the resolution.

4.3 Filling the Void: the Establishment of the Expert Group on the Rights of Indigenous Peoples

The United Nations Human Rights Council (HRC) in its resolution 6/16 of 28 September 2007 decided to hold one and half day informal meeting to discuss the most appropriate mechanisms to continue the work of the Working Group on Indigenous Populations. The webpage of the defunct working group, before the tenure of the informal meeting, contained a list of document of different origins to narrow the debate. These documents are of primary importance to asses the mandate of the WGIP's successor, to understand its origin, as to seize the different views and the stakes of the informal meeting. Consequently, an analytical summary of their content will be proposed, as an introduction to the formulation of the mandate of the new Expert Mechanism on the Rights of Indigenous Peoples.

4.3.1 The Informal Meeting of the 6th and 7th December 2007

A collection of twelve documents were available for consultation on the webpage¹⁶⁹. The collection regrouped a majority of recommendation from indigenous organizations and others, the documents for consideration in this

¹⁶⁸ That are the Special Rapporteur, the Permanent Forum on Indigenous Issues, but also the expert advice body of the HRC as well as the treaty bodies.

¹⁶⁹ <http://www2.ohchr.org/english/issues/indigenous/groups/groups-01.htm>.

part¹⁷⁰. If the title of the different documents may vary , all from a ‘draft’ to ‘proposal’, passing by ‘memorandum’ and ‘outline’, they all clearly express the position of the different organizations that attended the meeting.

Due to their numbers, one could think that each document gives expression for a proper point of view. It does not appear to be the case; the content of the recommendations/proposals/outline is sensitively the same. This statement leads the reader to think either that the nuances between one document to the other do have its importance, or that the consequent duplication of ideas are the result of an ongoing strategy to attract the attention. Repeating to be assured of being heard. Consequently, the task to lead an analytical summary of these documents poses some methodology challenges. The choice was made to lead the analysis around four main points: position, mandate, members and method of work.

The documents unanimously agree on the location of the new mechanism within the UN hierarchy, as for the terms of participation to the mechanism’s session. The WGIP’s successor has to be subsidiary to the HRC, offering the same condition of participation than the Permanent Forum, that is in other words, Member states, UN bodies and organs, intergovernmental organizations, Human Rights institutions, NGO with consultative status (as observers), organization of Indigenous Peoples could equally participate, using the practical arrangements of the former WGIP.

When it comes to the mandate, the documents, depending on their nature, offer more or less details¹⁷¹. Drafts, by nature, tend to be more explicit in their content due to their vocation of becoming a resolution. However one finds a common pattern of tasks to be assured by the new mechanism.

¹⁷⁰ The document IMMWGIP/2007/CRP.1, offering a matrix on United Nations Mechanism and bodies on Indigenous Peoples will not be taken into consideration here. For linguistic reasons, the documents IMGIP/2007/CRP.4, containing an Oral statement and Additional Recommendation submitted by the representatives of the Global Caucus of Indigenous Peoples regarding the work of the new United Nations Human Rights Council, and IMWGIP/2007/CRP.7 containing a written statement submitted by the Indian Movment “Tupaj Amaru”, non-governmental organization with ECOSOC status are left out of focus (the author of the present work does not understand Spanish).

¹⁷¹ As for example, the documents ‘Memorandum on the Indigenous Peoples Human Rights Expert Body to the Human Rights Council, submitted by the International Indian Treaty Council (IITC) and the International Organization of Indigenous Resource Development (IOIRD)’ (produced in July 2007), only presents four elements to be included in the new mechanism’s mandate, whereas the draft submitted for the occasion by the indigenous caucus contains a mandate subdivided from a) to f).

Consequent to its position and the remarks above-mentioned, the mechanism is designed as an expert group, reporting annually to the HRC with its advices on the best practices for the implementation of the rights of Indigenous Peoples. This design, directly drawn from the void left by the WGIP and the insufficient combination of the mandates of the Permanent Forum and the Special Rapporteur, is meant to be inclusive. It has to work in cooperation with the other mechanism on the situation of Indigenous Peoples to complement their work. The new organ shall therefore be able to review and undertake studies and focused research on human rights issues as they relate to Indigenous Peoples, promoting in close relation with States the realization of their rights .It shall support the HRC, in any tasks it is assigned. No mention is to be found about the continuation of the standard setting activities of the former WGIP. From this statement, one clearly sees the concern to implement the standards contained in the declaration, before the possible codification of another instrument on the rights of Indigenous Peoples. This appears to be both legitimate and, to a certain extend, wise. State reluctance has been a long lasting enemy of the former WGIP, mostly due to this mandate. Turning the WGIP's successor into a expert group giving advices on the best practice to implement the standards, with the support of case studies, leaves the initiative of producing instruments to that end to the concerned States. It also allows the mainstreaming and the promotion of the rights of Indigenous Peoples in a narrow fashion that would not be affected by the absence of official definition of the concept of indigenous peoples (see above, chapter I).

The membership of the new mechanism has to guarantee representation and equal opportunity between States and Indigenous Peoples. All documents reflect in their recommendations the concerns to assure expertise and cohesion within the UN agenda and to ensure indigenous participation. Consequently, one finds a combination of State- elected experts, Indigenous experts, Indigenous-selected experts along with eventually chair/member of the PFII and the special rapporteur, and representative of the HRC advisory committee with a number varying between 4 and 6, and sometimes documents offering two options.

Finally the new mechanism shall be able to determine its own methods of work to accomplish its mandate. This trait is maybe inherited from the conculent experience of the working group, which lead to the opening of its doors for indigenou organization in absence of consultative status

The content of the documents produced for the purpose of the informal meeting is not surprising in the light of the elements discussed above. The formulation of the documents may differ, but all authors remained consistent with each other in order to go on with the lobbying amerced in 2006, and one can already guess the main potential feature of the WGIP's successor. The baton is ready to be passed on...

4.3.2 The Establishment of the Expert Group on the Rights of Indigenous Peoples

The establishment of Expert Mechanism on the Rights of Indigenous Peoples constitutes the final piece of institutional-building of the council. As it has been seen, the decision appears to be a major step forward and a success for many States and indigenous peoples who have worked for its establishment over the last two years. The informal meeting also had another historical value since, for the first time in the UN history, both Co-chairs, the Indigenous Caucus representative Chief Littlechild and the Bolivian Ambassador, were Indigenous.

According to the resolution that established it¹⁷², the Expert Mechanism will assist the council in the implementation of its mandate by providing thematic expertise and making proposals to the council pertaining the rights of Indigenous Peoples. Its mandate is to be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, to address situations of violations of Human Rights and to promote the effective coordination and mainstreaming of Human Rights within the United Nations system. It is composed by *“five experts following the procedure established in paragraphs 39 to 53 of the annex to Council*

¹⁷² Human Rights council resolution Resolution 6/36.

resolution 5/1 of 18 June 2007. The Human Rights Council has strongly recommended to give due regard to experts of indigenous origin. The experts will serve for a three-year period and may be re-elected for one additional period. Although the Expert Mechanism shall not adopt resolutions or decisions, it should determine its own methods of work. For its first session, it will meet for three days and thereafter for up to five days and these sessions may be a combination of open and private meetings”¹⁷³.

The fast establishment of the Expert Mechanism has of course been welcomed, mainly as a sign of “ *good faith and political will of the Human Rights Council*”¹⁷⁴. Bolivia took the lead and produced the final draft in close collaboration with the Indigenous Caucus. The resolution was streamlined and amended in the final days of the session in negotiations between a number of states including Guatemala, Mexico, Denmark, Greece, Canada, United Kingdom, Spain and others. They worked to ensure that it could be adopted by consensus of the Council’s 47 member states, a requirement for the Councils’ structural or ‘institution building’ provisions, while at the same time maintaining a broad enough mandate to ensure its effectiveness. The first reactions collected on the creation of the Mechanism are of course , and legitimately, positive: from the mandate one clearly sees a continuity regarding the WGIP unfinished case study. The Expert Mechanism will be able to review them in the updated UN machinery, to asses them, and work for their endorsement *in concreto*. In other words, capital studies such as the UN Study on Treaties, the Study on Permanent Sovereignty over Natural Resources, the Study on Indigenous Peoples’ Cultural Heritage and others, will be followed up. Moreover, the creation of this Mechanism gives a new opportunity to “*propose ways for the Council, UN member states and the UN system as whole to implement the Declaration*”¹⁷⁵.

¹⁷³Information taken from the High Commissioner for Human Rights’s webpage, <http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/mandate.htm>

¹⁷⁴ Chief Littlechild, press release: United Nations Human Rights Council establishes new Expert Mechanism on the rights of Indigenous Peoples December 13th 2007, International Indian Treaty Council, December 21, 2007.

¹⁷⁵ International Indian Treaty Council Executive Director Andrea Carmen, Yaqui Nation, linking the adoption of the declaration and the establishment of the expert mechanism, quoted in the IITC press release of December 21 2007.

As a whole, the new body provides opportunities for Indigenous Peoples to work with States, UN agencies and bodies, in addressing Human Rights violations worldwide. “*We look forward to seeing what it can do*” stands as the best illustration of the optimism and excitement provoked¹⁷⁶.

However, some elements of the mandate proved to be disappointing for some. As an example, Bolivia, one of the original main sponsors of the draft establishing the new body, said while it would fully support the new Mechanism, it was not satisfied with the end result. Bolivia stressed that it disagrees with a number of basic points of the resolution. In particular, it would have wanted a reference to the full implementation of the UN Declaration on the Rights of Indigenous Peoples and regretted that “*the full participation of indigenous peoples is not guaranteed*”¹⁷⁷. Under these circumstances, Bolivia withdrew its name from the text.

Cuba said it would have preferred a more inclusive resolution, to allow to better take into account the interests of Indigenous Peoples. It pointed out that the thematic efforts of the new Mechanism would focus mainly on studies and research-based advice¹⁷⁸.

It is true that the conditions of membership included in the official mandate of the new Expert Mechanism do not contain any of the recommendation produced by the different authors of the documents before the informal meeting. Consequently there is no formal guarantee for Indigenous Peoples to become members of the body. The procedure established in paragraphs 39 to 53 of the annex to Council resolution 5/1 of 18 June 2007 to be following in appointing members only have mentions in their paragraphs 50, 51,52 to exceptional circumstances or the particularity of certain post justifying the additional nominations with equal or more suitable

¹⁷⁶ IITC Board President Francisco Cali, Mayan Kaqchikel from Guatemala, member of the UN Committee for the Elimination of Racial Discrimination (CERD), IITC press release of December 21 2007.

¹⁷⁷ A/HRC/6/L.42

¹⁷⁸ Information taken from Council Monitor, International Service for Human Rights, Human Rights Monitor Series, Human Rights Council, 6th session, daily update, 14 december 2007.

qualification for the post. The views of the stakeholders are also to be taken in account¹⁷⁹.

On June 18, 2008, the Human Rights Council appointed the five members of the expert mechanism on the rights of indigenous peoples, for the period of 2008-2011. They read as follows:

Ms Catherine ODIMBA KOMBE (Congo)

MR José Mencio MOLINTAS (Philippines)

MS Jannie LASIMBANG (Malaysia)

Mr José Carlos MORALES MORALES (Costa Rica)

Mr John HENRIKSEN (Norway)

The Expert Group Mechanism on the Rights of Indigenous Peoples held its first session from 1 to 3 October 2008 at the United Nations Office in Geneva. It will certainly take some years before the new body reaches its cruising speed. . There are however many reasons to be optimistic:

First, the context of establishment of the Mechanism significantly differs from the Working Group's. The WGIP was a measure, a recommendation following the martinez-cobo study as it was an innovation. The new expert mechanism is the result of two years of advised lobbying, and constitutes the last piece of the institutional building apparel of the Human Rights Council. Its mandate has been largely discussed to prevent any forms of redundancies, and to incorporate the views of indigenous organizations. To compensate for its lack of experience, the mechanism benefits from the history of the WGIP, and the support from both the Permanent Forum and the Special Rapporteur.

¹⁷⁹ The paragraphs read,

50. The consultative group will consider candidates included in the public list; however, under exceptional circumstances and if a particular post justifies it, the Group may consider additional nominations with equal or more suitable qualifications for the post. Recommendations to the President shall be public and substantiated.

51. The consultative group should take into account, as appropriate, the views of stakeholders, including the current or outgoing mandate-holders, in determining the necessary expertise, experience, skills, and other relevant requirements for each mandate.

52. On the basis of the recommendations of the consultative group and following broad consultations, in particular through the regional coordinators, the President of the Council will identify an appropriate candidate for each vacancy. The President will present to member States and observers a list of candidates to be proposed at least two weeks prior to the beginning of the session in which the Council will consider the appointments

Second, its location within the UN assures more independence for its work than the Working Group ever enjoyed in all of its 25 years of experience. Its quality as subsidiary body of the Council, and the faculty to determine its own methods of work will reduce the gaps between itself and the decision-taking institutions.

At last, and even if the Mechanism is not to adopt any resolutions or decision of its own, its recommendations will definitely weight more than those of the Working Group. Advices and recommendations produced by an organ called ‘the Expert Mechanism on the Rights of Indigenous Peoples’ leaves a bigger impression than those emerging from a ‘Working Group on Indigenous Populations’. This subtlety may appear irrelevant to some, but the title of an organ reflects the consideration due to it. The denomination of ‘working group’, gives expression for the laborious nature of the work; and yes, to some extent the WGIP functioned laboriously. The Expert Mechanism will benefit another cachet, that is, the one of expertise.

Of course, the future is uncertain, and it would not fit a lawyer to build certainties on movable grounds... But if the future is uncertain, so is the worse. Under its 25 years of experience, the WGIP is teaching the lesson of optimism, not a naïve one, but merely the determined kind. Inspired by the witty rhetoric of Irene Erica Daes about the draft declaration, one could not find a better conclusion than the one stating the following:

“[The expert mechanism on the rights of indigenous peoples] *was not intended to be a synthesis of current practice, but a beacon of hope- a beacon of hope for the justice indigenous peoples seek, as they shed fears, humiliation, and despair of centuries of oppression. Shall the United Nation offer them [an organ] to inspire them or one that deepens their sense of rejections by the rest of humanity?*”¹⁸⁰.

¹⁸⁰ Statement made to the Sub-Commission on the occasion of the first International Day of the World’s Indigenous People, 9 august 1995. Recollected by Russel Lawrence Barsh for his article, *Indigenous Peoples and the UN Commission on Human Rights: a case of the Immovable Object and the Irresistible Force*, Human Rights Quarterly, 18.4, 1996, pp 782-813, p 808.

5 Analysis

The Struggle of indigenes on the international level for the respect of their Human Rights is of higher importance for any Human rights lawyer and jurist. Not only it challenges the ideals of justice and good faith, maybe the most valuable value acknowledged in the ethic of International Law, but the tale of Indigenous Peoples illustrates the failure of formulation and use of the Human Rights through history. It also reveals the flaws of the traditional articulation of these rights. In that sense, the events discussed all from the establishment of the WGIP in 1982 to the first session of the EMORIP in October 2008 attest a legal awareness that constitute a good omen for a new era where the whole understanding of Human Rights may be updated. Let us not miss that opportunity.

History shows that every conception of a legal instrument including new moral values expressed into rights succeeds an era marked with social injustices or even humanitarian disasters. Human Rights can appear then to be a reaction, a tool, to prevent the repetition of these injustices for the future. As for example, against anarchy and the religion wars, Hobbes and Bodin established absolutism and its limits. Against that absolutism, Locke introduces liberalism and its police. In the XIXth century, Marx proclaimed the work value to break the bourgeois-state inherited from liberalism. The XXth century was marked with the quests for the good of humans on a global scale, it lead to the totalitarian States and its despise of the individual. In that sense, the UNDHR, through its array of individual Human Rights, still is haunted by the horrors of nazism's spectra

So, how to interpret the adoption of the declaration on the rights of indigenous peoples? Is it a just a consequence of a legal theory trapped by its own universalism? Is it the *coups fatal* for a post-colonialist period?

It is only now that we can set the bases for an answer to that question. As we seen, there are no such things as pure Indigenous Rights: the Declaration only proclaims existing rights and assess some legal remedies to assure their respect. Yet this reasoning relies on the acceptance of indigenous groups as

'Peoples'. If one could state that this recognition is the fulfilment of the universalism of Human Rights, this inscribes it self in the greater movement amerced after WWII to get out of the colonial times (see the controversy about self-determination and the salt water thesis). The proclamation of a substantive self-determination as enjoyed by Indigenous Peoples also shakes the ground of the State positivism and the government's legitimacy. It is the opportunity to break the era of the norm within democratic designs, by introducing other values than association and allegiance as the prerequisites for political representation.

Of course, an organized lobbying from indigenous supportive actors marked the events of 2007. Nevertheless, the stakes of the indigenous movement for the recognition of their status and rights allows putting in perspective some fundamental grey zones in the dynamic of the Human Rights theory, as it illustrates its paradoxes.

At the same timeline that the West was forging its array of Human Rights, the marginalization of Indigenous Peoples grew stronger. This phenomenon may be just another reminder that legal norms are not the Law. Legal norms are only describing the law; which is in its turn an instrument to seek justice. Law, is an instrument to serve a greater cause. It must not be confused with the cause it self. Thus, the elaboration of formulas shall and needs to take into account all factors being involved in a dialectic process. The WGIP in codifying the draft declaration reunited with the conception of laws and rights as sharing a proper source, the observation of the relations between humans in a determined frame: the romans took the City as unity; the WGIP took the State and its Peoples.

The ratio of rights is horizontal: Law only intervenes between humans or human groups (may they be called society, states etc...) and as an instrument to solve disputes. Equality now being at the heart of the international concerns for the respect of Human Rights, and international

peace and security¹⁸¹, the questions of recognition and identity still are challenging these goals. These notions are indeed still connected with a question of allegiance of established sovereignties. As for example, the refugees, which statelessness *de facto* endangers the respect of their human rights, do not enjoy any legal identity. They become the category of ‘Asylum-seekers’, a qualification which a third State may grant or not. As for the Indigenous Peoples, weakened in the limbo between statelessness *de jure* and the absence of statehood *de facto*, still are victims of racism and a Darwinist historicism, according to which the conquered/vanquished are worth less.

If law and the distribution of rights operate horizontally, it requires a dialogue as base for mutual recognition. Political recognition, as illustrated by the indigenous movement, marks a tension between equality in dignity and the right to be different. Does it imply strict neutrality in the recognition of all differences? Or shall we abandon this neutrality to redress the inequalities of chances between different groups? Special measures in International Law would be the proof that it opted for the latter. However, these special measures are of remedial nature, and there are still States refusing the consequent vision of a fragmented *dêmos*. Here again, the argument against special measures, minorities and Indigenous Peoples finds a solid ground in the individualistic conception of the citizen/human being deduced from the first Human Rights documents.

International Law is not the expression of a meta-etatic order, and *a priori*, the absence of an official international legislator favors a horizontal vision of legal interactions. The policy of the WGIP to open its session to Indigenous Peoples concretizes this idea, by becoming UN’s biggest forum. This innovation marked the beginning of the indigenous representation at the UN. But will the Indigenous Peoples be able to keep their identity and originality by playing according to the rules of those who dominated them for so long? The challenge then lies in the faculty of International Law to

¹⁸¹ As it is visible through the systematic rejection of gender-based discrimination and racism within the UN charter, Treaties and declarations.

adapt to these new actors and not instruct them to fit the system. It will otherwise be nothing else than just another form of assimilation.

Despite the evolution of International Law, its administration, its machinery, its matrix remains culturally occidental. The vision of the world as a patchwork of sovereignties, may they be legal or mercantile, is not the prerequisite of a legal international order. The collaboration with the indigenous, victims of the asymmetries of such matrix can help.

The declaration encourages an evolution and can be used as a milestone to mark a teleological change in codifying legal standards: Land becomes more than a subjected source of raw materials; knowledge is now more than just a mercantile value on the market. Law can become a tool to respect, protect and fulfil *the common heritage of humankind*¹⁸², and accomplish the abandon of any doctrine advocating the superiority of races, peoples, individuals as well as the reason of the strong.

The concept of equality, stretched to its paroxysm, allows imagining a possible evolution of the Human Rights legal thinking. The earlier documents (la Declaration Universelle des Droits de l'Homme et du Citoyen, the American Constitution, the Habeas Corpus etc...) shows a ratio of rights calculated from a liberal perspective, inducting the 'Human Rights' as a vertical tension of force (free-enslaved, independent-subjected, legitimate-illegitimate). Consequently, the limitations of the relation become at best a 'necessary evil' to be explained and understood by the *demos* feeling a violation of their fundamental and initial state of freedom. Moreover, this *a priori* leaves the problem of the horizontal level: the concurrent and ongoing conflict of each and/against everyone claiming and calculating the scope of their own fundamental rights¹⁸³.

From the view of inalienable rights compromising the sovereignty of the political authority (ICCPR) the Human Rights standards on the international level matured to a ratio of rights interested to the essence of humankind (cultural rights, right to development etc...). As a result, an ontological

¹⁸² According to the formula of the declaration's preamble : "all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind".

¹⁸³ Such a depiction works equally for individuals and States.

tension is revealed, necessitating the construction of the principle according to which the Human Rights are indivisible and interdependent in order to assure their respect and coherence¹⁸⁴. This leads to a lexical redundancy, and numerous interpretations since different instruments have different binding force. The liberal philosophy aims human dignity, through freedom as a prerequisite of peace- International Law, judging from the preamble and article 1-2 of the UN Charter aims international peace and security through the respect of the Human Dignity. In this vision, the supreme good is an *osmosis*, which nevertheless remains *a priori* a-ethical¹⁸⁵, and relies on agreed values, an agreed definition of peace. It becomes also highly conservative since it aims the preservation of the system that produced the legal frame.

The evolution of Human Rights above described invites the lawyer to think about the advantages of considering those rights from the perspective of the being, in its literal understanding.

From the most pessimistic view, globalisation and the undeniable attraction of 'modern life' doom indigenusness to disappear. Law does however contain two fundamental aspects. First, it recalls values: in the hypothesis that the case of Indigenous Peoples is beyond redress, law reminds the indignity of their extermination for our shared humanity. Secondly, it gives the tool to compromise or even, avoid the worse. As illustrated by the

¹⁸⁴ The UN declaration on Human Rights made clear that all Human Rights are indivisible and interdependent. Economic, Social, Cultural Rights shall be respected, protected and realized on an equal footing with Civil and Political Rights. The resulting 'integrated approach' defined as the protection afforded by civil and political rights instruments to economic and social rights, refers to some extent to the idea of the 'permeability' of Human Rights norms. For a similar interpretation see Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia 2003, p 53

¹⁸⁵ The osmosis as a goal for international relations does not necessarily take into account - and respect- the primary composition of the world. It can presuppose an action of transformation- or better, of homogenisation. The ongoing 'war on terror' (roughly obeying the order 'you are either with us or against us') casts a new light on Herbert Spencer's considerations from 1851. In his work *Social Statics*, Spencer notices "*the forces which are working out the great scheme of perfect happiness, taking no account of incidental suffering, exterminate such sections of mankind as stand in their way (...). Be he human being, or be he brute, the hindrance must be got rid of*". Herbert Spencer, *Social Statics: or, The Conditions essential to Happiness specified, and the First of them Developed*, London: John Chapman, 1851, Part IV, Chapter XXX general considerations.

indigenous lobbying, law has become the way of the modern revolt: disciplined, calm, it remains nevertheless obstinate. In this view, the worst becomes the sparkle engaging the fire of action. The more the action mobilizes, the less law is utopian. It is however necessary to legitimate such action philosophically.

Thereon, and in a logic reminding Wilhelm of Ockham¹⁸⁶, the Human Rights should become the legal prerequisite of the existence: rights shall protect all the necessary aspect of existence for living entities. Such 'legal nominalism'¹⁸⁷ allows an inclusive conception of principles, based on observation, and conducts the legal actors to define together the conditions of a *symbiosis*, horizontally and vertically, instead of conceptualizing the terms of a universal *osmosis*. Accordingly, International Law would aim human dignity through international peace and security.

Accepting the paradigm 'I am therefore I shall be able to be' transforms every legal initiative into an *erga omnes* obligation, and permits the expansion of law as one movement, instead for an addition of interested spheres. Even if such paradigm may sound highly individualistic in its formulation, it allows the articulation of *individualities*: in order to exist, 'I' shall live biologically (in a healthy environment), legally, culturally, and in a social/political context. The 'other' becomes then the necessary key for the fulfilment and recognition of 'my' existence as well as a tool to define 'my' identity. In that way, the questions of coherence in the articulation of individual and group rights becomes pointless. Taken *a contrario*, it

¹⁸⁶ Towards the end of 1327 the Franciscan Minister General, Michael of Cesena, who had himself been recently summoned to Avignon by the Pope, ordered Ockham to study John XXII's bulls of 1322-4 on whether Christ and the Apostles had owned anything and on the poverty of the Franciscan Order in particular. The question was delicate. The papal court was by then scandalously opulent, and John XXII was very much aware of the challenge to it by the advocacy of poverty that had been spreading in many Franciscan quarters in the previous decades. His series of bulls on the subject had been intended to put a stop to this movement. Comparing these with the Gospels and the writings of previous popes, Ockham boldly concluded that John XXII was himself heretical (Routledge Encyclopedia of Philosophy, Version 1.0, London: Routledge). Ockham's reasoning broke the traditional understanding of the concept of propriety, inherited from Roman law, and introduced a relation of necessity: the things on which the substance of an individual depends, is not a matter of propriety. Thus, I can eat an apple and at the same time not owning it.

¹⁸⁷ Based on the idea that no one can deny the right of the individual to the things which his substance depends on.

formulates a stronger prohibition to treatments creating *Homo Sacer*¹⁸⁸. As for Human Rights, this could strengthen its secularity¹⁸⁹. The concept of *symbiosis*, as a necessity and the goal of legal interactions, presents many advantages as it supposes forums to define the strictly necessary for existence, to question the teleology of Law and to merge different legal culture. An eloquent example is the Mohawk term for justice and law, translated by “*to live together nicely*”¹⁹⁰.

Echoing the stories of past deceit, the adoption of the declaration and the establishment of the expert mechanism to succeed the WGIP, allow an optimist -yet grounded- view for the future. However, one has to keep in mind that the progress made in the matter of indigeneity complies with a logic of social and legal justice to redress a situation morally and legally indefensible. As it shakes the ground of the traditional understanding of political representation and legitimacy, the declaration invites a symbiotic view of the world. It is therefore revolting to witness the advocating of a ‘European Indigenous People’s Movement’ aiming the legal predominance of European traditions, culture and majority to stop the “invasion” originated from immigration in Europe. As for example, the article of the Brussels Journal *Creating a European Indigenous People’s Movement*¹⁹¹ proposes a list of 6 goals and objectives, allegedly inspired by the UNDRIP. The rhetoric to defend such initiative ignores completely the historiography

¹⁸⁸ Slovoj Zizek about the n°3 al-quaida imprisoned in Guantanamo : M. Mohammed has become what Giorgio Agamben calls for *Homo Sacer*: “*a being legally dead but biologically alive*”. Slovoj Zizek, *Knight of the living dead*, New York Times, 24 mars 2007

¹⁸⁹ Many jurists consider that the acceptance of Human Rights necessarily is linked with the moral perception of human Beings as sacred. This renews the question whether or not Human Rights truly are secular. As for example, R.H. Tawney argued “*The essence of all morality is this: to believe that every human being is of infinite importance, and therefore that no consideration of expediency can justify the oppression of one by another(...). To believe this it is necessary to believe in God*”. Quotation found in Ari Kohen, *In Defence of Human Rights- a non religious grounding in a pluralistic world*, Routledge innovation in Political theory, 2007,p 15.

¹⁹⁰ Information taken from the summary of discussion by Marie Léger, Collected Papers and proceedings of the Seminar: *Right to Self-determination of Indigenous Peoples*, New York may 18, 2002. International Centre for Human Rights and Democratic development.

¹⁹¹ Fjordman, *Creating a European indigenous People’s movement*, the Brussels Journal, April 2008. Article available at www.brusselsjournal.com/node/3153.

of the indigenous movement on the international level and the teleology of the Declaration. Moreover, it uses a grave confusion of the right of self-determination with a right of self-preservation which feeds a resentment of injustice and jealousy for European nationalists.

This implies a political reading of the declaration that bears much resemblance to the theory of Carl Schmitt as exposed in *the concept of the political*¹⁹². The article of the Brussels Journal, categorizing a ‘European people’ as indigenous¹⁹³ establishes a relation of alterity, where the other, depicted as ‘the immigrant’, becomes an enemy, a threat against which protection and fight is required. Such recuperation denatures completely the scope of the rights of indigenous peoples: from equalitarian purposes to redress a legally and morally illegitimate situation, the declaration becomes the pretext to advocate, systemize and establish a ratio of domination.

If the idea of creating a european indigenous movement to assure the supremacy of european culture and representation within democratic schemes does not resist a rational, legal analysis; the spreading of that kind of claim can be dangerous. This is another sign that the promotion of indigenusness must have two dimensions: first, to assure the implementation and realization of the standards contained in the UNDRIP; second to actually instruct about indigenusness. The declaration would have more effects if it is understood and accepted by the non-indigenous peoples.

...*Indocti discant et ament meminisse periti*¹⁹⁴.

¹⁹²Carl Schmitt, *the Concept of the Political*, New Brunswick, NJ: Rutgers University Press, 1976. Originally published in 1932, *Der Begriff des Politischen*. The author used the French edition, *la notion de politique*, Calmann-Lévy, 1972. Schmitt’s thought is that the fundamental distinction of the politic is that between friend and enemy. Consequently, the questions of identity and alterity reveal the friend-enemy distinction. Politically, the notion of enemy implies a logic of struggle, which can eventually lead to a state of war.

¹⁹³ The intellectual association remaining unexplained!

¹⁹⁴ Let the unlearned learn, let the wise delight in remembering.

Annex

I. Legal instruments concerning Indigenous peoples

To some extent, the expression ‘Indigenous Rights’ is inaccurate. The stake of the indigenous struggle on the international level is the respect of their Human Rights, not the creation of any: respect and “*protection within a State, without interrupting sovereignty*”¹⁹⁵. Consequently, Indigenous Peoples are concerned in many different instruments such as declarations, covenants, treaties and reports. They cover various Human Rights, from the most basic interdiction of discrimination to more ‘indigenous-specified’ rights.

The Universal declaration of Human Rights (1948)

Art1: All human beings are “equal in dignity and Rights”

Art2: Everybody is entitled to the rights “without distinction of any kind, such as race, colour , sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

Convention on the prevention and punishment of the crime of genocide (1951)

Genocide means any act which has the intention of destroying, in whole or in a part, a national, ethnical, racial or religious groups. Art.2 contains a list of act falling into the incrimination of genocide-

International Covenant on Civil and political Rights (1966)

Contains provisions for Collective Rights, within art 27. The covenant has a complaints procedure. Source of the indigenous jurisprudence.

International covenant on Economic, Social and Cultural Rights (1966)

¹⁹⁵ *Human Rights and Criminal Justice for the Downtrodden* Essays in Honour of Asbjörn Eide, Morten Bergsmo editor, Martinus Nijhoff Publishers 2003. Chapter , the Greenlanders and their human rights choices, Gudmundur Alfredsson, p454

Contains provisions for Collective Rights.

Convention on the Elimination of all Forms of Racial Discrimination (1966)

Article 1 defines 'racial discrimination' as “ *any distinction, exclusion, restriction, preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*”.

International Labour Organization Convention 169 (1989)

See above.

Convention on the rights of the Child (1990)

Art.2 contains regulations and suggestions relevant to Indigenous Peoples on the non- discrimination of children,

Art 17 towards the broadcasting of information by the mass media in minority languages,

Art.29 regarding the right to education, education on Human Rights, own cultural identity, language and values.

Art.30 states that children of indigenous origin shall not be denied their right to their own culture, religion or language.

Declaration on the right of person belonging to National or Ethnic, Religious and linguistic minorities (1992)

The declaration deals with all minorities including Indigenous Peoples and concerns individual rights and States obligations.

Art.1 on national or ethnic, cultural, religious or linguistic identity of minorities.

Art.2 free expression and development of culture, association of minorities among themselves, participation in decisions regarding the minority.

Art.3 the exercise of minority rights, both individual and groups.

Art.4 education of and about minorities

Convention on biological diversity (1992)

Art.8 (j) the convention calls upon its signatories to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovation and practices.

The United Nations Declaration on the Rights of Indigenous Peoples (2007)

the Declaration sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues in 46 articles.

Art 43 declares “the rights recognized herein constitute the minimum standards for the survival, dignity and well being of the indigenous peoples of the world”.

II Achievements of the Working Group on Indigenous Populations, document E/CN.4/Sub.2/AC.4/2006/CRP.1

Reproduction of the annex I of the document above-mentioned:

Declaration on the Rights of Indigenous Peoples

Report of the Working Group on Indigenous Populations on its first session (E/CN.4/Sub.2/1982/33) 25 August 1982. Paragraph 126 states that the Working Group should elaborate a declaration and paragraphs 21 and 111 decide that its sessions should be open and accessible to representatives of indigenous peoples without consultative status with ECOSOC

Report of the Working Group on Indigenous Populations on its fourth session (E/CN.4/Sub.2/1985/22) 27 August 1985 Annex II: The first principles drafted for the future declaration.

Report of the Working Group on Indigenous Populations on its eleventh session (E/CN.4/Sub.2/1990/42) 27 August 1990. Following workshop meetings, the Working Group sent formally the first 30 articles of the declaration to governments for comments

Report of the Working Group on Indigenous populations on its eleventh session (E/CN.4/Sub.2/1993/29) 23 August 1993. The draft declaration is agreed upon by members of the Working Group to coincide with the International Year of the World's Indigenous People.

Technical review of the draft United Nations declaration on the rights of indigenous peoples (E/CN.4/Sub.2/1994/2/Add.1) 20 April 1994. Secretariat review requested by Working Group and Sub-Commission.

Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214, Economic and Social Council resolution 1995/32, Commission on Human Rights resolution 1995/32 of 3 March 1995 following the adoption of the draft declaration by the Sub-Commission in resolution 1994/45

Voluntary Fund for Indigenous Populations

Report of the Working Group on Indigenous Populations on its first session (E/CN.4/Sub.2/1982/33) 25 August 1982. Paragraph 112 recommends that a fund be established to assist indigenous peoples' participation at the Working Group.

Report of the Working Group on Indigenous Populations on its second session (E/CN.4/Sub.2/1983/22) 23 August 1983. Part IV is dedicated to the voluntary fund and how it should work (§120-133); approved by General Assembly resolution 40/131 of 13 December 1985

From 1985 to 2005, around 800 participants have received funds from the Voluntary Fund. In this period the Fund have received around 2100 applications.

International Year and International Decades of the World's indigenous People

Report of the Working Group on Indigenous Populations on its seventh session (E/CN.4/Sub.2/1989/36). 25 August 1989 Recommended to the General Assembly that 1993 should be proclaimed the international year for indigenous rights. Resolution 1990/248 of ECOSOC recommends the General Assembly to implement this recommendations but the name changes to "international year for the world's indigenous peoples". Resolution 45/164 of the General Assembly proclaims International Year of the World's Indigenous People.

Report of the Working Group on Indigenous Populations on its twelfth session (E/CN.4/Sub.2/1994/30) 17 August 1994: Paragraphs 139 and 146 relate to recommendation of World Conference on Human Rights to establish an international decade of the world's indigenous people. General Assembly resolution 48/163 proclaims Decade. In subsequent years Working Group holds annual discussion on Decade.

Report of the Working Group on Indigenous Populations on its twenty-first session (E/CN.4/Sub.2/2003/22) 11 August 2003: paragraph 117 recommends the proclamation of a second decade. Established by General Assembly resolution 59/174 of 16 December 2004

Report of the Working Group on Indigenous Populations on its twenty-third session (E/CN.4/Sub.2/2005/26, annex IV) 12 August 2005 recommends a series of activities for the Programme of Action that was approved by the General Assembly 60/142 of 16 December 2005

Special Rapporteur

Report of the Working Group on Indigenous Populations on its seventeenth session (E/CN.4/Sub.2/1999/19) 12 August 1999: Paragraph 120 recommends the Commission establish a Special Rapporteur to report on the rights of indigenous peoples. The Special Rapporteur was approved by the Commission resolution 2001/57 of 24 April 2001

Permanent Forum

Report of the Working Group on Indigenous Populations on its twelfth session (E/CN.4/Sub.2/1994/30) 17 August 1994 (Annex: Guidelines for the establishment of a permanent forum of the world's indigenous peoples): For the following years, the Working Group dedicates time to discussing the forum proposal. Permanent Forum on Indigenous Issues recommended by the Commission in its resolution 2000/22 and established by ECOSOC in its resolution 2000/22 of 24 July 2001

Studies

Study of the problem of discrimination against indigenous populations (E/CN.4/Sub.2/1986/7) 1 March 1987

Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes, (E/CN.4/Sub.2/1993/28) 28 July 1993

Working Paper by the Chairperson-Rapporteur, Erica-Irene A. Daes, on the concept of "indigenous people" (E/CN.4/Sub.2/AC.4/1996/2) 10 June 1996

Study on treaties, agreements and other constructive arrangements between States and indigenous populations Final report by Miguel Alfonso Martínez, Special Rapporteur (E/CN.4/Sub.2/1999/20) 22 June 1999

Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur, Erica-Irene A. Daes (E/CN.4/Sub.2/2001/21) 11 June 2001

Indigenous peoples' permanent sovereignty over natural resources. Final report of the Special Rapporteur, Erica-Irene A. Daes (E/CN.4/Sub.2/2004/30) 13 July 2004

Seminars and workshops:

United Nations seminar on the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and States. E/CN.4/1989/22

Report of the meeting of experts to review the experience of countries in the operation of schemes of internal self-governments for indigenous peoples (E/CN.4/1992/42 and Add.1)

Technical Conference on indigenous peoples and the environment held at Santiago de Chile E/CN.4/Sub.2/1992/31 and Add.1 May 1992

Report of the United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples E/CN.4/Sub.2/1992/31, 23 June 1992

Technical meeting on the international year and the international decade of the World's indigenous people E/CN.4/Sub.2/AC.4/1994/CRP.4 1993

Workshop held in accordance with Commission on Human Rights resolution 1995/30 on consideration of a permanent forum on indigenous issues in the United Nations E/CN.4/Sub.2/AC.4/1995/7. Copenhagen 26-28 June 1995

Expert seminar on practical experience regarding indigenous lands and claims E/CN.4/Sub.2/AC.4/1996/6 and Add.1 Whitehorse, Canada, 24-28 March 1996

Technical Meeting on the Protection of the Heritage of Indigenous People (Geneva, 6-7 March 1997) E/CN.4/Sub.2/1997/15

Second Workshop on the permanent forum on indigenous issues held in accordance with Commission on Human Rights resolution 1997/30 (Santiago, 30 June-2 July 1997) E/CN.4/1998/11

Workshop of Indigenous Journalists Madrid, 26-28 January 1998
E/CN.4/Sub.2/AC.4/1998/6

Workshop on research and higher education institutions and indigenous peoples E/CN.4/Sub.2/AC.4/1999/5 and Add.1. Costa Rica, 28 June to 2 July 1999

Seminar on the draft principles and guidelines for the protection of the heritage of indigenous peoples 28 February - 1 March 2000
E/CN.4/Sub.2/2000/26

Workshop on indigenous media: “promoting the rights of indigenous peoples through the media” E/CN.4/Sub.2/AC.4/2001/3, New York, 11-14 December 2000

Workshop on Indigenous Peoples and Sustainable Development: Technical Follow up to the World Summit on Sustainable Development, Washington, 19 – 20 February 2003 (OHCHR jointly with the World Bank). Note by the Secretariat - E/CN.4/Sub.2/AC.4/2003/10

Expert Seminar on Indigenous Peoples and the Administration of Justice (Madrid, 12-14 November 2003) E/CN.4/Sub.2/AC.4/2004/6

Seminar on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples (Geneva, 15-17 December 2003) E/CN.4/Sub.2/AC.4/2004/7 and Corr.1

Expert seminar on indigenous peoples and education in cooperation with UNESCO, Paris, 18-20 October 2004 E/CN.4/2005/88/Add.4

Technical seminar to evaluate the United Nations Voluntary Fund for Indigenous Populations and the Voluntary Fund for the International Decade of the World’s Indigenous People E/CN.4/Sub.2/AC.4/2005/CRP.1

Expert seminar on indigenous peoples' permanent sovereignty Geneva 25-27 January 2006 E/CN.4/Sub.2/AC.4/2006/3

Multiculturalism in Africa: peaceful and constructive group accommodation in situations involving minorities and indigenous peoples. Series of seminars held in Arusha, United Republic of Tanzania, 13-15 May 2000 E/CN.4/Sub.2/AC.5/2000/WP.3; Kidal, Mali 8-13 January 2001 E/CN.4/Sub.2/AC.5/2001/3; Gaborone, Botswana 18-22 February 2002 E/CN.4/Sub.2/AC.4/2002/4 and Consultation and Training Workshop for Pygmy Communities on Human Rights, Development and Cultural Diversity in Cooperation with the ILO and the UNESCO, 11-15 November 2002, Yaoundé and the Dja Biosphere Reserve, Cameroon E/CN.4/Sub.2/AC.4/2003/11.

Bibliography

International Conventions at the global and regional level:

Treaty of Waitangi, 6 February 1840

The Covenant of the League of Nations, 28 June 1919 (entered into force 10 January 1920.)

The United Nations Charter, 26 June 1945 (entered into force 24 October 1945.)

The Abolition of Forced labour Convention, The International Labour Office, 25 June 1957 (entered into force 17 January 1959.)

International Covenant on Civil and Political Rights, 16 December 1966 (entered into force 23 March 1976.)

International Covenant on Economic Social and Cultural Rights, 16 December 1966 (entered into force 3 January 1976.)

The Canadian Charter of Rights and Freedoms (entered into force 17 April 1982.)

The Indigenous and Tribal Peoples Convention, The International Labour Office, 27 June 1989 (entered into force 5 September 1991.)

International declarations:

The United Nations Declaration on Human Rights, 10 December 1948

The United Nations Declaration on the Right to Development, 4 December 1986

The United Nations Durban Declaration and programme of Action, 22 January 2001

The United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007

United Nations Documents:

The Special study on Racial Discrimination in the political, Economic, Social and Cultural Spheres, 1969

The study of the Problem of Discrimination against Indigenous Populations, 1 March 1987, E/CN.4/Sub.2/1986/7

Working Paper by the Chairperson-Rapporteur, Erica-Irene A. Daes, *On the concept of "indigenous people"*, 10 June 1996, E/CN.4/Sub.2/AC.4/1996/21

United Nations, background paper prepared by the Secretariat of the Permanent Forum on indigenous issues, *The concept of indigenous peoples*, PFII/2004/WS.1/3,

The Rights of Indigenous Peoples, office of the High Commissioner for Human Rights, the Fact sheet no 9 (rev.1)

The Commission on Human Rights document, *information on the achievements of the Working group*, E/CN.4/Sub.2/AC.4/2006/CRP.1

List of Non-Governmental Organizations in Consultative Status with the Economic and Social Council as at 31 August 2006, ECOSOC document E/2006/INF.5

The Working Group on Indigenous populations draft declaration, E/CN.4/Sub.2/1989/33

“UN Charter-based Bodies and Indigenous Peoples”, UN leaflet Number 3

Human rights of Indigenous peoples, *study on treaty, agreement and other constructive arrangement between States and indigenous populations*, final report by Miguel Alfonso Martinez, Special Rapporteur, ECOSOC document E/CN.4/Sub.2/1999/20

Books

Gudmundur Alfredsson and Maria Stavropoulou (ed.), *Justice Pending: Indigenous Peoples and other Good Causes, essays in Honour of Erica-Irene Daes*, The Raoul Wallenberg Institute Human Rights Library, Martinus Nijhoff Publishers, 2002.

S. James Anaya, *Indigenous Peoples in International Law*, Oxford University Press inc. First issued Oxford university Press Paperback, 2000.

Morten Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden- Essays in Honour of Asbjörn Eide*, Martinus Nijhoff Publishers, 2003.

Ian Brownlie, *Treaties and Indigenous Peoples*, Calendron Press- Oxford, 1992.

Cynthia Price Cohen (ed.), *Human Rights of Indigenous Peoples*, Transnational Publishers, 1998.

Malcolm D. Evans (ed.), *International Law*, Oxford University Press, second edition, 2006.

Lydia van de Fliert (compilation and edition), *Indigenous peoples and international organisations*, Russel Press Ltd, 1994.

Rosalyn Higgins, *Problems and Process: International Law and How we use it*, Oxford University Press, 1994.

Ari Kohen, *In Defence of Human Rights- a non religious grounding in a pluralistic world*, Routledge innovation in Political theory, 2007.

Winston E. Langley, *Encyclopedia of Human Rights Issues since 1945*, Fitzroy Dearborn Publishers, 1999.

Anna Mejknecht, *Towards International Personality: The position of Minorities and Indigenous Peoples in International Law*, Intersentia- Hart, 2001.

Hayden Patrick, *The philosophy of Human Rights*, Paragon House, 2001.

Luis Rodriguez Pinero, *Indigenous peoples, Postcolonialism, and International Law*, Oxford University Press, 2005.

Arvind Sharma, *Are Human Rights Western? a contribution to the dialogue of Civilization*, Oxford University Press, 2006.

Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia 2003.

Shaw, *International Law*, fifth edition, Cambridge University Press, 2003.

P. Sieghart, *The International Laws of Human Rights*, Oxford University Press, 1983.

Herbert Spencer, *Social Statics: or, The Conditions essential to Happiness specified, and the First of them Developed*, London: John Chapman, 1851. (available at the online *Library of Liberty*: <http://oll.libertyfund.org>)

Markku Suksi (ed.), *Autonomy: Applications and implications*, Kluwer Law International, Institute of Human Rights Åbo Akademi, 1998.

Thornberry, *Indigenous peoples and Human Rights*, Manchester University Press, 2002.

Michel Villey, *Le droit et les droits de l'homme*, Paris: Presses Universitaires de France, 1983.

Alexandra Xanthaki, *Indigenous Rights and United Nations Standards*, Cambridge University Press, 2007.

Articles and journals:

Gudmundur Alfredsson, *Fourth Session of the Working Group on Indigenous Populations*, Nordic Journal of International law, Vol 55, 1986, n# 1-2.

S. James Anaya and Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Toward Re-empowerment*, published in Jurist legal news & research, university of Pittsburg. Available at <http://jurist.law.pitt.edu/forum/2007/10/un-declaration-on-rights-of-indigenous-php>

Russel Lawrence Barsh, *Indigenous Peoples and the UN Commission on Human Rights: A Case of the immovable Object and irresistible Force*, Human Rights Quartley, 18 (4), 1996.

Clem Chartier, Saskatchewan Indian federated College, January/February 1981, Vol 11, n 01-02, available on the webpage <http://www.Sicc.sk.ca/saskindian/a81jan07.htm>.

Rachel Davis, briefing paper prepared on behalf of the Jumbunna Indigenous House of Learning, University of technology Sydney, *Summary of the UN declaration on the Rights of Indigenous Peoples*, November 2007.

Asbjörn Eide and Rianne Letschert, *Institutional Developments in the UN and at the Regional Level*, International Journal on minority and group rights, vol 14, 2007.

Alison Field, *Indigenous Peoples Network*, Aboriginal Law Bulletin, 1986. <http://www.austlii.edu.au/au/journals/aboriginalLB/1986/6.html>.

First Nations strategic Bulletin, volume 4, issue 2, February 2006.

Fjordman, *Creating a European indigenous People's movement*, the Brussels Journal, April 2008. Article available at www.brusselsjournal.com/node/3153.

Andreas Follesdal, *The special claims of Indigenous minorities to Corrective Justice*. Unpublished paper available at <http://folk.uio.no/andreasf/ms/indigenous.rtf>

Jeremie Gilbert, *Indigenous Rights in the making: the UNDRIP*, in *International Journal on Minority and group rights*, volume 14 2007, no 2-3.

Catherine J Iorns, *The draft Declaration on the Rights of Indigenous Peoples*, *Murdoch University Electronic Journal of Law*, 1993, vol 1, number 1.

Will Kymlicka, *review of Indigenous Peoples in International Law* by S. James Anaya, *the University of Toronto Law Journal*, Vol.49, No.2, Spring 1999.

Sarah Pritchard, *The Rights of Indigenous Peoples to Self-Determination under International Law*, *Aboriginal Law Bulletin*, 1992.

Rudolph C. Ryser, *Indian Nations and the United States debate Self-Determination and Self-Government at the UN*, *Center for World indigenous Studies*, 1993, document UNWGIP93.TXT.

Douglas Sanders. *Developing a Modern International Law on the Rights of Indigenous Peoples*, *University of British Columbia*, December 1994.

Douglas Sanders, *The UN Working Group on Indigenous Populations*, *Human Rights Quarterly*, 1989, vol 11, number 3.

Siegfried Wiessner, *Rights and Status of Indigenous peoples: A Global Comparative and International Legal Analysis*, *Harvard Human Rights Journal*, volume 12, spring 1999.

Robert A. Williams Jr, *Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples' survival in the world*, *Duke Law Journal*, vol.1990, No 4, *Frontiers of Legal Thought III*, September 1990.

Slovoj Zizek, *Knight of the living dead*, *New York Times*, 24 mars 2007.

Darren C. Zook, *Decolonizing Law: Identity Politics, Human Rights, and the United Nations*, *Harvard Human Rights Journal*, volume 19 spring 2006.

Internet Sources:

The International Labour Office, at www.ilo.org, last visited on December 2007.

The Working Group on Indigenous Populations, at the Office of the United Nations High Commissioner's webpage,

www2.ohchr.org/english/issues/indigenous/groups/groups-01.htm), last visited on December 2007

The United Nations News centre, at <www.un.org/news>, last visited on April 2009

The Indian Country today, at www.indiancountrytoday.com, last visited on February 2008.

First Nations strategic bulletin, at <www.gatheringplacefirstnationscanews.ca>, last visited on February 2008.

The Indigenous Peoples' Centre for Documentation, Research and Information, Docip at <<http://old.docip.org>>, last visited on march 2008.

The International Indian Treaty Council, at <www.treatycouncil.org>, last visited on march 2008.

The International Service for Human Rights, at <www.ishr.ch>, last visited on March 2008.

Others

Encyclopaedia on CD-rom: *Routledge Encyclopedia of Philosophy*, Version 1.0, London: Routledge.

Master thesis: Yann Kergunteuil, *Le nominalisme de Guillaume d'Ockham et la naissance du concept des droits de l'homme*, Master thesis, Université Catholique de Lyon, Institut des droits de l'homme, 2005/2006.

Table of Cases

International Court of Justice

The *Western Sahara* case, advisory opinion, 16 October 1975.

The *North Continental Shelf* case, ICJ reports 1969.

The *Lybia/Malta* case, ICJ reports, 1985

The *Military and Paramilitary Activities in and against Nicaragua*, judgement of 27 June 1986.

Legality of the Threat or Use of Threat of Nuclear Weapons, advisory opinion, 8 July 1996.

The *Gulf of Maine* case, Canada/United States of America, judgment of 12 October 1984.